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Department of Labor ---------- Employment and Training Administration ---------- 20 CFR Part 655 Temporary Agricultural Employment of H-2A Foreign ***Workers*** in the Herding or Production of Livestock on the Range in the United States; Final Rule Federal Register / Vol. 80 , No. 200 / Friday, October 16, 2015 / Rules and Regulations [[Page 62958]] ---------- DEPARTMENT OF LABOR Employment and Training Administration 20 CFR Part 655 RIN 1205-AB70 Temporary Agricultural Employment of H-2A Foreign ***Workers*** in the Herding or Production of Livestock on the Range in the United States AGENCY: Employment and Training Administration, Labor. ACTION: Final rule. ---------- SUMMARY: The Department of Labor is issuing regulations to govern its certification of the employment of nonimmigrant ***workers*** in temporary or seasonal agricultural employment under the H-2A program. Specifically, these regulations establish standards and procedures for employers seeking to hire foreign temporary agricultural ***workers*** for job opportunities in herding and production of livestock on the range. These regulations are consistent with the Secretary of Labor's statutory responsibility to certify that there are not sufficient able, willing, qualified and available U.S. ***workers*** to perform these jobs, and that the employment of foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** in the United States similarly employed. Among the issues addressed in these regulations are the qualifying criteria for employing foreign ***workers*** in the applicable job opportunities, preparing job orders, program obligations of employers, filing of H-2A applications requesting temporary labor certification for range occupations, recruiting U.S. ***workers***, determining the minimum offered wage rate, and the minimum standards for housing used on the range. The regulations establish a single set of standards and procedures applicable to employers seeking to hire foreign temporary agricultural ***workers*** for sheep and goat herding and range production of livestock, ***given*** the unique characteristics of these job opportunities in their industry. DATES: Effective Date: This rule will be effective on November 16, 2015. FOR FURTHER INFORMATION CONTACT: For further information, contact William W. Thompson, II, Acting Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or

speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339. SUPPLEMENTARY INFORMATION: I. Background On April 15, 2015, the Employment and Training Administration (ETA) of the Department of Labor (DOL or Department) issued a notice of proposed rulemaking (NPRM) requesting comments on proposed standards and procedures to govern the certification of nonimmigrant ***workers*** in temporary or seasonal agricultural employment under the H-2A program. Temporary Agricultural Employment of H-2A Foreign ***Workers*** in the Herding or Production of Livestock on the Open Range in the United States, 80 FR 20300 (2015). Specifically, the NPRM addressed employment in sheep, goat and cattle herding occupations performed on the open range.\1\ ETA invited written comments on all aspects of the proposed regulations from interested parties. ETA also invited public comment on a variety of specific issues. Originally, the written comment period closed on May 15, 2015. However, in response to many requests for additional time in which to comment, ETA extended the comment period through June 1, 2015. ETA has reviewed and considered all timely comments received in response to the proposed regulations. ---------- \1\ As discussed in greater detail below in Sec. IV.A.3.c., we have modified the definition of ``open range'' based on a significant number of comments addressing the issue, and the Final Rule now refers to these herding occupations as work on the ``range.'' However, when discussing this requirement as it appeared in the former rules or in the proposed provisions in the NPRM, we rely on the prior references to the ``open range.'' In addition, ETA has traditionally referred to the production of cattle separately as the ``open range production of livestock.'' For ease of reference, and because this Final Rule concludes that the work involved in sheep, goat and cattle production, including herding, can be treated similarly for the purposes of this regulation, we may also refer to the ``range production of livestock'' as ``cattle production,'' which includes ``cattle herding.'' ---------- The Department received 506 timely comments from a wide variety of sources. Commenters included: Members of Congress; State political officials, including State governors and legislative representatives; State executive agencies; individual ranchers that employ H-2A herders in their operations; national and state-level industry advocacy organizations; ***worker*** advocacy organizations; national and state-level agriculture advocacy organizations; wool growers associations; sheep shearing businesses; members of the media; and the Small Business Administration's Office of Advocacy (SBA Office of Advocacy), among others. The vast majority of comments specifically addressed issues contained in ETA's proposed rule. The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this Final Rule was developed only after consideration of all the material submitted. II. Statutory and Regulatory Authority The Immigration and Nationality Act (INA or the Act) establishes the H-2A visa classification for employers to employ foreign ***workers*** on a temporary basis to perform agricultural labor or services. INA Section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also INA Secs. 214(c)(1) and 218, 8 U.S.C. 1184(c)(1) and 1188. The INA authorizes the Secretary of the Department of Homeland Security (DHS) to permit the admission of foreign ***workers*** to perform agricultural labor or services of a temporary or seasonal nature if the Secretary of the Department of Labor (Secretary) certifies that: (A) There are not sufficient ***workers*** who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (B) The employment of the foreign ***worker***(s) in such labor or services will not adversely affect the wages and working conditions of ***workers*** in the United States similarly employed. 8 U.S.C. 1188(a)(1). The Secretary has delegated these responsibilities, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). Sec. Order 06-2010, 75 FR 66268 (Oct. 27, 2010). The Secretary has delegated responsibility for enforcement of the ***worker*** protections to the Administrator of the Wage and Hour Division (WHD). Sec. Order 01-2014, 79 FR 77527 (Dec. 24, 2014). Since 1987, OFLC and its predecessor agencies have operated the H- 2A program under regulations promulgated under the authority of the Immigration Reform and Control Act of 1986 (IRCA), which amended the INA and established the H-2A program.\2\ OFLC's [[Page 62959]] current regulations governing the H-2A program were published in 2010 following notice and comment. 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule). Historically, and as provided in 20 CFR 655.102 of the 2010 Final Rule, the H-2A regulations permitted OFLC to set ``special procedures'' to govern the employment of foreign ***workers*** in certain occupations, such as sheep and goat herding and the range production of livestock, to which the standard H-2A regulations did not readily apply, so long as the special procedures adhered to the statutory mandates to determine U.S. ***worker*** availability and to certify that bringing in foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** in the United States similarly employed. 8 U.S.C. 1188(a)(1). The Department's history of setting standards and procedures applicable to range

herding or production of livestock occupations through Training and Employment Guidance Letters (TEGLs) and predecessor sub-regulatory guidance documents is set out in extensive detail in the NPRM, 80 FR at 20301-20302, and we do not repeat it here.\3\ However, as a result of a recent court decision, Mendoza et al. v. Perez, 754 F.3d 1002 (D.C. Cir. 2014), ETA is now establishing the standards that govern H-2A herder occupations in this Final Rule through notice and comment rulemaking. The new regulations will be incorporated at 20 CFR part 655, subpart B. ---------- \2\ The Immigration and Nationality Act of 1952 created the H-2 temporary ***worker*** program. Public Law 82-414, 66 Stat. 163. In 1986, IRCA divided the H-2 program into separate agricultural and non- agricultural temporary ***worker*** programs. See Public Law 99-603, sec. 301, 100 Stat. 3359 (1986). The H-2A agricultural ***worker*** program designation corresponds to the statute's agricultural ***worker*** classification in 8 U.S.C. 1101(a)(15)(H)(ii)(a). \3\ This Final Rule supersedes the two TEGLs that currently govern the temporary employment of foreign herders, TEGL No. 32-10 (Jun. 14, 2011) and TEGL No. 15-06, Change 1 (Jun. 14, 2011). ---------- III. Discussion of General Comments This preamble sets out DOL's interpretation of the new regulations added to Subpart B, section by section. Before setting out the section- by-section analysis below, however, we will first acknowledge and respond to comments that did not fit readily into this organizational scheme. A. General Comments Most of the hundreds of comments we received addressed one or more specific issues in the NPRM, such as the proposed wage methodology, all of which are discussed in greater detail in Sec. IV below. However, within many of those targeted comments were more general remarks on the nature and the scope of the proposed rule, as discussed here. We received several general comments in support of the NPRM and the proposed standards and procedures. Several commenters indicated that new rules were necessary to improve wages and other conditions for ***workers*** and to monitor compliance with the regulations. Some commenters noted that the new regulations were long overdue, in particular because foreign ***workers*** in herder occupations are grossly underpaid. One commenter noted that although herders' wages should be increased, the upward adjustment should be implemented over a period of time so that employers can adapt to the wage increase. The vast majority of comments we received were from individuals or organizations that opposed specific aspects of the NPRM's provisions, particularly the wage methodology. Many of the comments were from individual ranchers who stated that their families had been operating their businesses for five or more generations. From a review of these comments, several overarching general themes emerged. Several commenters observed that the current rules ``are not broken,'' so no fix is required. Dozens of commenters remarked that the proposed wage methodology would result in the loss of livelihood of many individual ranchers, and dozens of others went further to conclude that the proposed wage methodology would put an end to the production of sheep, goat and cattle industries in the United States as a whole. Many commenters noted that satellite industries that provide goods and services to or derive goods and services from sheep, goat and cattle production, including textiles businesses and wool mills; the production of military, sports, and first responder uniforms from sheep wool; meat processing; feed lots; animal transport; veterinarians and vet supplies; and seed stock producers, among others, would be adversely effected by the new regulation. Others noted that in addition to the impact on satellite industries, the communities in which the regulated ranches are located would suffer, because the ranches stimulate the local economy through the purchase of goods, supplies and services locally to sustain their businesses, including banking services, grocers and gas stations, among others. The adverse impact to both the satellite industries and the local communities would include, the comments noted, the loss of jobs to U.S. and foreign ***workers*** alike. One comment noted that with increased costs to ranchers, which would result in loss of livestock-based jobs, land grant colleges with agriculture programs would suffer. We received many comments that addressed the international aspects of the herder occupations and the industries that employ them. One commenter noted that the foreign labor certification program creates goodwill between the United States and the foreign ***workers***' countries of origin, and the new rules would diminish that goodwill. Several comments noted the impact of foreign imports, particularly sheep imports, on the ability of U.S. ranchers to compete in the global marketplace. These comments suggested that if herder wages are increased, the government must also protect the U.S. market from price competition resulting from less expensive foreign imports. Many ranchers remarked that foreign importers would further profit because foreign producers would undercut U.S. meat and wool prices. Commenters also asserted that foreign meat imports are not held to the same food safety standards as U.S. meat producers, which increases the cost of the domestic products. We also received several dozen comments about the environmental impact that would result if the sheep, goat and cattle industries experience increased costs to employ herders. One commenter noted that grazing livestock producers manage 250

million acres of Western land, including public land under the stewardship of the U.S. Forest Service (USFS or Forest Service) in the U.S. Department of Agriculture and the Bureau of Land Management (BLM) in the U.S. Department of the Interior. Many of these comments noted that the migratory pattern of animal herding is itself a natural resource management activity. Among the natural resource management benefits of controlled animal migration are the improvement of wildlife habitats that promotes animal breeding and sustains migratory fowl; the control of the spread of noxious and invasive weeds; the reduction of the use of herbicides and pesticides; the increased use of sheep ``fertilizer'' to improve the quality of the land; and the decreased use of machinery for tending the land, thus reducing fuel use and our carbon footprint. Several dozen comments indicated that animal grazing aids in the reduction of undergrowth that feeds wildfires in the West. Thus, these commenters asserted that if sheep, goat and cattle producers' costs are raised, this would result in the reduction of animal grazing overall, which would, in turn, increase wildfires in the Western United States because of the abundance of ``fuel'' that would otherwise be reduced by grazing. Such fires would, among other things, result in the devastation of sage brush, which is the [[Page 62960]] habitat of sage grouses that nest in grasslands across the American West. Other commenters noted that without regular grazing, invasive weeds would overtake Western grasslands. One comment indicated that if ranchers' costs are increased, ranch land would be sold, and developers would build tract housing. The land management issues offered by these comments raise important questions about the role of animal grazing and care of our natural resources. This Final Rule is limited to the regulation of particular issues dealing with the employment of herders, but we have consulted with our sister agencies, USFS and BLM, about particular issues addressed in this Final Rule, including the proposed definition of ``open range,'' discussed further below in Sec. IV.A.3. of the section-by-section analysis. Many ranchers noted that, in their view, foreign herders are satisfied with their current wages and working conditions. In support of this conclusion, they indicated that the wages earned are far superior to those wages they might earn for the same work in their countries of origin. Ranchers noted that their foreign ***workers*** routinely send funds home, suggesting that the herders have expendable income. They also noted that the same herders return to their U.S. jobs year after year, suggesting that the wages and working conditions are satisfactory to support the retention of foreign herders. Several ranchers noted that herders become ``one of the family'' and are welcome in the ranch house to take meals with the family, and that employers take good care of herders' health and welfare. To this end, we received several comments inviting us to visit the ranches and the herders so that we could better understand the industry and the way of life. Several ranchers indicated that if there were, in fact, exploitive ranch operations that did not ``play by the rules,'' DOL should take action against those ranchers but not change the current rules. We received several comments requesting that we ``work closely'' with the industry to develop ``workable new rules.'' Prior to this notice and comment proceeding, we received and considered written input from the industry, as well as employee advocates, in developing the provisions proposed in the NPRM. 80 FR at 20309. We have also reviewed and considered carefully all 506 comments received from the stakeholders affected by this Final Rule, including both industry and employee representatives. We address in more detail below, particularly in the section on the wage methodology adopted in the Final Rule, the concerns raised about the adverse impact of the regulation on ranchers, their local communities, and other industries that serve the ranching industries. As we discuss more fully below, we recognize that after decades of the status quo, in which there was no change to the rules governing these industries, the current modernization effort can have a broad impact, and we have made adjustments to the proposed provisions, as discussed more fully below, with these interests in mind, as well as those of the employees. We thank all commenters for their input, including those that offered their general support for and their opposition to the new regulations, and we have considered all these remarks as we developed the provisions included in this Final Rule.\4\ ---------- \4\ We note that we received several general comments about issues outside the scope of the present rulemaking. One comment asserted that this rulemaking ``sets a dangerous precedent'' for regulating the beekeeping and custom combine harvesting industries that also employ H-2A ***workers***. Another comment indicated that the United States needs ``immigration reform,'' but did not specify the nature of that reform. One comment asserted that the government should not be involved at all in agriculture, that the ``open market'' should control, and that ``government supports'' for sheep and cattle ranchers should be removed. One commenter submitted that employers should be required to provide herders with two weeks of paid vacations. Finally, three comments suggested that DOL should expand the H-2A program to include other year-round animal agriculture, including dairy production. As noted, these comments all address issues that are not within the scope of this rulemaking. ---------- B. Mendoza v. Perez and the Need for Rulemaking The NPRM

indicated that among the reasons for the current rulemaking was the decision in the Mendoza case, cited above. That case required the Department to engage in notice and comment rulemaking to set standards governing the employment of foreign herders because those standards were legislative rules governed by the Administrative Procedure Act, 5 U.S.C. 553. Mendoza, 754 F.3d at 1024-1025. We received several comments to the effect that although the Mendoza case required the Department to engage in notice and comment rulemaking, that case did not require the Department to alter the substantive standards that currently govern the employment of foreign herders as set out in the applicable TEGLs. These comments note that we could have simply proposed the current TEGL standards without change, and asked for comment on those provisions. We agree that the Mendoza case only required us to engage in notice and comment rulemaking, but did not require us to alter the standards as they were set in the applicable TEGLs. However, the NPRM provided reasons other than the Mendoza case to support notice and comment rulemaking initiated by a proposal that substantively altered the standards long governing herding occupations. As noted in the NPRM, ETA's traditional method of determining the prevailing wage for these occupations--the use of surveys by the state workforce agencies (SWAs)--has become increasingly difficult. In these occupations the prevailing wage has served as the Adverse Effect Wage Rate (AEWR). Few survey results are produced, which casts doubt on the statistical validity of those surveys. 80 FR at 20302, 20307. New wage methodology standards were needed to establish ``a more effective and workable methodology for determining and adjusting a monthly [wage] for these unique occupations[.]'' 80 FR at 20302. In addition, because of the difficulty in setting the wage under the prior methodology based on the SWA surveys, herder occupations have experienced ``wage stagnation in various degrees across these occupations[.]'' 80 FR at 20307. In many cases, herders whose wages are set under the current standards are making only slightly more in nominal wages than they were 20 years ago, and therefore are making significantly less in real terms today. Id. Therefore, we needed to engage in notice and comment rulemaking not only as a result of Mendoza; we also needed to address the inadequate wage methodology that over years contributed to herder wage stagnation. It is a reasonable exercise of DOL's discretion to propose a new wage methodology in the NPRM on which commenters could and did provide input. We received two joint comments from ***worker*** advocate groups that supported the need for rulemaking, particularly to address the inadequate wage methodology and herder wage stagnation. A relatively brief ***worker*** advocate joint submission applauded the proposed rules, asserting that the revisions will ``greatly benefit both temporary foreign ***workers*** and U.S. ***workers*** alike, including long-overdue wage increases and other proposed provisions that seek to address the poor working conditions.'' \5\ A more [[Page 62961]] comprehensive ***worker*** advocate joint comment submitted the same day, which included many of the same signatories as the other ***worker*** advocate joint comment, supported the rulemaking as necessary to revise the current wage methodology that has produced wage stagnation over a period of years.\6\ This comment stated that DOL has relied on old data and outdated surveys, with sample sizes that are too small to be statistically valid. This comment identified problems with the wage- setting method under the TEGLs, including permitting reliance on prior years' surveys and basing the wage on neighboring states where no survey results were available. This comment also identified the failure to filter out the wages of H-2A nonimmigrants in the survey results, and errors and inconsistencies in the SWA surveys (which, the comment indicates, may be a misclassification of ***workers***) as contributing to wage stagnation. The comment suggested that the methodology is flawed and has cost herders ``millions of dollars.'' Although much of the specific substance of this comment will be discussed below in the section-by-section analysis, DOL concurs with the general theme of both employee advocate joint comments that, apart from the Mendoza case, this rulemaking is warranted to address problems with the wage methodology and herder wage stagnation, as we stated in the NPRM.\7\ ---------- \5\ Fifty-four groups and three individuals were signatories to this 4 page joint employee advocate comment providing input on wages, housing, food, employer-provided items, experience requirements, and a few other issues. The signatories to this joint comment were American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); California Church IMPACT; California Rural Legal Assistance Foundation; CATA--EL Comit[eacute] de Apoyo a los Trabajadores Agr[iacute]colas/The Farmworker Support Committee; Catholic Migrant Farmworker Network; Central-West Justice Center, Migrant Farmworker Program; Centro de los Derechos del Migrantes, Inc.; Church of the Brethren, Office of Public Witness; Coalition of Immokalee ***Workers***; Coalition to Abolish Slavery & Trafficking; Cumberland Presbyterian Church Missions Ministry Team; Disciples of Christ Refugee and Immigration Ministries; Dominican Sisters and Associates of Peace; Eastern Regional Alliance of Farmworker Advocates; Equal Justice Center; Farmworker Association of Florida; Farmworker Justice; Food Chain ***Workers*** Alliance; Franciscan Sisters of Little Falls Justice & Peace Commission; Friends of Farmworkers,

Inc.; Global ***Workers*** Justice Alliance; Greater Rochester Coalition for Immigration Justice; Immigrant ***Worker*** Project--Ohio; Jobs With Justice; La Union Del Pueblo Entero; Labor Council for Latin American Advancement; Legal Aid Services of Oregon; L[iacute]deres Campesinas; National Guestworkers Alliance; National Consumers League; National Council of La Raza (NCLR); National Employment Law Project; National Farm ***Worker*** Ministry; North Carolina Farmworkers Project; New Mexico Center on Law and Poverty; New Mexico Legal Aid; National Farm ***Worker*** Ministry; Northwest ***Workers***' Justice Project; Office of Justice, Peace and the Integrity of Creation at the Stuart Center; Orange County Interfaith Committee to Aid Farm ***Workers***; PathStone Corporation; Pi[ntilde]eros y Campesinos Unidos del Noroeste (PCUN); Polaris Project; Public Citizen; Public Justice Center; Puerto Rico Legal Service Migrant ***Worker*** Project; Ramsay Merriam Fund; Rural Neighborhoods; Sisters of Charity of the Blessed Virgin Mary, Dubuque Iowa; Telamon Corporation; Towards Justice; The Episcopal Church; United Farm ***Workers***; United Migrant Opportunity Services; Sergio Velasquez Catalan (one of the named plaintiffs in Mendoza v. Perez, No. 11-cv-01790 (D.D.C. May 7, 2015)); Thomas A. Arcury, Ph.D., Professor; Susan Gzesh, Senior Lecturer & Executive Director, Pozen Family Center for Human Rights, University of Chicago. \6\ Fourteen groups and three individuals were signatories to a 35 page employee advocate joint comment with attachments, and included California Rural Legal Assistance; California Rural Legal Assistance Foundation; Central California Legal Services; Colorado Legal Services, Community Legal Services of Arizona; Farmworker Justice; Florida Legal Services; Global ***Workers***' Alliance; Jennifer J. Lee, Assistant Clinical Professor of Law, Temple University Beasley School of Law; Legal Aid Services of Oregon; Northwest Justice Project; Southern Minnesota Regional Legal Services; Texas RioGrande Legal Aid; United Farm ***Workers***; Utah Legal Services; Zacarias Mendoza and Francisco Castro (two of the plaintiffs in Mendoza v. Perez, No. 11-cv-01790 (D.D.C. May 7, 2015)). \7\ We have reviewed and considered both employee advocate joint comments. Because the comprehensive joint comment essentially addressed all the subjects that the shorter one did and in greater detail, and because there is a good deal of overlap in the signatories, when referencing the joint comments of the employee advocates, we will refer to them as the ``***Worker*** Advocates' Joint Comment.'' ---------- C. Historical Background of Foreign Herder Employment We received several comments, including from industry associations Mountain Plains Agricultural Services (Mountain Plains) and Western Range Association (Western Range) that address the early history of foreign sheep herders coming into the United States to perform herding work, as early as the 1950s. The NPRM discussed this history in some length. 80 FR at 20301-20302. Based on the history, one commenter noted that early herders from the Basque region in Spain were ***given*** special treatment in order to permit their entry into the United States to work when no U.S. ***workers*** were available, which ***gave*** rise to the establishment of special procedures. Three commenters underscored that Congress recognized the special needs of sheep ranchers in their early enactments in the 1950s. Two commenters indicated, without specific citation, that IRCA intended that DOL grant special procedures to ranchers seeking foreign herders. One commenter asserted that foreign herders should be permitted to stay in the United States longer than typically allowed because of the unique skills of foreign herders. One commenter submitted that the history of special procedures, as reflected in early Congressional action, DOL sub-regulatory action, and subsequent regulations permitting the establishment of special procedures, provides a sound foundation for the continuation of special procedures. Several commenters noted that the process and standards set out in early Departmental guidance and later incorporated into the TEGLs have worked well for decades and that change is unnecessary. These commenters noted that special procedures--separate from the regular H-2A standards--are necessary because of the recognized unique nature of the herding occupation, including that herders tend to the herd all day, every day, and that their remote location makes their work hours difficult to record. Finally, the ***Worker*** Advocates' Joint Comment pointed out that even though separate regulatory standards may be required because of the nature of herding work, those variances from the standard H-2A requirements must apply only to herders working on the range and not to livestock ***workers*** on the ranch. They further note that the variances must be consistent with the statutory command to protect against adverse effect on U.S. ***workers***' wages and working conditions. As with the proposal in the NPRM, we have taken into account the unique nature of herder work and its long history with respect to the employment of foreign ***workers*** as we developed this Final Rule. D. Requests for Extensions of Time to Submit Comments We published the NPRM on April 15, 2015 and originally requested that comments be submitted within 30 days, by May 15, 2015. We received 100 comments requesting an extension of the public comment period. A plurality of requests to extend the comment period (48) did not identify the specific time period sought for an extension. However, 38 requests sought an extension of the comment period for 90 days. The

remainder of the requests sought additional time variously in a range between 30 and 180 days. On May 5, 2015, we extended the comment period an additional 15 days, to June 1, 2015. 80 FR 25663. We received a few additional comments (counted in the 100-request total mentioned above) seeking time beyond the new June 1, 2015 deadline. However, because of the Mendoza court scheduling order, we were not able to extend the public comment period beyond June 1, 2015 to submit comments.\8\ However, as noted, we [[Page 62962]] received 506 unique comments during the allotted comment period, addressing all aspects of the NPRM, which is a robust response ***given*** the 45-day comment period. ---------- \8\ The original scheduling order, dated October 31, 2014, required DOL to issue an NPRM by March 1, 2014, and a final rule by November 1, 2015, with an effective date no later than December 1, 2015. The revised scheduling order, dated February 25, 2015, required DOL to issue an NPRM by April 15, 2015, but maintained the requirement that we issue a final rule by November 1, 2015, with an effective date no later than December 1, 2015. ---------- IV. Section-by-Section Summary of the Final Rule, 20 CFR Part 655, Subpart B This preamble sets out ETA's interpretation of the new regulations in Subpart B, section by section, and generally follows the outline of the regulations. Within each section of the preamble, the Department has noted and responded to those comments that are addressed to that particular section of the rule. The Department notes that, in the NPRM, we had proposed to place these new rules in a new Subpart C. In order to ensure that there is no confusion regarding the Department's continued authority to enforce requirements relating to herding and range livestock ***workers*** pursuant to 29 CFR part 501, we have decided to place the new rules at the end of existing Subpart B, the standard H-2A requirements, rather than in a new Subpart. Therefore, ministerial conforming modifications have been made throughout the regulation to accommodate this non-substantive change. Such minor modifications are not addressed individually below. A. Introductory Sections 1. Section 655.200--Scope and Purpose of Herding and Range Livestock Regulations As stated in the NPRM, the standard H-2A regulations in existing 20 CFR part 655, subpart B (Sec. Sec. 655.100--655.185) govern the certification of employers' temporary employment of nonimmigrant ***workers*** in temporary or seasonal agricultural employment. Because of the unique nature of the herder occupations, employers who seek to hire temporary agricultural foreign ***workers*** to perform herding or production of livestock on the range, as described in Sec. 655.200(b), are subject to certain standards that are different from the regular H-2A standards and procedures. These new regulations, found at Sec. Sec. 655.200-655.235 (hereinafter generally referred to as the herding and range livestock regulations), are intended as a comprehensive set of regulations governing the certification of the temporary employment of foreign ***workers*** in herder or production of livestock occupations on the range.\9\ However, to the extent that a specific variance from the standard H-2A requirements is not set out specifically in the new herding and range livestock provisions, the standards and procedures set forth in the standard H-2A regulations apply. ---------- \9\ Some States have set employment standards governing agriculture employment generally, or herder employment more specifically, and those standards may differ from the standards set in this Final Rule. The terms and conditions of herder employment established in this Final Rule are intended as a floor and not a ceiling. See, e.g., 29 U.S.C. 218(a). Accordingly, where a State sets employment standards applicable to herders that are higher (more protective) than those set in this Final Rule, DOL intends that the State standards should apply. ---------- Prior to this Final Rule, the standards and procedures governing sheep, goat and cattle herders were set separately in two different TEGLs, as noted above. Although there were some differences in the TEGL standards as they applied to the different industries (sheep and goat herding were covered by one TEGL and cattle herding by the second TEGL), the standards and procedures were largely the same. We proposed in the NPRM to set the same certification standards and procedures for employers employing foreign sheep and goat herders as employers employing foreign cattle herders. We received two comments on this issue. The first was included in the ***Worker*** Advocates' Joint Comment, which concurred that a single set of rules is needed to protect goat herders, sheep herders, and range production of livestock ***workers*** efficiently and effectively. The second comment, submitted by Maltsberger Ranch, opposed applying the same standards to sheep and goat herding, and open range production of livestock. Maltsberger Ranch indicated that the rules should be different because the animals' ``husbandry, needs and handling standards are different, [and an] area's geographic location may dictate the need of different ranching practices. . . . The rule should not be rewritten in a manner that changes the scope of, or redefines the application of special procedures historically granted [to] Range Producers of Livestock.'' We are adopting the position taken in the NPRM, which sets common procedures and other standards for sheep and goat herding, and open range production of livestock. The common standards and

procedures will improve the requirements' clarity and readability, streamline application processing, and improve compliance, all without hindering variations in employer practices or impairing employee rights or employer obligations. Accordingly, as proposed in the NPRM, the herding and range livestock regulations apply to employers seeking certification of applications to employ foreign herders to tend sheep, goats and cattle on the range. 2. Section 655.200(b)--Jobs Subject to Herding and Range Livestock Regulations a. Background In order to use the herding and range livestock regulations, an employer's job opportunity must possess all of the characteristics described in this provision. The TEGL for sheep and goat herding occupations and the TEGL for open range production of livestock repeatedly refer to the unique characteristics of these occupations as the bases for the special procedures. The TEGL for sheep and goat herding occupations describes the unique characteristics of herding as ``spending extended periods of time with grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week . . .'' TEGL 32-10, 3. The TEGL for open range livestock production also states that these occupations ``generally require ***workers*** to live in remote housing of a mobile nature, rather than `a fixed-site farm, ranch or similar establishment.' '' TEGL 15-06, Change 1, Appendix B, I. Both TEGLs require that the Form ETA-790 submitted to the SWA include that the anticipated hours of work are ``on call for up to 24 hours per day, 7 days per week.'' TEGL 32-10, Attachment A, I(C)(1); TEGL 15-06, Change 1, Attachment A, I(C)(1). Both TEGLs also require that employers provide effective means of communication with ***workers*** ``***due*** to the remote and unique nature of the work to be performed.'' TEGL 32-10, Attachment A, I(C)(4); TEGL 15-06, Change 1, Attachment A, I(C)(4). As discussed more fully in Sec. IV.A.3. of the preamble related to Sec. 655.201, both TEGLs also provide descriptions of job duties that employers may use when submitting their Form ETA-790 to the SWA. Section 655.200(b) of the NPRM proposed to limit the scope of jobs subject to these rules by requiring that: (1) the work activities involve the herding or production of livestock and any additional duties must be ``minor, sporadic, and incidental to the herding or production of livestock''; (2) the ``work is performed on the open range requiring the use of mobile housing'' for ``at least 50 percent of the workdays in the work contract period'' and ``[a]ny additional work performed at a place other than the range . . . that does not constitute the production of livestock must be minor, sporadic and incidental [[Page 62963]] to the herding or production of livestock;'' and (3) the ``work activities generally require the ***workers*** to be on call 24 hours per day, 7 days per week.'' 80 FR at 20339. The NPRM also proposed to require that job orders include ``a statement that the ***workers*** are on call for up to 24 hours per day, 7 days per week and that the ***workers*** are primarily engaged (spend at least 50 percent of the workdays during the contract period) in the herding or production of livestock on the open range.'' Id. Proposed Sec. 655.210(b) also provided that duties ``may include activities performed at the ranch or farm only if such duties constitute the production of livestock or are closely and directly related to herding and the production of livestock. Work that is closely and directly related to herding or the production of livestock must be performed on no more than 20 percent of the workdays spent at the ranch in a work contract period. All such duties must be specifically disclosed on the job order.'' Id.\10\ ---------- \10\ The Department is addressing here the NPRM provisions in Sec. 655.200(b) as well as the corresponding proposed job order disclosures found in Sec. 655.210(b), as these issues and comments overlap. The remainder of the provisions of proposed Sec. 655.210, ``Contents of job orders,'' are addressed below in a separate discussion. ---------- In the Final Rule, the Department eliminates the 50 percent mobile housing requirement, and requires that herders spend more than 50 percent of their workdays on the range, which is more consistent with the exemption in the Fair Labor Standards Act (FLSA) for range production of livestock, as discussed below. We have also retained the requirement that the work activities generally require the ***workers*** to be on call 24 hours per day, 7 days a week. As discussed in more detail below in Sec. IV.A.3., in which we address Sec. 655.201, ``Definition of terms,'' we have deleted the definition of ``minor, sporadic and incidental'' duties and removed the 20 percent cap on such closely and directly related duties. b. Comments A number of commenters addressed the requirement that the work be performed on the open range requiring mobile housing for at least 50 percent of the work days in the contract period. Some commenters addressed the 50 percent requirement directly and others provided information regarding the times of year ***workers*** typically spend on and off the range or in mobile housing. Commenters directly addressing the 50 percent range requirement primarily raised concerns with the combined effect of the 50 percent range requirement and the proposed definition of ``open range'' (which generally included the absence of fencing as a required element of open range, which is discussed further below); they stated that many operations currently using the TEGLs would no longer qualify for the program because of the prevalence of fencing on the range. That is, commenters explained

that it is almost impossible to spend at least 50 percent of the contract period away from fences. For example, the Garfield County Farm Bureau (GCFB) commented that the 50 percent range requirement ``simply does not work for many of our members.'' The GCFB explained that many producers run their operations on private fenced and unfenced parcels, and are only using ``large acre non-fenced permits'' for late spring and summer, thus not meeting the 50 percent range requirement. Silver Creek Ranch explained that fences are prevalent throughout their herding operations, so to regulate the time herders are in contact with fences or enclosed areas would be impractical and could impair the quality of the care provided to the livestock. The Wyoming Livestock Board explained that many producers graze on crop residue, private leases, vineyards and other parcels near populated areas, and that if ``herding can only take place where no fences exist, for at least 50 [percent] of the work time[,] a majority of range sheep operations would not be eligible for H-2A herders.'' \11\ ---------- \11\ We received a substantial number of comments addressing the proposed definition of ``open range'' and describing the prevalence of fencing in modern herding. Those comments are discussed in further detail below, in Sec. IV.A.3. of the preamble related to Sec. 655.201, ``Definition of terms.'' ---------- Several commenters, including the Idaho Wool Growers Association, stated that the NPRM's dual requirements of no fencing and that the herders must spend half of the year away from headquarters and livestock facilities would disqualify many herders from using these regulations. These commenters primarily discussed the fencing issue and did not elaborate on whether herders typically spend more than 50 percent of the work contract at a fixed site on a ranch or farm. For example, the Texas Sheep & Goat Raisers' Association (TSGRA) stated that ``the proposal suggests that no fences would be allowed in connection with sheepherders and, further, half of the herders' year must be away from the ranch headquarters and livestock facilities.'' TSGRA further explained that ``private grass, supplemental hay and crop aftermath are the available options to maintain year-round feed for the animals and that does not fit the Department's apparent view of grazing out of sight of fencing or facilities.'' Some commenters stated that the 50 percent rule is ``unworkable'' or an ``administrative nightmare'' and does not allow for flexibility in cases of bad weather, emergencies, or other circumstances. For example, Henry Etcheverry, a sheep rancher, described the recordkeeping associated with the 50 percent rule as ``impossible'' and explained that each operation varies and thus requires different times spent in mobile housing or at the ranch. Brian Clark, an employee of the Wyoming State Workforce Agency representing his own views, stated that using percentages to determine how much time is spent on the range could create an ``administrative and enforcement nightmare,'' does not reflect reality, and does not reflect the FLSA criteria. Peter and Beth Swanson, commercial sheep producers, commented that many of their grazing locations are neither a ``ranch site'' nor ``open range'' (as defined in the NPRM) and that time spent on the ``open range'' depends on range forage availability, which varies ***due*** to a number of circumstances, such as rainfall, weather conditions, and land owner decisions. Mountain Valley Livestock stated that time spent in mobile housing versus at headquarters can be completely dependent on the weather. Mountain Plains and Western Range, in a comment adopted by several other commenters, specifically addressed the 50 percent mobile housing requirement, calling the rule ``arbitrary and unworkable.'' In their view, a sheepherder spending 182 days of the year in mobile housing but the rest in a bunk house during other livestock production work would not be eligible under either the special procedures or the standard H- 2A program. Mountain Plains and Western Range further commented that, as mobile housing was defined in the NPRM, a limited number of range cattle operations in Montana and Texas currently using the special procedures may not be eligible for the new herding and range livestock regulations, as they use non-mobile range housing on the range for livestock ***workers***. However, they acknowledged that virtually all employers use mobile housing except for this small subset. Mountain Plains and Western Range recommended that instead of the 50 percent range/mobile housing and 20 percent minor, sporadic, and incidental limitations, the Department adopt the FLSA range production exemption from minimum wage and overtime ``principally engaged'' rule. See 29 [[Page 62964]] U.S.C. 213(a)(6)(F), 29 CFR 780.325. Under the FLSA, a ***worker*** spending more than 50 percent of his or her time on the range is exempt, even if the employee performs some duties on the ranch not closely or directly related to herding or the production of livestock. 29 CFR 780.325. Mountain Plains and Western Range commented that the FLSA exemption is ``less confusing and more workable'' than the ``arbitrary'' percentage limitations in the NPRM, as well as more ``holistic and flexible,'' and, in their view, focuses on the duties of the ***worker*** rather than the location of the work. They commented that the FLSA test would be better understood and more likely complied with by employers. The Department received a small number of additional comments specifically addressing the requirement to spend 50 percent of the work contract period in mobile housing; however, none of these comments supported the proposed

requirement. As Mountain Plains and Western Range explained, a small number of their members use non-mobile range housing rather than mobile housing and thus would be ineligible to apply under these regulations. The ***Worker*** Advocates' Joint Comment commented that the 50 percent mobile housing requirement is unnecessary, and that this requirement could have the unintended effect of inducing employers to house ***workers*** in mobile housing when fixed site housing is otherwise available. Several commenters provided detailed information regarding time typically spent on the ranch versus the range. These comments, considered together, demonstrate that herding and production cycles vary greatly among operations, and a certain amount of flexibility is warranted to allow for differing amounts of time spent at the ranch. However, despite many the commenters expressing concern with a 50 percent range requirement (largely ***due*** to the issue of fencing), these comments demonstrate that most operations appear to be spending more than 50 percent of the work contract period on land considered ``range,'' if fencing is permissible. For example, W.F. Goring & Son commented that they run their sheep on the open range about 80 percent of the time and the remaining 20 percent of the time is ``spent on private lambing grounds where our animals are divided into large fenced pastures.'' The Siddoway Sheep Company spends approximately two to three months at the ranch for lambing, then spring and fall grazing are conducted on BLM-permitted lands, state lands and private lands, and summer grazing is in the high mountain meadows. Larson Livestock stated that it grazes sheep on the open range for twelve months of the year. In contrast to the above comments, the ***Worker*** Advocates' Joint Comment agreed that the ``Department's attempt to specifically delineate the kinds of jobs that fall under [the proposed rule] is long overdue and sorely needed.'' However, they expressed concern with the 50 percent threshold, asserting that this provision will adversely impact the wages and working conditions of U.S. ***workers*** because it allows too much time off the range and creates a loophole allowing employers to pay the herding and range livestock wage for up to six months of work on the ranch. The advocates explained that ``H-2A and comparable U.S. ***workers***, who do not work on the range (ranch hands), would otherwise be classified as `Farmworker, Livestock . . . They would not fall under [these rules] and would be entitled to be paid at the hourly AEWR rate . . . That work, if offered apart from the on the range herding work is more likely to attract U.S. ***workers***.'' They recommended that the Department revise the rule to require that 70 percent of the work contract period be spent on the range. A number of commenters also addressed the requirement that the work activities generally require ***workers*** to be on call up to 24 hours per day, 7 days per week. These comments overwhelmingly support the conclusion that these occupations require herders and range livestock production ***workers*** to be on call at all times while on the range to protect and manage the herd, one of the unique characteristics of these occupations. The Texas Sheep & Goat Raisers' Association emphasized the on call nature of the job as central to herding, stating, ``[s]heep ranching on rangeland throughout the United States has always been an industry that has at its roots sheepherders, which are on call 24 hours a day, 7 days a week, to protect livestock from predation and natural disasters.'' The Washington Farm Bureau similarly stated that ``the open range sheep and livestock herding industry is unique and requires special treatment'' and that herders are constantly on call to protect the herd. However, some commenters stressed that although ***workers*** are on call ``24/7,'' they are not required to work every hour of the day. As Helle Livestock stated, ``while herding doesn't require constant attention to the sheep it does require a constant presence.'' Southern Cross Ranches commented that ``it is imperative for herders to be available on a 24/7 `on call' basis for maintaining herd integrity and predator control'' but herders are ``not expected to and don't work 24/ 7.'' Mountain Plains and Western Range commented that the term ``on call'' may be misleading and suggested that instead the Department use the term ``available.'' Although not specifically commenting on the 24/ 7 provision, the ***Worker*** Advocates' Joint Comment stated that ``[w]orkers must also be ***given*** time off at least every six months and as required for other H-2A ***workers***, who cannot be required to work more than 6 days per week, while at the ranch.'' c. Discussion As in the TEGLs, these NPRM provisions recognized that herding and range livestock production occupations are unique and distinguishable from other H-2A occupations because they are conducted primarily in remote areas away from headquarters, require ***workers*** to be on call 24 hours per day, 7 days a week, and require certain unique job duties. Specifically, the Department included in the NPRM a requirement that at least 50 percent of the work contract period be spent on the range and in mobile housing. The purpose of this provision was to provide a sufficient threshold to confirm the unique, remote characteristics of these occupations, because herding and range livestock regulations are intended only to apply to ***workers*** who attend the herd as it grazes on the range, while also allowing for a realistic and workable amount of time at the ranch. The Department concluded that some delineation with respect to ranch versus range time was necessary because it has found in its investigations that some ***workers*** are spending extended amounts of time at

the ranch while being paid the wage rate intended for range ***workers*** under these rules. The Department viewed the 50 percent threshold as a reasonable requirement, as it requires ***workers*** to be primarily on the range, is consistent with the FLSA range production of livestock exemption, and allows for flexibility in the cases of emergencies and changing circumstances. The NPRM further proposed that if an employer violated the 50 percent range requirement, the employer would be in violation of its obligations under this part. 80 FR at 20303. Depending on all the facts and circumstances, the employer would have been responsible for compliance with all of the regular H-2A requirements, including the payment of the highest applicable wage rate for all hours worked, and the Department could have sought other remedies for the violation. Id. [[Page 62965]] Upon consideration of the all comments received on these issues, the Final Rule removes the requirement that ***workers*** be in mobile housing for at least 50 percent of the work contract period. The Department received no comments in support of this provision. We agree with the ***Worker*** Advocates' Joint Comment that this requirement is not essential to the 50 percent range requirement to confirm that ***workers*** being paid the herding and range livestock ***worker*** wage are engaged in work performed on the range, and could have an unintended consequence of employers housing their ***workers*** in mobile housing when fixed site housing is otherwise available. Further, the Department did not intend to exclude operations currently using the TEGLs who use non-mobile range housing on the range from using these rules (assuming they are in compliance with the remainder of the requirements under this Subpart), as pointed out by Mountain Plains and Western Range. The issue of non- mobile range housing is addressed in greater detail below, in Sec. IV.E. of this preamble related to the discussion of Sec. 655.230, ``Range Housing.'' However, we conclude that the need for range housing is relevant to whether a particular area is considered range and have addressed this issue in the definition of ``range,'' as discussed in greater detail below. The Final Rule requires that ***workers*** spend a majority, meaning ``more than 50 percent,'' rather than ``at least 50 percent'' as provided in the NPRM, of the workdays in the work contract period on the range, as range has been defined in the Final Rule. This change is intended to be more consistent with the range production of livestock exemption from minimum wage and overtime under the FLSA. However, the Department concludes that fully adopting the FLSA range production of livestock exemption ``principally engaged'' rule is inappropriate here, because it would allow these ***workers*** to perform duties at the ranch or farm beyond those duties constituting the production of livestock. The Department's consideration of the FLSA exemption, permissible duties and the 20 percent cap are further addressed below in Sec. IV.A.3. of the preamble related to the discussion of Sec. 655.201. The record demonstrates that a rule requiring a majority of the workdays under the contract to be spent on the range is appropriate and necessary to confirm that occupations under the herding and range livestock regulations, earning the required wage rate, are indeed uniquely remote and thus distinguishable from other H-2A occupations. As discussed above, the use of these special procedures is contingent on these occupations posing unique challenges and circumstances, one of which is the remote nature of the job. We conclude that allowing employers to pay the herding and range livestock wage to ***workers*** who are spending more time on the ranch than on the range would be inappropriate and would have an adverse effect on U.S. ***workers***, as this work would otherwise be offered at the standard hourly AEWR for all hours worked and thus be more likely to attract U.S. ***workers***. The Department concludes that a majority range requirement is sufficient to confirm the unique, remote nature of these occupations and distinguish herders from other H-2A occupations, such as ranch hands, while also allowing for necessary flexibility in modern herding to allow for changing circumstances on the range. Thus, the Department declines to increase the threshold of time required on the range to 70 percent, as suggested by ***worker*** advocates. The Department also concludes that a majority range requirement is reasonable and practical. It is consistent with the FLSA range production exemption, as proposed by Mountain Plains and Western Range (a suggestion adopted by several other commenters) and, as discussed above, many comments received on this issue provided evidence that operations currently using the TEGLs are spending more than 50 percent of the contract period on grazing areas considered range, as now defined in the Final Rule. As discussed in detail below, the Department has revised the definition of ``open range'' to ``range'' and removed the presence of fencing as an indicator of whether land is ``range.'' The Department concludes that the revised definition of ``range'' will address the majority of the comments received regarding the 50 percent range requirement, as they focused largely on the issue of fencing. Although some commenters expressed concern with setting a certain required percentage of time on the range, we consider the majority range requirement to provide adequate flexibility to address changing circumstances ***due*** to weather, forage availability, and other factors. Allowing more than half of the work contract to be spent at locations other than the range while still being paid the herding and range livestock wage would be contrary to the Department's statutory mandate to determine whether

U.S. ***workers*** are available for the job opportunity, and to provide that there is no adverse effect on similarly employed U.S. ***workers***. Of course, if there are employers who cannot meet the majority range requirement, they may still use the standard H-2A program to obtain ***workers***. Moreover, such employers might be able to use these procedures for some portion of the year that meets the majority range requirement, and use the standard H-2A program for the remainder of the year; this would require filing at least two certification applications. Additionally, the Final Rule retains the requirement that the work activities generally require the ***workers*** to be on call 24 hours per day, 7 days a week. The record fully supports that herding and range livestock production occupations continue to require constant attendance to the herd so that ***workers*** are on call 24/7. This is one of the unique characteristics of these occupations that distinguish these jobs from other H-2A occupations, and we conclude that it is appropriate to require that this be a characteristic of such jobs. With respect to the commenters who underscored that ``on call'' does not mean actively working, the Department agrees that ``on call'' does not mean working for 24 hours per day, seven days per week, and the current terminology, which has been used consistently in the TEGLs for many years and is used in this final rule, reflects this distinction. We decline to adopt the ***Worker*** Advocates' Joint Comment recommendation to require that ***workers*** must be ***given*** time off at least every six months and while at the ranch. The NPRM did not include any provisions requiring time off at certain intervals or while on the ranch, and the Department did not seek comment on any issues relating to mandatory time off. Therefore, the public has not had sufficient notice that such a provision was contemplated for the Final Rule and has not had the opportunity to comment on such provisions. Additionally, as discussed above, an essential characteristic of these job opportunities is that they require ***workers*** to be on call up to 24 hours per day, 7 days per week. However, the Department understands from its enforcement experience that ***workers*** often do receive days off while at the ranch and some comments indicate that some ***workers*** receive paid vacation time. We encourage employers to adopt or continue these practices. As provided in the NPRM and noted above, where the job opportunity does not fall within the scope of herding and range livestock production, the employer must comply with all of the standard H-2A procedures. If an [[Page 62966]] employer submits an application containing information and attestations indicating that its job opportunity is eligible for processing under the herding and range livestock procedures, but it is later determined, as a result of an investigation or other compliance review, that the ***worker*** did not spend more than 50 percent of the workdays on the range, or that the ***worker***'s duties at the ranch do not constitute the production of livestock (as discussed more fully below), the employer will be in violation of its obligations under this part and, depending upon the precise nature of the violation, may owe back wages or be required to provide other relief. Depending upon all the facts and circumstances, including but not limited to factors such as the percentage of days the ***workers*** spent at the ranch, whether the work was closely and directly related to herding and the production of livestock, and whether the employer had violated these or other H-2A requirements in the past, the employer will be responsible for compliance with all of the standard H-2A procedures and requirements, including payment of the highest applicable wage rate, determined in accordance with Sec. 655.122(l) for all hours worked. In addition, the Department may seek other remedies for the violations, such as civil monetary penalties and potentially debarment from use of the H-2A program. 3. Section 655.201--Definition of Herding and Range Livestock Terms a. Definitions of ``Herding,'' ``Production of Livestock,'' and ``Minor, Sporadic, and Incidental Work'' i. Background The TEGL for sheep and goat herding occupations provides a standard description of job duties that employers may use when submitting their Form ETA-790 to the SWA. TEGL 32-10, Attachment A, I(C)(1). That job description includes duties such as: Attending the animals on the range or pasture; using dogs to herd the flock and round up strays; guarding the flock from predatory animals and from eating poisonous plants; examining the animals for signs of illness; administering vaccines, medications and insecticides; and assisting with lambing, docking, and shearing. It also provides that the ***workers*** ``may perform other farm or ranch chores related to the production or husbandry of sheep and/or goats on an incidental basis.'' The TEGL does not define ``incidental.'' The TEGL also states that any additional duties must be normal and accepted for the occupation. The TEGL for the open range production of livestock also contains a standard job description listing similar duties related to the animals. TEGL 15-06, Change 1, Attachment A, I(C)(1). It also states that the ***worker*** may assist with irrigating, planting, cultivating, and harvesting hay, and that ***workers*** must be able to ride and handle horses and maintain their bearings in grazing areas. Finally, it provides that any additional job duties must be normal and accepted for the occupation. The TEGL does not place any limitation on the amount of time ***workers*** may perform these duties. Section 655.201 of the NPRM proposed to define ``herding'' as the ``[a]ctivities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the open range.'' 80 FR at 20339. The NPRM proposed to define the

``production of livestock'' as the ``care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock, examining livestock to detect diseases, illnesses, or other injuries, administering medical care to sick or injured livestock, applying vaccinations and spraying insecticides on the open range, and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock.'' Id. The NPRM further proposed that any duties performed at the ranch or farm must either constitute the production of livestock or be closely and directly related to herding and/or the production of livestock, and that any such closely and directly related work must be minor, sporadic, and incidental. Id. Section 655.201 of the NPRM proposed to define ``minor, sporadic, and incidental work'' as ``[w]ork duties and activities that are closely and directly related to herding and the production of livestock and are performed on no more than 20 percent of the workdays spent at the ranch in a work contract period.'' Id. Because the proposed definitions of herding, the production of livestock, and minor, sporadic, and incidental work operated together to define the scope of permissible job duties for a ***worker*** employed under these regulations, the commenters generally discussed them together; similarly, we are addressing them together. The Final Rule retains the definition of herding as proposed; modifies the definition of the production of livestock to include duties that are closely and directly related to herding or the production of livestock; and eliminates the 20 percent cap on such closely and directly related duties. To provide further guidance, the Final Rule also includes examples of duties that qualify as closely and directly related and duties that do not qualify under these rules. ii. Comments A substantial number of commenters addressed the proposed intertwined definitions of permissible herder duties. Almost all of the commenters that addressed the proposed 20 percent cap were opposed to it. Some commenters expressed their opposition directly in commenting on the 20 percent cap, while others provided a more generalized opposition to the proposed definitions' limitations on permissible duties. Mountain Plains and Western Range stated (in a comment adopted by numerous other commenters) that the proposed definitions ``are inappropriately restrictive and are not a realistic reflection of the industry's labor needs.'' They specifically stated that the 20 percent limit on days spent performing incidental work was ``arbitrary'' and ``unworkable.'' They suggested that the Department use ``a more holistic and flexible approach'' as in the regulations implementing the FLSA's minimum wage and overtime exemption for agricultural employees ``principally engaged in the range production of livestock.'' 29 U.S.C. 213(a)(6)(E). Those FLSA regulations look to whether the employee's ``primary duty'' is range work. 29 CFR 780.325(a). Under the FLSA, a ***worker*** ``who spends more than 50 percent of his time'' on the range performing range production duties is exempt from minimum wage and overtime. 29 CFR 780.325(b). Thus, under the FLSA, such an exempt ``employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.'' Id. The Mountain Plains and Western Range comment stated that we should similarly recognize that ``other work has historically been connected to that work and must be included in the definition of the job.'' They asserted that the NPRM did not explain how the 20 percent rule would help U.S. ***workers*** or how H-2A ***workers*** were harmed by its absence. They also asserted that the wording of the 20 percent cap on the number of days that could be spent on such incidental work was confusing, and they thought it might mean that only one day out of five at the ranch could be spent working and the other four spent had to be spent resting. [[Page 62967]] Cunningham Sheep Company and Dufurrena Sheep Company both commented that ``[l]imits on incidental work related to herding would unnecessarily burden our operation'' because ``herders need to remain flexible and be able to perform husbandry-type jobs without unrealistically mandated rules.'' Another sheep rancher stated that the definition of incidental work ``needs to be more clearly defined and broadened. Fences need to be repaired to hold the sheep in, supplemental feed fed, and a host of associated jobs that do not necessitate the need for additional job descriptions and employees.'' Another rancher asserted that, while ``H-2A ***workers*** should not be diverted to work such as construction,'' they should be permitted to perform ``related livestock tending duties, such as the building of lambing jugs.'' Etchart Livestock similarly stated that incidental work related to sheep production should be allowed, such as ``[f]ence repair, corral repair, or other limited tasks,'' but did not want a percentage cap; this commenter also stated that if the work does not involve sheep production, it should not be permitted. The Wyoming Farm Bureau Federation stated that the 20 percent ``is too low a cap ***given*** the nature of the industry.'' Some comments revealed that the ranchers essentially want the ***workers*** to be able to perform any chore required (although a number of the examples they ***gave*** are animal husbandry duties that fall within the definitions of herding or the production of livestock). One sheep and cattle rancher, Kelly Sewell, noted that ***workers*** perform a variety of duties at the ranch base and thus wanted a general agricultural classification because these ``valuable employees

irrigate crops, fix fences, and many other jobs necessary to run a ranch.'' Similarly, Indart Ranch stated that, in ``addition to caring for the sheep and husbandry duties, our herders are constantly building and taking down fence, driving pickups and water trucks, fixing and maintaining equipment, amongst many other ranch type duties.'' Another sheep rancher commented that, ``[a]s long as the ***workers*** are working on the ranch . . . there should not be such a thing as a 50-20 rule.'' The Rocky Mountain Sheep Marketing Association acknowledged that ranchers sometimes employ extra ***workers*** as insurance against an H-2A ***worker*** falling ill or going home ***due*** to a family need, and stated that under the current regulations ``this extra help can be put to productive work on non-herding, necessary work on other aspects of the ranching operation.'' The Colorado Wool Growers Association commented that there are many chores associated with maintaining the herd, including ``fixing a sheep pasture fence or irrigating a field that is grazed by sheep.'' The Association suggested that such activities should not necessitate a separate job or pay rate, but rather that the permissible job duties should include all such chores. CLUB 20 also recommended expanding the job description ``to include all chores that are in direct support of maintaining livestock managed in a grazing livestock production system.'' Similarly, Mountain Plains and Western Range suggested replacing all of the definitions with a comprehensive ``grazing livestock production system'' definition. A number of other comments contained the same theme--that the H-2A ***workers*** should be permitted to perform any duty at the ranch, including some activities that would constitute herding or the production of livestock and some that would not. For example, the John Espil Sheep Company comment noted that the livestock ***workers*** spend time at the ranch when weaning the calves before they are sold, and that feeding the calves may only take a couple of hours a day. Therefore, they also may perform other duties such as: repairing corrals or the feedlot fence; cleaning the shop, the bunkhouse and the tack room; and harvesting hay for winter feed. The company stated that this is all part of livestock production, and that keeping track of their time hourly or daily would be extremely difficult or impossible, both on the range and at the ranch, because every day is different. Similarly, another sheep rancher, Katie Day, commented that the ***workers*** irrigate pastures, harvest livestock feeds, maintain fences, clean corrals, doctor sheep and feed them, and it would be ``absurd'' to limit how long a job can be performed or to require recordkeeping for the incidental work. Finally, the Garfield County Farm Bureau similarly stated that ``[w]hat is defined as incidental work is vital to the day- to-day operations of their ranches. Without the upkeep of fences, pasture irrigation, mitigation of noxious weeds and production of livestock feed, their operations cannot exist. As ranchers, they must be able to perform whatever job needs done at any ***given*** time and would expect their employees to do the same. . . . In short, there is no such thing as incidental work on a livestock ranch.'' Many employer commenters seemed to object to the 20 percent cap on directly and closely related duties while at the ranch based, at least in part, upon their concerns regarding the associated recordkeeping requirements and, in some cases, a misunderstanding of those requirements. Those specific concerns are addressed in Sec. IV.B.2. of the preamble related to the recordkeeping provision in Sec. 655.210(f). Numerous employer commenters and their representatives, including American Sheep Industry Association (ASI), Mountain Plains and Western Range, California Wool Growers Association, Colorado Wool Growers Association, Texas Sheep & Goat Raisers Association, Vermillion Ranch and Midland Livestock Company, and John Espil Sheep Company, suggested that the Department adopt a much broader definition of permissible sheepherder duties. They generally labeled their preferred definition as the ``Grazing Livestock Management System.'' That definition permits ``the utilization of herbage or forage on a piece of land via grazing or supplementation'' and turns inputs into goods (protein, wool, etc.) through practices that: include but are not limited to: animal husbandry, temporary fencing, permanent fencing, management of urban interface, transport of water for animal use, use of structures and corrals to facilitate production practices, assistance with production of feed sources for animals being cared for, assistance with repair and maintenance of equipment and facilities used in production practices, trailing livestock and/or assistance in loading and unloading animals into livestock trucks for movement. Mountain Plains and Western Range stated that this definition would make clear that feedlots and similar operations are not covered, while focusing on the critical component of the job--the grazing of livestock. In a joint comment, Vermillion Ranch and Midland Livestock Company (Vermillion and Midland) stated that it would be ``general enough to encompass multiple open range occupations without creating arbitrary line-drawing that is impossible to follow.'' They opined that this definition and the FLSA regulatory definitions would be ``sufficient to protect the integrity of the special procedure regulations'' while not replacing established occupational practices. The Wyoming Wool Growers Association stated that this definition would reflect that herding goes beyond just controlling animal movement and includes animal care and husbandry and natural resource management. The Association commented that the suggested definition of sheepherder duties recognizes

the totality of the process. Finally, the California Wool Growers Association stated that this definition would ``more accurately [[Page 62968]] reflect current industry practices and requirements.'' In contrast to most employer commenters, Billie Siddoway, on behalf of the Siddoway Sheep Company, submitted a detailed description of the specific activities performed during various months of the year and did not object to the proposed 20 percent cap. Billie Siddoway stated that if an employee undertakes minor, sporadic or incidental work outside the definition of herding, such as by performing tasks as erecting temporary pens and corrals in anticipation of the lambing season, the employer could track those hours and job duties in order to allow the Department to evaluate compliance with the 20 percent rule. Billie Siddoway requested clarification that the 20 percent limitation applies only to work performed on the ranch (so that, for example, if a pair of ***workers*** divide up their chores on the range with one primarily responsible for tending the sheep and the other primarily responsible for caring for the camp and the dogs and horses, there is no need to evaluate that range time). In further contrast to the vast majority of the employer comments, the ***Worker*** Advocates' Joint Comment agreed that the definitions of the terms ``herding'' and ``livestock'' are accurate, but stated with respect to the proposed definition of ``minor, sporadic, and incidental work'' that the 20 percent rule ``is a critically important element of the proposed rule.'' They emphasized that sheep herders have alleged in litigation that they often are assigned work outside the permissible duties and spend significant time performing duties such as irrigating fields, harvesting crops, and maintaining ranch buildings, vehicles, and equipment. Nonetheless, the ***workers*** have been paid the monthly wage required under the TEGL rather than the higher hourly AEWR, which could lead to displacement of domestic ***workers*** employed as ranch hands. The ***Worker*** Advocates' Joint Comment requested that the Department ***give*** more examples of work that would be minor, sporadic and incidental (repairing a fence or corral) as well as examples of work that falls outside the permissible job duties (e.g., constructing fences or corrals, reseeding, haying, operating and repairing heavy equipment, and constructing dams, wells, and irrigation ditches). They further suggested that the Department expressly prohibit such other work. As noted, the suggestions related to recordkeeping are discussed in Sec. IV.B.2. of the preamble with regard to Sec. 655.210(f). iii. Discussion The NPRM recognized that employers using these procedures to hire ***workers*** for the range production of livestock may, at times, require the ***workers*** to bring the herd to the ranch or farm for certain periods to perform work that constitutes the production of livestock, such as lambing or calving, shearing, branding, culling livestock for sale, or tending to a sick animal. The NPRM further recognized that, during such periods at the ranch, the ***workers*** could also perform other work that is closely and directly related to herding or the production of livestock. The NPRM proposed to limit to 20 percent the number of ranch days that could be spent performing such directly and closely related work, and it required that the other directly and closely related ranch duties be included in the job order. See 80 FR at 20303. The purpose of including the proposed 20 percent cap was to require that ***workers*** being paid the herding and range livestock wage not be used as general ranch hands, who are entitled to the standard H-2A hourly AEWR for all hours worked, because these provisions are only intended for ***workers*** who attend the herd as it grazes on the range. 80 FR at 20301. The Department determined that some limit on the scope of duties such ***workers*** could perform was essential because, in the course of its investigations, it found that some ***workers*** are stationed at the ranch for extended portions, if not all, of the job order and are performing general ranch hand work rather than work closely and directly related to the range production of livestock. Therefore, the NPRM identified tilling the soil for hay and constructing an irrigation ditch as examples of work not closely and directly related to herding or the production of livestock. The inspection and repair of the corral was ***given*** as an example of work that is closely and directly related. 80 FR at 20303, 20306. After considering all the comments received, we have decided to remove the 20 percent limitation on the number of ranch days that can be spent on work that is closely and directly related to herding or the production of livestock, because such work is inextricably linked with those primary tasks. Where such work is, indeed, closely and directly related, it comprises an essential part of the work that employees who are engaged in herding and the production of livestock perform. Further, allowing ***workers*** to perform work that is closely and directly related to herding and the production of livestock on only one out of every five days at the ranch unnecessarily limits the ranchers' flexibility in dividing tasks among their H-2A ***workers***. For example, herders may be at the ranch for two months during birthing season. During that time, the ***workers*** may remain responsible for caring for the dogs they use on the range to help herd and guard the sheep or goats; they also may remain responsible for the care of the horses they use on the range to pull their camps or to assist with herding. The proposed 20 percent cap on the number of ranch days that a ***worker*** could perform such closely and directly related work would have required the employer to divide the animal care sequentially among five herders, so no one ***worker*** performed it more than 20

percent of the days. The employer would have violated the cap if it instead had required that one herder do the animal care every day, even if the task only took one or two hours to perform. Smaller ranchers with fewer than five H-2A ***workers*** would have found it very difficult to comply with the proposed limitation on the percentage of days such work can be performed at the ranch. When the work is closely and directly related to herding or the production of livestock, there is no need to limit its performance in this way. Therefore, we are including closely and directly related work within the definition of the production of livestock, which provides employers with sufficient flexibility to assign appropriate tasks to ***workers*** when they are not on the range. The Final Rule makes conforming changes to delete references to the 20 percent cap in Sec. Sec. 655.200(b)(1) and (2), 655.210(b), and 655.230(d). However, we continue to conclude that it is inappropriate to provide employers with the unlimited latitude that some requested by allowing them to require ***workers*** employed pursuant to these rules to perform any ranch duties that are necessary to meet the day-to-day needs that arise in ranch operations. Accordingly, the Final Rule does not adopt the revised Grazing Livestock Management System definition of permissible duties, as recommended by a number of employers and their representatives. That definition is overly broad and vague, with undefined terms, such as ``management of urban interface,'' which make it unsuitable for the Final Rule. That definition would allow ranchers virtually unfettered discretion to assign ***workers*** any duties, unrelated to herding and the production of livestock, particularly because it states that the permissible duties ``include, but are not limited to'' the listed tasks. More specifically, under [[Page 62969]] that definition, ***workers*** could perform additional tasks such as assisting with the production of feed sources for animals being cared for, which could include planting crops like hay or alfalfa, irrigating the crops, applying pesticides to the crops, harvesting the crops, and drying and storing the crops. That definition also would allow ***workers*** to assist with the repair and maintenance of any equipment and facilities used in production practices, which could include work repairing a harvesting machine or maintaining a grain silo. The Department concludes that allowing such general ranch hand work to be performed by herding and range livestock ***workers***, rather than by corresponding U.S. ranch hand ***workers*** who would earn the standard hourly AEWR, would have an adverse effect on U.S. ***workers*** similarly employed. For similar reasons, the Department also is not adopting the FLSA's regulatory definition, as some commenters suggested. The FLSA regulation, 29 CFR 780.325, is tied to the FLSA's statutory language, which exempts an employee ``principally engaged'' in the range production of livestock. Therefore, that regulation allows a tolerance for non-herding work so long as it is less than 50 percent of the work hours. However, such a tolerance would be overbroad in the context of these H-2A rules, which create a special exception from the standard H- 2A wage requirements. Therefore, in order to fulfill our original purpose of providing that ***workers*** employed pursuant to the herding and range livestock regulations are not working as general ranch hands when they are not on the range, and to provide the requested guidance and clarity to both ***workers*** and the regulated community, the Final Rule includes several additional examples both of duties that qualify as directly and closely related to the production of livestock and duties that do not qualify. The Final Rule identifies the following as examples of work on the ranch that is closely and directly related: repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the ***workers*** use on the range to assist with herding or guarding the flock; feeding and caring for the horses that the ***workers*** use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. Furthermore, we note that many of the duties that the commenters stated should be permissible (caring for sick animals at the ranch, providing supplemental feed, and assisting with lambing) already are included within the definition of the production of livestock. The Final Rule identifies the following as work that is not closely and directly related: Working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range. Several of these examples are taken from the FLSA regulations implementing the exemption for the range production of livestock, which a number of commenters identified as a model for this rule. See 29 CFR 780.325(b), 780.327, 780.329(c). Further, the Final Rule provides employers adequate flexibility in the use of H-2A ***workers***, while still requiring that the work be agricultural and herd-related in nature. Thus, although ***workers*** employed pursuant to the herding and range livestock provisions may not engage in work that falls outside the scope of these rules, the Department does not intend to debar an employer who in good faith has H-2A ***workers*** perform an insubstantial amount of herding work not listed in the Application. In exercising our enforcement discretion when an employer has had an H-2A ***worker*** perform work outside the scope of the activities listed on the job order ***due*** to unplanned and uncontrollable events,

the Department will consider the employer's explanation, so long as the activities are within the scope of H-2A agriculture, have been occasional or sporadic, and the time spent in total is not substantial. Moreover, the debarment regulations require that the violation be substantial, and that a number of factors must be considered in making that determination, including: An employer's previous history of violations; the number of ***workers*** affected; the gravity of the violation; the employer's explanation, if any; its good faith; and its commitment to future compliance. Under these criteria, the good faith assignment of a ***worker*** to work not listed in the Application for a small amount of time would not result in debarment. The Department concludes that this improved clarity of the scope of the rules for herding and range livestock ***workers*** will lead to improved compliance and more effective enforcement by the Wage and Hour Division. As we explained in the NPRM, 80 FR at 20303, where employers violate this limitation on duties, they may owe back wages and DOL may seek other relief depending upon the precise nature of the violation. b. Definitions of Livestock and Range Housing i. Livestock Livestock is not defined in the TEGLs. The NPRM defined livestock as ``[a]n animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of this subpart, livestock refers to those species raised on the open range.'' 80 FR at 20339. As explained in the NPRM, the proposed definition of livestock described the type of animals, when managed on the range, covered by these rules. 80 FR at 20303-04. As mentioned above, Mountain Plains and Western Range suggested replacing all of the definitions with a ``grazing livestock production system'' definition, but this would not address the type of animals covered by these rules. The ***Worker*** Advocates' Joint Comment agreed that the definition of the term livestock is accurate. Because the Department received no comments opposing the proposed definition of livestock or otherwise suggesting modification, the Final Rule retains the proposed text without any modification. ii. Range Housing\12\ ---------- \12\ As noted in Sec. IV.E. of the preamble, and for the reasons discussed there, we have discontinued the use of the phrase, ``mobile housing,'' and instead refer to housing on the range as ``range housing.'' ---------- The TEGLs set standards for, but do not define, range housing. The NPRM defined ``mobile housing'' as ``[h]ousing meeting the standards articulated under Sec. 655.235 that can be moved from one area to another area on the open range'' and explained that this definition ``focuses on the movable nature of the housing used on the open range and specifies the provision in the regulation that sets forth the standards such housing must meet.'' 80 FR at 20304. The ***Worker*** Advocates' Joint Comment agreed with the NPRM definition of range housing. While the Department received comments regarding the standards for such housing and SWA inspection requirements, those comments are discussed in Sec. IV.E. of the preamble related to Sec. Sec. 655.230 and 655.235. Because we received no comments opposing the definition of range housing or otherwise suggesting modification, the Final Rule reflects the definition proposed in the NPRM, with two modifications. First, we now refer to housing on the range as ``range [[Page 62970]] housing'' rather than ``mobile housing,'' as discussed further below in Sec. IV.E. Second, for the same reasons, we have deleted the requirement that the housing must be capable of moving from one area to another. c. Definition of Range i. Background The TEGL for sheep and goat herding provides that the special procedures were established in recognition of the unique characteristics of sheepherding, which requires ``spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week.'' TEGL 32-10,]3. The TEGL provides that the SWA may rely on a standard job description of the duties to be performed and this description refers to ``sheep and/or goat flock grazing on range or pasture,'' but the terms ``range'' and ``pasture'' are not further defined. Id. at Attachment A, I(C)(1). The TEGL for the open range production of livestock procedures similarly were established in recognition of the ``unique characteristics of the open range production of livestock.'' TEGL 15- 06, Change 1,]3. The SWA may rely on a standard description of the job duties for a job opportunity in the open range livestock production industry, which refers to tasks performed ``on the open range'' and states that the ***workers*** also must ``occasionally live and work independently or in small groups of ***workers*** in isolated areas for extended periods of time.'' Id. at Attachment A, I(C)(1). No definition of ``open range'' is included in the TEGL. The NPRM defined open range as ``[u]nenclosed public or private land outside of cities and towns in which sheep, cattle, goats, horses, or other domestic hooved animals, by ownership, custom, license, lease, or permit, are allowed to graze and roam. Animals are not meaningfully enclosed where there are no fences or other barriers protecting them from predators or restricting their freedom of movement; rather a ***worker*** must actively herd the animals and direct their movement. Open range may include intermittent fencing or barriers to prevent or discourage animals from entering a particularly dangerous area. These types of barriers prevent access to dangers rather than containing the animals, and therefore supplement rather than replace the

worker's efforts.'' 80 FR at 20339. The Department specifically sought comment on whether the definition of open range should include a minimum acreage of the land on which the animals roam; under what circumstances (e.g., state requirements related to the ``open range'') the regulation may take into account barriers, fences, or other enclosures on this same land; and other factors that should be considered in the definition of open range. 80 FR at 20304. The Final Rule removes the qualifier ``open'' and revises the proposed definition, using a multi-factor test based on a modified version of the definition of ``range'' used in the FLSA range production of livestock exemption. It sets forth the following factors that indicate the range: The land is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in remote, isolated areas; and range housing is typically required so that the herder can be close to the herd to fulfill the requirement to be constantly ready to attend to the herd. No one factor is controlling and the totality of the circumstances is determinative. The definition also specifies what is not considered range--specifically, that the range does not include feedlots, corrals, or any area where the stock would be near headquarters. The term also does not include any other areas where a herder is not required to constantly be available to attend to the livestock to perform tasks such as ensuring they do not stray off, protecting them from predators, and monitoring their health. ii. Comments The Department received a substantial number of comments addressing the proposed definition of open range. The comments addressed a number of issues, including: Fencing on the range; the changing nature of the landscape of the West and the feed used for sheep, including crop stubble; the necessity of herders regardless of fences and barriers; ``open range'' state laws; and the definition of ``range'' used in the FLSA range production exemption. The comments are addressed below according to the questions presented in the NPRM: (a) Whether the definition of open range should include a minimum acreage of the land on which the animals roam; (b) under what circumstances (i.e., state requirements related to the ``open range'') the regulation may take into account barriers, fences, or other enclosures on this same land; and (c) other factors that should be considered in the definition of open range. 80 FR at 20304. (1) Comments on Minimum Acreage The NPRM requested comments on whether the definition of open range should include a minimum acreage of land. Mountain Plains and Western Range, along with a handful of other commenters, opposed a minimum acreage test. Mountain Plains and Western Range reasoned that an employer may not be aware of the acreage. Commenter Billie Siddoway supported modifying the definition to include ``remote areas more than fifty miles from the base ranch that require delivery of water by truck.'' (2) Comments on Barriers, Fences, or Enclosures Many commenters explained that livestock grazing varies substantially among operations, depending on the particular ranch owner and/or the geographic location. As indicated by the SBA Office of Advocacy, the practice of herding has changed since the 1950s and herders must graze on lands that are less ``open.'' Diamond Sheep Company explained that urban sprawl has changed herding patterns, as well as the availability and type of food consumed by sheep. Because the West is no longer an open area, sheepherding in its modern form has changed; according to the Idaho Wool Growers Association and other commenters, it increasingly includes ``a mix of native grass on federal, state and/or private leases, hay and alfalfa grazing, crop aftermath grazing, feeding under power lines and in vineyards and even small parcels in residential areas for fuel load management.'' The comments almost unanimously opposed using fencing as a defining factor for ``open range.'' Commenters indicated that the prohibition on fencing was one of the two most problematic aspects of the NPRM. The comments explained that fencing is common on the range; Mountain Plains and Western Range stated that there is ``no such place'' that contains such unenclosed land as the Department had described in the NPRM. Stephany Wilkes stated that the idea that grazing only takes place away from fences is ``unrealistic, magical thinking.'' Mountain Plains conducted a survey of its members and of the 140 employer-members who responded, 45 percent of respondents indicated that their operation would not qualify as ``open range'' according to the definition in the NPRM. The opposition can generally be described as deriving from the realities of the modern landscape in the West where fences appear for many reasons, including on federal land managed by the Forest Service and the BLM, as well as the proposition that sheepherding requires a herder to be present regardless of whether the area has [[Page 62971]] fencing. Numerous ranchers explained that fences are necessary for a variety of reasons, including to mark boundaries, separate plant or animal species, protect crops or property, keep sheep from eating poisonous plants, manage grazing, protect animals from predators and keep them safe from traffic on public roads. They also stated fences are used for rangeland improvement, riparian or riverbank zones protection, and sustainability of rangelands. The employer comments indicated that fencing may be used on both small and large acreages; the size of fenced land varies, and sheep may be within fences but within thousands of acres of private land. For example, Etchart Livestock, Inc. stated that its private pasture is fenced and varies in size from 4 acres to 4,000 acres. The

Washington State Sheep Producers described large bands of sheep that are herded on unfenced open range from early spring to fall and are also herded across 500+ acre rangelands that are fenced for cattle containment, not sheep containment. Rangeland described by D.A. Harral was fenced around the exterior and broken up into 2,000 to 10,000 acre tracts of semi- arid land. A common theme throughout the comments submitted by ranchers and their associations was that fencing does not replace the need for herders. Julie Hansmire expressed the view that regardless of whether a fence is a quarter of a mile from the sheep or 20 miles, a herder is still required. As explained in the comments, if a fenced area is very large, a herder may keep the sheep in a manageable area, and a herder also keeps the animals moving to graze on different areas for controlled grazing. For example, Hansen Ranch pointed out that its sheep are grazed on Forest Service land to control the noxious weed ``Leafy Spurge,'' and the sheep herders are needed to keep the sheep grazing on this weed within a fenced area. Many commenters, such as John Parker and the Washington State Sheep Producers, pointed out that sheep cannot be left alone on the range because they may stray from the band of sheep and become lost, or be attacked by predators. Commenters also noted they used temporary fencing as well. The employer commenters expressed particular concern about predators, explaining that sheep herders are critical to protecting sheep from attack regardless of whether the sheep are in a fenced area. As Pauline Inchauspe described, ``[c]oyotes and mountain lions are a constant threat and though the herders are equipped with livestock guardian dogs, there is no substitute for the watchful eye of a sheepherder. Their 24 hour presence is a necessity . . . throughout the entire year.'' For example, Detton Fawcett put a herd on private ground with fences and lost 40 percent of his herd over the summer; on another piece of land he lost multiple lambs (stating that losing 50 or more lambs in three weeks is common). Yet, with a herder present, Mr. Fawcett stated that he only loses approximately five percent of the herd. Commenters also pointed out that the term ``open range'' refers to state laws that require property owners to build and maintain fences sufficient to keep livestock off their property. For example, William Ashby Maltsberger, a Texas rancher, submitted information on the Texas livestock laws explaining this concept. He pointed out that the NPRM definition of open range would prevent range producers of livestock, who are required by Texas open range law to fence their properties, from using the special procedures. Similarly, Tom Thompson explained that ``[o]ur understanding of open range is that if you want to keep other people's livestock off your property you have to put up fences, making fences required in areas where there are other ranchers.'' (3) Comments on Other Factors That Should Be Considered in the Definition of Range (a) The FLSA Range Production Exemption Both industry and ***worker*** advocates suggested using the FLSA range production of livestock exemption definitions in some form for the purposes of the H-2A rule, some suggesting adopting them in full and some emphasizing different portions. Mountain Plains and Western Range and the ***Worker*** Advocates' Joint Comment generally encouraged the Department to align the definition of ``range'' with the FLSA regulations, as discussed further below. The FLSA range production of livestock exemption regulation defines the term ``range'' at 29 CFR 780.326(a) and (b). That regulation describes the range generally as land that is not cultivated and typically is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor. It is land that produces native forage for animal consumption, and it includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. The range need not be open. The regulation provides that many acres of range land are required to graze one animal unit (five sheep or one cow) for 1 month; therefore, by its nature, the range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres. The FLSA regulation at 29 CFR 780.329 provides that an employee is exempt if his primary duty is the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day does not affect the application of the exemption. However, exempt work must be performed away from the headquarters, which is the place for the transaction of the business of the ranch; the headquarters does not include large acreage, but only the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The FLSA exemption does not apply to feed lots or to any area where the stock involved would be near headquarters. Rather, it applies only to those employees principally engaged in activities requiring constant attendance on a standby basis, away from headquarters, such as herding, where the computation of hours worked would be extremely difficult. Although Mountain Plains and Western Range indicated a preference for eliminating an independent definition of range altogether and instead using the alternative ``grazing livestock production system,'' (discussed more fully above with regard to the ``production of livestock'' definition) they alternatively recommended replacing the definition of open range in the NPRM with the FLSA definition of

range. Specifically, Mountain Plains and Western Range stated that the use of the phrase ``range'' as defined in the FLSA is a better fit than ``open range,'' as nothing is truly ``open'' land anymore. The ***Worker*** Advocates' Joint Comment emphasized that the rule should specify that the land must be uncultivated so that the H-2A procedures for sheep herders are not more encompassing than the FLSA definition. The ***Worker*** Advocates' Joint Comment also supported using a ***worker***'s proximity to the ranch as an indication of whether the work is on the open range. Their comment stated that ``ranch or farm signifies a place where crops are cultivated or where livestock are enclosed. Proximity to a location where livestock must be enclosed or where land is cultivated is an indication that such a place is not the open range.'' They suggested a slight modification to the FLSA definition, stating that work [[Page 62972]] activity performed ``near a ranch or farm used by the employer'' is not done on the range. Other comments echoed similar elements about the topography of range or rangeland, which are factors found in the FLSA definition. For example, Lyle McNeal stated that range has native forages of grasses, forbs, and shrubs and that ``range is also defined as uncultivated land, including forest land, which produces forage suitable for livestock grazing.'' However, this rancher also noted that herders are needed on other types of land. McNeal further explained that the term ``improved range'' involves ``reseeding and replacing the native range plants with a specific improved forage plant, i.e., crested wheat grass, forage kochia, etc. Improved range might also refer to water developments, springs, or wells, including reservoirs or guzzlers.'' Similarly, according to the sources attached to the comment submitted by Vermillion and Midland, ``rangeland'' is defined as ```land on which the native vegetation (climax of natural potential) is predominantly grasses, grass-like plants, forbs, or shrubs suitable for grazing or browsing and present in sufficient quantity to justify sufficient grazing or browsing use,' [including] non-native vegetation which was either planted for reclamation purposes or has since invaded the rangeland.'' ``Range'' is defined by these sources as ``an open region over which animals (as livestock) may roam and feed.'' (b) Crop Residue and Stubble The ASI represented that 46 percent of their sheep spend part of the year on federal grazing permits or allotments, but noted that the availability of federal grazing land is on the decline and private grass, supplemental hay, and crop aftermath are the other available grazing options. The Idaho Wool Growers Association identified the primary times crop residue or stored crops (baled hay and corn) are used for feed is during the fall when the sheep are coming down off the mountain, in the winter when native food cannot be found, and in times of drought. The Washington State Sheep Producers indicated that the sheep graze for part of the year on crop aftermath in irrigated crop circles of 100-150 acres in size, and that herders are necessary to move the sheep among the crop circles. The Wyoming Livestock Board stated that ``[m]any producers graze also on crop residue, private leases, vineyards and other parcels near fixed ranch sites and populated areas'' and that these areas still require managed herding. Eph Jenson Livestock explained that they have been desperate to find feed for the sheep and that allowing sheep to feed on crop residue is an economical means of clearing the field for the farmer. Cunningham Sheep Company stated that crop residue grazing is healthy for the sheep and the agricultural economy because it allows producers to remove residue without burning or using another destruction method. The distance crop residue grazing takes place from the ranch, and from urban areas, may vary by operation and by geographic location. For example, numerous commenters, including the Utah Farm Bureau Association, the American Farm Bureau and the Sublette County Conservation District, noted that sheep are used for fire prevention close to urban areas, especially in California. Comments indicated that California's sheep industry relies on crop residue grazing near urban areas anywhere from 6 months a year (Roswell Wool) to year-round (California Wool Growers Association). Elgorria Livestock characterized grazing on crop residue as a ``large part'' of the production cycle in California. (c) Mobile Housing Although not directly discussing the definition of ``range,'' many commenters, such as the Wyoming Wool Growers Association, noted that mobile housing is necessary for range work because it enables the herder to remain with the herd. As the Colorado Wool Growers Association explained, mobile housing is necessary because ``livestock is often grazed far from the nearest town, or the ranch headquarters. It would be illegal to build fixed housing on U.S. Forest Service, Bureau of Land Management grazing allotments, as well as numerous other locations that livestock are grazing. It is not feasible to drive herders back and forth to work every day, leaving sheep unattended and vulnerable to predator attacks, straying too far from water sources, or being exposed to poisonous plants. While a lot of predator attacks happen at night, it is not unusual for predators to attack in broad daylight. This is why there has been the historic recognition of the necessity for mobile housing to keep herders near the sheep.'' However, the Wyoming Farm Bureau Federation noted that many livestock ***workers*** do not need mobile housing for even 50 percent of the workdays in a contract. Further, as explained by Mountain Plains and Western Range, there are a limited number of employers who use stationary bunkhouses on the range

rather than mobile housing at points throughout the ``vast areas of land'' where cattle are grazing, particularly in Montana and Texas. Finally, the ***Worker*** Advocates' Joint Comment indicated that requiring the use of mobile housing would have the unintended effect of inducing employers to house ***workers*** in mobile housing when fixed site housing is available; they stated that the nature and location of work should be the focus instead. iii. Discussion Based on the comments received, it is apparent that herding practices have evolved significantly over the last 50 years and the proposed definition of ``open range'' in the NPRM did not reflect these changes. The Final Rule, therefore, adopts a multi-factor test for defining what constitutes the ``range.'' As explained below, the Final Rule's definition allows more flexibility than the NPRM and offers more guidance than the TEGLs by drawing on the FLSA regulatory definition suggested by many commenters as a starting point. The definition maintains a nexus to the longstanding purpose of the special procedures, to provide that herders can be available to tend to the flock in remote locations 24 hours a day, 7 days a week. In response to the information received in the comments, the Department will no longer use the term ``open range,'' will not use a set minimum number of acres in the definition of range, and will not use fencing as a defining feature of the range. We will, however, continue to consider the number of acres as a relevant factor in the determination of range. We address these considerations below. First, the definition of ``open range'' in state law has limited use for the purposes of determining special procedures for herders, and the use of the term ``open range'' in these rules may cause unnecessary confusion in ``open range'' states. Therefore, as a result of the concerns raised by commenters, the Department no longer uses the NRPM phrase ``open range,'' and instead the Final Rule defines ``range.'' Second, in response to comments, the Department has not included a minimum number of acres in the definition of range. However, the amount of acreage is relevant as a factor in determining whether the area is considered the range, as discussed further below. Third, the Department understands and appreciates the serious concern raised by commenters regarding the use of fencing as a proxy for open range as proposed. The comments demonstrate that using the NPRM definition is untenable for many ranchers ***due*** to the [[Page 62973]] extensive presence of fencing across many of the lands used for grazing, including the fencing present on BLM and Forest Service lands. Therefore, the Department is eliminating fencing as an indicator of range. For similar reasons the Department also declines to adopt a test using the ``enclosure of livestock'' as the indicator of range, or, as proposed by the ***Worker*** Advocates' Joint Comment, as an indicator of ranch. Rather, based on the comments, when assessing whether the work takes place on the range or off of the range, the Department will consider the following factors that indicate the range: The land is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in remote, isolated areas; and range housing is typically required so that the herder can be close to the herd to fulfill the requirement to be constantly ready to attend to the herd. No one factor is controlling and the totality of the circumstances is determinative. The question of whether any area on the ranch (beyond the headquarters, discussed below) is considered on the range, and therefore counts toward the 50 percent threshold requirement, or off of the range must be determined by looking at the factors established in this Final Rule. It is worth noting that when we use the term ``ranch'' as distinguished from the ``range'' in this Final Rule, we are referring to that portion of the ranch that does not qualify as range after analyzing it under the multi-factor test. The range specifically does not include feedlots, corrals, or any area where the stock would be near headquarters, which is consistent with the FLSA range production of livestock exemption. The term also does not include any other areas where a herder is not required to constantly be available to attend to the livestock to perform tasks such as ensuring they do not stray off, protecting them from predators, and monitoring their health. The work must be performed away from the headquarters used by the employer to qualify as range work. The term ``ranch'' is distinct from the term ``headquarters.'' The term headquarters is limited and does not embrace large acreage. The headquarters is the place where the business of the ranch occurs and is often where the owner resides. The term headquarters only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity, meaning that anything beyond this immediate area is not considered the headquarters. Any work performed at or near the headquarters would not qualify as work on the range for purposes of the requirement for herders to spend more than 50 percent of their time on the range. The Department maintains the requirement that the work must be done away from the headquarters in order to preserve the longstanding purpose of the special procedures--that the unique occupational characteristics require ***workers*** to spend extended periods of time in isolated, mountainous, remote areas to be available to attend to the herd's needs on a 24/7 basis, making tracking of the hours worked exceedingly difficult. This situation does not exist when ***workers*** are stationed, for example, in a cultivated field near the headquarters where hours could be easily tracked (and where U.S. ***workers*** may be more interested in working). This

fundamental historical purpose of the special procedures, and DOL's statutory obligation to certify that there are not sufficient U.S. ***workers*** who are able, willing, and qualified to perform herding jobs on the range, require the Department to maintain geographic parameters for range work. For this reason the Department cannot allow for use of the Mountain Plains and Western Range definition of ``grazing livestock production system,'' because it does not account for the location where the work occurs. Although the FLSA definition of range provides a useful starting point, the Final Rule does not fully adopt the FLSA definition of range in three key respects. First, for the reasons identified by the Colorado Wool Growers Association and other commenters, range housing typically is necessary for the ***workers*** covered under this Rule. The Final Rule contemplates that range housing is almost always a requirement of range work because the ***workers*** must be on call 24 hours, 7 days a week to tend to the needs of the animals, and range work cannot take place near the headquarters. Housing with the herd and away from the headquarters is therefore essential. However, the Department does not intend to provide an incentive to use range housing when it is not appropriate, as noted by the ***Worker*** Advocates' Joint Comment. Further, the Department acknowledges the comments received about a small subset of ***workers*** who use a series of remote, stationary bunkhouses on the range while traveling with the herd, while it is grazing over vast areas of land; this practice would not disqualify their employers from using the these regulations. The second modification from the FLSA definition is for grazing that occurs on crop residue. Many of the descriptions of the land used for herding submitted by commenters would easily fall within the FLSA range production exemption's regulatory definition of the range as generally uncultivated land and land not suitable for cultivation; however, areas where sheep are grazing on crop residue may not always qualify as ``range'' under the FLSA definition. Therefore, to accommodate the comments that many sheep are feeding on crop residue during certain months of the year, often on leased lands at a distance from the rancher's property as the herd trails to or from BLM or Forest Service allotments, the Department is establishing the multi-factor test, as well excluding the FLSA regulation's language, ``land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor.'' 29 CFR 780.326(b). Allowing for some work on cultivated land, depending on the other factors, is consistent with the purpose of this variance (that the work is unique because it is remote and requires 24/7 availability, which makes the hours difficult to calculate) from the standard H-2A rules. The modern reality of herding, which the commenters indicate occurs on crop residue during certain seasons, does not necessarily disqualify herders who are operating remotely from the ranchers. However, we note that the FLSA regulation provides that ``generally'' the land is not cultivated and ``typically'' is not suitable for cultivation; therefore, the deletion of the language is not a significant modification, as the Final Rule still asks whether the land actually is cultivated as an indicator of the range. The Department recognizes that, depending on an analysis of the factors, the test established in the Final Rule may in certain cases encompass more land as ``range'' than under the FLSA, as indicated in the ***Worker*** Advocates' Joint Comment. Additionally, in other cases, an area considered range under the FLSA may not be considered range under the test set forth in the Final Rule, depending on an analysis of the factors. Third, the Department is intentionally omitting the sentence in the FLSA regulation stating that ``[t]he balance of the `headquarters ranch' would be the `range.'" 29 CFR 780.329(b). As discussed above, determining which portions of the balance of the ranch that is away from headquarters are considered on the range, and therefore count toward the 50 percent threshold requirement, or off the range will be assessed using the multi-factor test set forth in the Final Rule. [[Page 62974]] B. Pre-Filing Procedures The Final Rule establishes pre-filing procedures for employers seeking ***workers*** to engage in sheep, goat and cattle herding jobs. These provisions assist employers in understanding their pre-filing obligations. 1. Section 655.205--Herding and Range Livestock Job Orders The two TEGLs do not provide a variance from the standard rules for Form ETA-790 filing time frame or location, with one exception. Therefore, under the TEGLs, the standard Form ETA-790 filing requirements in 20 CFR 655.121(a) through (d) apply, except where an agricultural association submits a Form ETA-790 for a ``master'' job order (i.e., a Form ETA-790 submitted by agricultural association as a joint employer with its employer-members) for range sheep or goat herder positions. Although, under the TEGLs, all Forms ETA-790 for standard H-2A job orders must be submitted to the appropriate SWA no more than 75 calendar days and no less than 60 calendar days from the employer's start date of need, the TEGL applicable to sheep and goat herding employment permits a Form ETA-790 for a ``master'' job order for range sheep or goat herder positions to be submitted directly to the National Processing Center (NPC) once annually. In the NPRM, the Department proposed variances from the job order filing requirements in 20 CFR 655.121(a) through (d) for all range herding and livestock production job orders. Specifically, the NPRM proposed requiring an eligible employer to submit the, Agricultural and Food Processing Clearance Order, Form ETA-790, directly to the NPC, rather than to the SWA. As proposed,

the employer would submit the Form ETA-790 to the NPC at the same time it submits its H-2A Application for Temporary Employment Certification, Form ETA-9142A, as outlined in 20 CFR 655.130 (as modified by Sec. 655.215 of the NPRM). Also as proposed, an employer submitting its labor certification application electronically using the iCERT Visa Portal System would be required to scan and upload the Form ETA-790 as well as all other supporting documents. The NPRM addressed the TEGL's ``master'' job order annual Form ETA-790 submission allowance, available to associations filing master applications for sheep or goat herding or production occupations, in the proposed provision about variances from filing procedures at Sec. 655.215. The Department did not receive comments addressing the job order filing requirements proposed in Sec. 655.205, and we therefore adopt the proposed Sec. 655.205, with one minor change. As proposed and adopted, this provision essentially requires that all employers, whether filing as an individual, an association, or and H-2A Labor Contractor (H-2ALC), submit Form ETA-790, directly to NPC together with a completed H-2A Application for Temporary Employment Certification, Form ETA-9142A. As we explained in the NPRM, processing of these applications will be improved if we establish consistent filing requirements for employment of all herders in range herding and livestock production occupations. Allowing employers to file the Form ETA-790 with the NPC at the same time as the H-2A Application for Temporary Employment Certification, Form ETA-9142A, as proposed, will streamline the application process for both the filers and the agency. The only change we have made to the regulatory text of this provision is the deletion of the phrase ``as required in Sec. 655.130[,]'' which is a reference to the standard H-2A regulations. We conclude that it is more helpful to the regulated public to substitute, ``as required in Sec. 655.215[,]'' which is a reference to the applicable herding and range livestock filing requirements. 2. Section 655.210--Contents of Herding and Range Livestock Job Orders Provisions in Sec. 655.210 establish certain content requirements for job orders covering the employment of all herders in range herding and livestock production occupations. Section 655.210(a) reminds employers that if a requirement of the standard H-2A regulations is not addressed in the herding and range livestock regulations (such as ***workers***' compensation, among other requirements), then employer- applicants must comply with the standard regulation. We did not receive any comments from the public on this provision and are adopting it unchanged from the NPRM. a. Section 655.210(b)--Job Qualifications and Requirements Section 655.210(b) establishes the standards associated with job qualifications and requirements included in the job offer. Many of the standards contained in this provision have been addressed above, in Sec.IV.A.2., related to the nature of herding and range livestock jobs, and in Sec. IV.A.3., related to definitions. As a result, for the reasons discussed above in Sec. IV.A.2., we are adopting the standard unchanged from the NPRM that the job offer must include a statement that the hours of work are ``on call for up to 24 hours per day, 7 days per week.'' In addition, for the reasons discussed in the same section above (Sec. IV.A.2.), we are clarifying the proposed standard that ***workers*** must spend ``at least'' 50 percent of their workdays during the contract period on the range. Instead, under the Final Rule, the job offer must reflect that ***workers*** spend a majority, meaning more than 50 percent, of the workdays during the contract period on the range. Finally, for the reasons discussed above in Sec. IV.A.3. related to definitions, we have decided to eliminate the 20 percent limitation on the number of ranch days that can be spent on work that is closely and directly related to herding or the production of livestock, because such work is inextricably linked with those primary tasks. Where such work is, indeed, closely and directly related, it comprises an essential part of the work that employees who are engaged in herding and the production of livestock perform. The Final Rule requires that all such duties must be specifically disclosed on the job order. i. Background Apart from the issues discussed in the paragraph immediately above and in the prior preamble sections referenced in that paragraph, several issues related to job qualifications and requirements contained in Sec. 655.210(b), including ***worker*** experience requirements, are addressed here. Under the H-2A program generally, including under the TEGLs for sheep and goat herding and the range production of livestock, ``job offers may not impose on U.S. ***workers*** any restrictions or obligations that will not be imposed on the employer's H-2A ***workers***.'' 29 CFR 655.122(a). Additionally, each qualification and requirement included in the job offer must be ``bona fide and consistent with the normal and accepted qualifications'' required by employers not using H- 2A ***workers*** for those occupations, and the Certifying Officer or the SWA may require supporting documentation to substantiate the appropriateness of any job qualification specified in the job order. 29 CFR 655.122(b). The TEGLs provide additional information regarding permissible duties, qualifications and requirements. Both TEGLs mandate that the Forms ETA-790 submitted to the SWA provide descriptions of required job duties. TEGL 32-10, Attachment A, I(C)(1); TEGL 15-06, Change 1, Attachment A, I(C)(1). The TEGLs provide that any additional job duties ``must be normal [[Page 62975]] and accepted for the occupation'' and that the SWA and NPC have the authority to request supporting documentation to

substantiate the appropriateness of any the duties. Id. The TEGLs also provide that, ``***due*** to the unique nature of the work to be performed,'' the job offer may specify that applicants possess up to 6 months of experience in similar occupations to sheepherding or the range tending or production of livestock (as appropriate to the specific TEGL) and employers may require reference(s) to verify such experience. Id. Applicants must provide the name, address and telephone number of any employer used as a reference. Id. Both TEGLs note that the ``appropriateness of any other experience requirement must be substantiated by the employer and approved by the Chicago NPC.'' Id. The NPRM similarly provided that the ``job offer may also specify that applicants possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the open range and require reference(s) for the employer to verify applicant experience.'' 80 FR at 20339. The NPRM further proposed that an employer may specify other appropriate job qualifications and requirements. Id. The preamble to the NPRM explained that these qualifications ``could include the ability to ride a horse, use a gun for occupational safety to protect the livestock herd from predators, or operate certain motorized vehicles.'' 80 FR at 20304. The NPRM also specified that any qualification or requirement listed in the job offer must be bona fide, and that the Certifying Officer may require the employer to submit supporting documentation. 80 FR at 20339-20340. The NPRM further provided that any such qualifications or requirements must be applied equally to U.S. and H-2A ***workers***, in order to maintain compliance with the prohibition against preferential treatment of foreign ***workers*** under the H-2A program. 80 FR 20304. As discussed further below, the Final Rule retains these provisions. ii. Comments The Department received very few comments directly addressing these provisions. Mountain Plains and Western Range commented that ``the job qualifications continue over from the TEGLs and are essential for identifying and hiring ***workers*** who possess the requisite skills for this special work.'' As they explained, ``it would be a disaster'' to send a new ***worker*** to the range with a herd only to have that ***worker*** decide they do not in fact enjoy the work or they do not know how to care for and protect the animals. Vermillion and Midland stated that ``[e]stablished job descriptions and requirements for various open range livestock occupations should be deemed `bona fide' and `appropriate' under [these provisions] and should not be questioned.'' Although not addressing this provision directly, several commenters discussed the need for skilled herders and the length of time needed to become skilled in this work. For example, Rocky Mountain Sheep Marketing Association commented that their shepherds must be able to manage guard dogs and sheep dogs, horses, and, often, pack mules, ``have a thorough grasp of basic veterinary medicine,'' and must have the ``skills and maturity to protect themselves in remote landscapes,'' in addition to many other skills. They further commented that skilled herding is ``essential for modern range management.'' Peter and Beth Swanson commented that fencing must be done correctly to protect the herd; they stated that herders know what fencing is needed, and how to troubleshoot and correct problems. Mantle Ranch explained that their ***workers*** ``know how the livestock is handled and where the livestock belong at any ***given*** time'' and they are ``capable of moving, containing, [and] watching over [the herd] for predatory problems, sickness'' and the general welfare of the animals. Mantle Ranch further noted that there are many miles of fence and watering facilities that must be ``continually monitored, repaired, and updated.'' Kelly Ingalls, a sheep ranch manager, stated that ``[m]ore animals are saved because of the [H-2A] herder's experience in healing sick and injured animals.'' John & Carolyn Espil stated that ``[a] master of sheep husbandry generally has years of experience and an exceptional aptitude for his work.'' The Texas Sheep and Goat Raisers' Association similarly commented that it takes years to adequately train a ***worker***, and loss of a seasoned employee could set a business back. Hilger Hereford Ranch commented that a herder with only six months of experience may not understand or be experienced in all of the skills needed, as different tasks and skills are needed throughout the year. In contrast, the ***Worker*** Advocates' Joint Comment opposed the provisions allowing employers to require up to six months of experience and references to verify this experience. They stated that ``the experience requirement often serves more as an exclusionary mechanism'' rather than a ``legitimate job qualification.'' As they explained, ``experience requirements are often used as a barrier to exclude U.S. ***workers*** who may be qualified but do not have experience working with the particular [animal].'' Additionally, the ```verifiable' experience requirement is an undue burden on U.S. ***workers***, as employers often require an official reference on the company letterhead of the former employer.'' As they explained, ``migrant ***workers*** often do not maintain records of whom they worked for in the past'' and may not have the names, locations or up-to-date contact information for those employers. Furthermore, they stated that verifiable experience requirements are not equally imposed on H-2A foreign ***workers***. Similarly, Brian Clark commented that requiring six months of experience is unnecessary. Mr. Clark stated that three months of experience should be sufficient and that qualified U.S. ***workers*** could be found with three months of experience. Additionally, he noted that employers could allow for training in lieu

of experience. iii. Discussion As set out in the TEGLs, the provision allowing job offers to require up to six months of experience and verifiable references is ***due*** to the unique nature of the work to be performed, which often involves working alone for extended periods of time in remote locations where the herder is responsible for the safety of a herd, which the comments indicate is typically made up of approximately 1,000 ewes. The comments received on the NPRM demonstrate that these occupations require ***workers*** with experience in these jobs and the skills necessary to protect the animals and themselves. As explained in the preamble to the NPRM, these skills may include the ability to ride a horse, use a gun to protect the herd from predators, or operate certain motorized vehicles. As noted by Western Range and Mountain Plains, ***given*** the remote and unique nature of the work, it would be untenable to hire a ***worker*** with little to no occupational experience, who may decide quickly that this work is unsuitable or realize that he or she is unprepared to care for the animals. Additionally, as noted by several commenters, for the safety of the animals and the ***worker***, it is important that ***workers*** be able to protect the animals and themselves while on the range. Therefore, the Final Rule retains the provisions from the NPRM allowing job offers to specify that applicants must possess up to six months of experience in similar occupations involving herding or range livestock production, [[Page 62976]] and require reference(s) for the employer to verify such experience. The Department concludes that ``up to six months'' is a reasonable and appropriate limitation on the experience requirement. The six-month experience requirement is a longstanding requirement from the TEGLs, based on the unique characteristics of these occupations. As demonstrated by the comments, herding and range livestock production involve changing conditions throughout the year depending on grazing location, weather, predators, animal health, and other evolving circumstances. As these conditions change, different skills may be necessary, as noted by Hilger Hereford Ranch. For some employers, requiring ***workers*** to possess up to six months of experience in these occupations is reasonable, as a ***worker*** with less experience may have only encountered certain, limited range conditions and may be unprepared for different grazing locations, predator concerns, and weather conditions. Some commenters noted that it may take years of experience to become a skilled herder. The Department concludes that a maximum of six months of experience in similar occupations involving herding or production of livestock on the range, in light of the changing needs and conditions throughout the year, is a normal and accepted job requirement for these unique occupations to ensure that ***workers*** are sufficiently experienced in these unique occupations, while preventing unduly burdensome experience requirements that may prevent otherwise qualified U.S. ***workers*** from obtaining these positions. However, as underscored by the ***Worker*** Advocates' Joint Comment, experience and qualifications requirements must be bona fide and equally required of U.S. and foreign ***workers***. For example, if an employer requires less than six months experience of U.S. ***workers*** (for example, three months of experience), at least the same experience requirement must be required of foreign applicants. Additionally, while employers may require ``reference(s) for the employer to verify applicant experience,'' such reference requirements must be reasonable and may not be used as a barrier to hiring U.S. ***workers***. Requiring the type of formal, written reference on employer letterhead, as described by the ***Worker*** Advocates' Joint Comment, is inappropriate under the Final Rule. Employers who want to verify previous employment must make reasonable efforts to locate and contact the previous employer where an applicant provides basic information such as that required under the TEGLs--the prior employer's name, address and telephone number--or similar information facilitating contact, such as an email address, or social media account. As noted above, any reference requirements for U.S. ***workers*** must be no more stringent than those imposed on foreign ***workers***. b. Section 655.210(c)--Range Housing i. Background The TEGLs required the inclusion of several statements in a job order about the unique aspects of range herder employment, including housing. The TEGLs set forth specific requirements, including an employer's obligation to provide mobile housing for range ***workers***. In the NPRM, the Department proposed that the employer disclose in the job order seeking ***workers*** for range herding positions that mobile housing would be used to satisfy the employer's housing obligation under 20 CFR 655.122(d) (requiring an employer to provide sufficient housing to ***workers***, at no cost to the ***workers***, where their work does not allow them to reasonably return to their residence within the same day). As proposed, the job order would state that mobile housing, meeting the requirements of Sec. Sec. 655.230 and 655.235, would be provided to ***workers***. ii. Comments and Discussion The Department only received a few comments applicable to this requirement. The comments from Mountain Plains and Western Range discussed the use by some employers of fixed-structures in remote areas to temporarily house range ***workers*** as they move a herd along its grazing trail. These comments are addressed below in connection with section 655.230. As discussed further in Sec. IV.E. with regard to range housing, the Department's use of the term ``mobile housing'' was intended to distinguish between permanent, fixed-

site housing subject to the standards in 20 CFR 655.122(d) standards and the temporary housing provided ***workers*** in different locations, usually in remote areas, as their herds move from one grazing area to another, and does not to preclude the use of alternative housing structures for range ***workers***. The Department has modified the regulation in the Final Rule to enable an employer to accurately indicate the nature of the housing in the job order. The Department, however, received numerous comments on the use of mobile housing, inspection requirements for such housing, and minimum standards for the mobile housing, including those relating to heating, lighting, cooking, sleeping and personal hygiene while occupying such housing and the provision of food, water, and waste removal to ***workers*** while using mobile housing. These comments are discussed below in Sec. IV.E. of the preamble in connection with Sec. Sec. 655.230 and 655.235. c. Section 655.210(d)--Employer Provided Items i. Background All H-2A employers, including employers currently utilizing the TEGLs for sheep, goat and cattle herding, must provide to their ***workers***, free of charge, all tools, supplies and equipment required to perform their assigned duties. 20 CFR 655.122(f). The TEGLs further specify that, ***due*** to the remote and unique nature of the work to be performed, employers must ``specify in the job order and provide at no cost to ***workers*** an effective means of communicating with persons capable of responding to the ***worker***'s needs in case of emergency.'' TEGL 32-10, Attachment A, C(4); TEGL 15-06, Change 1, Attachment A, C(4). As recognized by the TEGLs, communication means are necessary to perform the work and can include, but are not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. Except for those requirements that relate to mobile housing standards, the TEGLs do not identify any additional tools, supplies or equipment that must be provided by the employer under 20 CFR 655.122(f). The NPRM proposed that employers must provide to ***workers***, without charge, all tools, supplies and equipment that are required by law, the employer, or the nature of the work to perform the job safely and effectively. 80 FR at 20340. The NPRM also proposed that employers must disclose in the job order which items it will provide to the ***worker***. Id. The NPRM preamble explained that the required tools, supplies, and equipment will depend on a number of factors, such as the terrain, weather, or size of the herd, and provided a number of examples of such items, such as binoculars to monitor the herd, a gun to protect the herd and the herder, boots, rain gear, and a horse. 80 FR at 20305. The NPRM also noted that, as provided in proposed Sec. 655.235 regarding mobile housing standards, protective clothing and bedding may be provided as an alternative to heating equipment in certain conditions, and this alternative [[Page 62977]] bedding and clothing is required by the job and must be provided free of charge or deposit charge. Id. The Department invited comments on other tools, supplies and equipment that may be required and whether it would be helpful to include in the regulation a list of items typically required by law or the nature of the work. The Department also proposed requiring employers to provide ***workers***, at no cost, an effective means of communicating with persons capable of responding to ***worker***'s needs in case of an emergency. 80 FR at 20304-20305. The NPRM provided the same non-exclusive list of acceptable communication devices as in the TEGLs. 80 FR at 20305. Accordingly, the proposed provisions in Sec. 655.210(d) would require employers to specify in the job order the electronic communication devices that will be provided to ***workers***. Id. However, the Department also noted that a ***worker***'s location may be so remote that electronic communication devices may not operate effectively at all times. Id. To address this concern, the Department proposed to require that employers arrange for ***workers*** to be located in geographic areas where electronic communication devices can operate effectively on a regular basis, unless the employer will make contact in-person with the ***worker*** regularly. Id. The Department noted that the definition of ``regularly'' could vary, but a ***worker*** must be able to communicate with the employer at intervals appropriate for monitoring the health and safety of the ***worker***. Id. We explained in the NPRM that such contact is in the best interest of both the employer and the ***worker*** in the event that there are problems with the herd, the ***worker*** suffered a medical emergency, or the ***worker***'s safety is threatened. Id. Last, the proposed provision also would require employers to include a statement in the job order specifying that it will make contact with the ***worker*** in-person or using electronic communication devices regularly. Id. Based on the comments received, which we discuss below, the Final Rule retains the NPRM provisions requiring employers to provide, free of charge or deposit charge, all required tools, supplies and equipment and to disclose which items will be provided in the job order, but does not include a list of typically required items in the regulatory text. The Final Rule maintains the requirements that employers must disclose and provide to ***workers***, free of charge or deposit charge, an effective means of communicating with persons capable of responding to the ***worker***'s needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The Final Rule also revises Sec. 655.210(d) to address situations in which ***workers*** are

stationed in locations where electronic communication devices will not operate effectively. In such cases, the employers must either make arrangements for ***workers*** to be located in geographic areas where electronic communication devices can operate effectively on a regular basis, or provide for regular, pre-scheduled, in-person contact. The Final Rule also revises job order disclosure provisions to require the employer to specify the means and frequency with which the employer plans to make contact with the ***worker*** when the ***workers*** are stationed in locations where electronic communication devices may not operate effectively. Finally, the Department has divided subsection 655.210(d) in the Final Rule into two paragraphs, the first addressing tools, supplies, and equipment generally, and the second specifically addressing communication. We will address each topic separately below. ii. Communication Devices (1) Comments The Department received a number of comments about the proposal to require employers to provide electronic communication devices to range herders and livestock production ***workers*** free of charge or deposit charge. The ***Worker*** Advocates' Joint Comment and the Western Watershed Project expressed concern that range herders and livestock production ***workers*** often work in remote locations with no means of communication in case of emergency. Western Watershed Project specifically noted that ***workers*** are exposed to various hazards in these remote locations, including exposure to disease and attacks from predators. Some employers, and employer associations Mountain Plains and Western Range, also agreed that electronic communication devices can help employers monitor the health and well-being of ***workers*** and the herd. One private citizen also suggested that ***workers*** should have access to a computer with Skype or similar communication that would allow the ***workers*** to contact a trusted person who speaks the ***workers***' language. At least one employer also expressed concern about language barriers. Only one comment, submitted by the Office of the Governor of Utah, urged the Department to eliminate the requirement that employers provide an electronic form of communication, stating that the Department failed to provide adequate justification for the requirement and asserting that the requirement would create an excessive encumbrance on employers. This comment also suggested that, because ``there is no apparent history of safety incidence to cause alarm,'' the Department should allow employers to develop their own action plans to provide means of communication to ***workers*** during emergencies. Other comments from employers noted that ***workers*** often use their employer- provided cell phones to contact their families abroad and suggested that ***workers*** should be responsible for the cost of such calls, as well as the cost of providing different devices that the ***workers*** may choose that are beyond what is necessary to effectuate emergency contact with the employer and emergency first responders. We also received comments about ***workers***' access to satellite phones. A comment from the Western Watershed Project urged the Department to require employers to provide ***workers*** access to satellite phones where in-person or cell phone contact is not available, as well as working batteries or rechargeable batteries and a solar charger to power the device for the amount of time spent in areas with limited or non-existent communication. This commenter also suggested that employers be required to maintain subscriptions for messaging services in cases of emergency and to provide proof of satellite coverage and appropriate equipment with respect to each ***worker*** on an annual basis. Some employer commenters indicated that they currently provide satellite phones to their ***workers*** for communication in geographic areas where there is no cellular service coverage and believed this was an effective way of providing contact in the event of an emergency. The ***Worker*** Advocates' Joint Comment urged the Department to require employers to provide ***workers*** with a satellite phone for communication at all times. They suggested that, without access to satellite phones, ***workers*** who are out on the range with no cellular service coverage will have to depend solely on more frequent contact with the employer as the only means of obtaining aid in the event of an emergency, and that in- person contact with the employer, unless it occurs daily, is not a reliable way of providing access to assistance in cases of emergency. They also stated that the Department's proposal creates a potential conflict of interest for employers in responding to [[Page 62978]] ***worker*** emergencies because ***workers***' compensation is triggered in the event of a work-related injury, and the comment alleged that many ***workers*** who have reported such injuries have been denied medical care by their employers. This comment, however, also acknowledged several alternatives to requiring employers to provide satellite phones. According to the ***Worker*** Advocates' Joint Comment, the Department could also ***give*** employers the option of providing ***workers*** with a mobile phone for everyday use and a satellite phone for times when the ***workers*** are out of cell phone service range. The ***Worker*** Advocates' Joint Comment further suggested, as a potentially inexpensive alternative to providing ***workers*** a satellite phone for everyday use, that employers could station ***workers*** in pairs while in areas with unreliable or no cell phone service. They indicated that because there are usually two herders working during the winter season, employers would only incur the cost of a second ***worker*** during the summer months on the range. They noted that while this arrangement

would be less advantageous than having direct access to emergency responders via a satellite phone, the presence of a second ***worker*** would ultimately benefit both the ***workers*** and the employer by allowing ***workers*** to locate emergency service sooner while providing for continued care of the livestock in the interim. Comments received from employers and employer associations reflected general agreement that a satellite phone is not an adequate substitute for in-person communication between employers and their ***workers***, and urged the Department to adopt a flexible approach in the Final Rule. Mountain Plains and Western Range acknowledged that electronic communication devices can help employers track the health and well-being of ***workers***, but noted that electronic communication cannot replace face-to-face communication. One employer stated that he had successfully used satellite phones as an effective alternative means of communicating with ***workers*** outside cellular service coverage areas, but stressed that employers should be allowed to find solutions that best serve their needs. Other commenters expressed concern about the cost of providing satellite phones and service plans, and one commenter reported that satellite phone service plans would cost $300 to $2,000 per year. The Department received comments, from ***workers*** and employers, agreeing that employers should be required to establish work locations where electronic communication devices will work effectively so that ***workers***' safety and health can be monitored. One commenter stated that it was critical for employers to establish locations where a cell phone, satellite phone, or other device will work, or where ***workers*** can stop at a nearby ranch in the event of an emergency. Some employers indicated that they already provide their ***workers*** with cell phones with consistent coverage in the areas where ***workers*** are stationed, and that they intentionally station ***workers***, as much as possible, in areas that provide cell phone coverage, allowing the ***workers*** to regularly contact the employer, as well as family and friends abroad. The Department also received comments about minimum allowable intervals between contacts initiated by the employer. One commenter, a private citizen, expressed concern that in some cases, it may be over a month before ***workers*** have contact with their employer. Comments from Mountain Plains, Western Range, and other trade associations stated that establishing minimum intervals for employer-employee contact is unnecessary and infeasible ***given*** the unpredictable nature of the terrain, weather, and cellular telephone signals, and employers currently strive to maintain regular communication with their ***workers***. Several employers pointed out that they have every economic incentive for maintaining regular contact with their ***workers*** because they are concerned with both the welfare of the ***workers*** and the welfare of the livestock. Other employers commented that they currently have practices in place that provide for regular contact with their ***workers***, including three employers who reported maintaining contact with ***workers*** by designating ``camp tenders,'' who are responsible for resupplying ***workers***' camps and monitoring the health and the well-being of ***workers*** and the herd. One employer suggested that employer-employee contact every two to three days should be sufficient. Another employer suggested that as long as ***workers*** have the ability to contact the employer at any time, employer initiated contact every ten days is reasonable and sufficient. The employer further explained that some employers arrange for ***workers*** to work in pairs during the summer when the ***workers*** are in remote areas, and in such cases the employer may only have in-person contact with one of the ***workers*** in the working pair. They suggested that, to the extent that minimum contacts are imposed, contact with one member of the working pair of employees in such arrangements should be sufficient. The ***Worker*** Advocates' Joint Comment suggested that in-person contact could not be relied upon for emergency purposes unless it is daily. They also stated that, for purposes of defining a reasonable amount of time between in-person visits to deliver necessities (e.g., food and water, hygiene products, first aid supplies, and clothing), ***workers*** should not go more than seven days without in-person contact with the employer. The ***Worker*** Advocates' Joint Comment also emphasized that because ***workers*** must rely on their employers for delivery of mail, the Department should promulgate a rule prohibiting employers from opening ***workers***' mail. They also reported that employers sometimes deny ***workers*** access to healthcare professionals, and prohibit ***workers*** from allowing visitors, using a radio, and possessing reading materials. (2) Discussion Based on the comments received, the Department has decided to maintain the proposed requirement, now located in Sec. 655.210(d)(2), that employers must provide to their ***workers***, free of charge or deposit charge, an effective means of communicating with persons capable of responding to the ***worker***'s needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. We found overwhelming agreement among the commenters that this requirement is needed ***due*** to the isolated nature of sheep, goat and cattle herding on the range. As the Western Watershed Project comment accurately noted, ***workers*** in these occupations often work in remote locations without sufficient access to medical facilities or means of communication in cases of emergency. Without proper communication equipment, range

herders and livestock production ***workers*** would be unable to seek and obtain assistance in cases of emergency. A majority of employers and employer associations agreed that electronic communication devices can help employers monitor the health and well- being of ***workers*** and the herd. Even when working in pairs, a communication device remains necessary because in the event that one ***worker*** needs emergency assistance on the range, the second ***worker*** would not likely be able to cause EMTs to arrive quickly without a communication device. Furthermore, we interpret the phrase ``persons capable of responding to the ***worker***'s needs in case of an [[Page 62979]] emergency'' in paragraph 655.210(d)(2) as necessarily including first responders and other emergency personnel, in addition to the employer. Thus, ***workers*** must be free to use the electronic communication device to contact directly, without first contacting the employer, first responders or others capable of responding to the ***worker***'s needs in an emergency. We also interpret the phrase ``effective means of communicating'' in paragraph 655.210(d)(2) to mean that employers must have the ability to address language barriers in the event of an emergency. Employers can address language barriers by having on staff or otherwise making available, such as through a conference call, a person capable of speaking the ***worker***'s language and communicating the ***worker***'s needs, or by using translation technology (e.g., computer software, translation devices, etc.). However, the Department has declined to prescribe a specific type of communication device, since the conditions, terrain, and particular circumstances will influence the feasible types of communication. Finally, although employers may choose to do so, we clarify that this Final Rule does not require an employer to pay for ***workers***' personal calls to friends or family or to supply or pay for communication devices beyond what is necessary for emergency contact with the employer and emergency first responders. After considering all the comments on this subject, the Department also revised and added two subparagraphs in paragraph 655.210(d)(2) to clarify the employer's obligations. First, subparagraph 655.210(d)(2)(i) requires employers to include in the job order a simple statement specifying the type of electronic communication device(s) that the employer will provide, free of charge or deposit charge, to the ***worker*** during the entire period of employment. Second, under subparagraph 655.210(d)(2)(ii), the employer must specify in the job order the means and frequency with which the employer plans to make contact with the ***worker*** to monitor the ***worker***'s well-being if there are periods when the ***worker*** is stationed in locations where electronic communication devices may not operate effectively. Subparagraph (ii) also clarifies that such contact must include either (1) arrangements for ***workers*** to be located in geographic areas where electronic communication devices can operate effectively on a regular basis, or (2) arrangements for regular, pre-scheduled, in-person visits between ***workers*** and the employer, which may include visits between ***workers*** and other persons designated by the employer to resupply the ***workers***' camp (e.g., ``camp tenders''). The Department concludes that this provision provides a suitable solution to the concern--acknowledged by many commenters--that range sheep, goat and cattle herders often work in isolated areas where electronic communication devices will not function at all times. Comments from employers also indicated that many employers are currently complying with this requirement and that this practice is effective in providing ***workers*** regular contact with the employer. One commenter suggested that employers that station ***workers*** in pairs while in areas with unreliable or no cell phone service should be required to make in-person contact with only one ***worker*** in the working pair. The Department concludes that in such instances, in- person contact with only one member of the working pair is sufficient for purposes of establishing an alternative means of communication for the second ***worker***, but only if in making in-person contact with the first ***worker***, the employer verifies the health and safety of the second ***worker***. This rule adequately protects each ***worker*** employed, while responding to the employers' need for efficiency and flexibility. Additionally, the disclosure requirements in the Final Rule will serve to inform ***workers*** on how best to seek help in the event of an emergency, and provide a suitable solution to the concern--acknowledged by all--that range herders and livestock production ***workers*** often work in isolated areas where electronic communication devices will not function at all times. In light of the comments from numerous employers and employer associations about the need for flexibility in determining the best method for providing ***workers*** access to emergency services, the Final Rule does not mandate the use of a specific electronic communications device. The Department has also decided not to require employers to provide ***workers*** access to satellite phones as a substitute for in- person employer-initiated contacts. Comments received from employers overwhelmingly rejected this approach, citing the costs and reliability of satellite phones, as well as the need for flexibility. The Department, however, clarifies that employers should consider and keep up with advances in technology when selecting appropriate electronic communication devices. A comment from the Western Watershed Project asserted that employers must provide ***workers*** with working or rechargeable batteries to power electronic communication devices for the amount of time spent in remote areas. In

response, we clarify that the requirement to provide an effective means of electronic communication means that the device must be operable at all times. Therefore, the employer must provide the ***worker*** with an adequate power source for the device. The Department will require the standards set out above without defining ``regular'' contact or imposing minimum in-person contacts, but, as mentioned above, will require the employer to disclose the frequency of contact in the job order. In the absence of evidence demonstrating pervasive issues with ***worker*** access to emergency services, a specific frequency requirement for in-person contacts is unnecessary. This choice strikes a suitable balance between the Department's legitimate interest in protecting H-2A sheep, goat and cattle herders with the employers' need for flexibility in determining the appropriate method for providing ***workers*** access to emergency services.\13\ ---------- \13\ The ***Worker*** Advocates' Joint Comment urged the Department to prohibit employers from opening ***workers***' mail, which we note is otherwise prohibited under federal law. See 18 U.S.C. 1702. They also stated that employers sometimes prohibit ***workers*** from allowing visitors (including healthcare professionals); using a radio, or possessing reading materials. We conclude that there is no reasonable basis upon which an employer should restrict a ***worker***'s use of a radio or possession of reading material obtained at the ***worker***'s own expense. With regard to access to visitors, this Final Rule requires the employer to permit access to emergency personnel to respond to ***worker*** illness or injury. We decline to set specific federal standards here governing access other than to emergency personnel. In accordance with the requirement to comply with all applicable Federal, State, and local laws and regulations, employers are reminded of obligations to adhere to local laws providing such access. ---------- iii. Tools, Supplies and Equipment (1) Comments Employers and their associations generally commented that employers provide all the tools, supplies and equipment needed for the job, at no cost to the ***workers***. Some employer commenters listed examples of items that are provided for their herders. For example, F.I.M. Corporation commented that they provide free of charge ``clothes, medicine, blankets, rain coats, boots, etc.'' Mule Head Growers commented that their herders have ATVs and herding dogs, and that they provide all other supplies requested by the herders. Cindy Siddoway of Siddoway Sheep Company's comment listed the following items as necessary [[Page 62980]] to perform the work safely and effectively, ``[h]orses, tack equipment, rain gear, guns, shovels, ax, various tools, sheep hooks, protective clothing and eyewear, gloves, binoculars, flashlights, batteries, lanterns, wood, and fuel.'' Another ranching operation buys what the herders need including clothes, boots, and tools. Paul Nelson of Nelson Bros. Farm stated that they make sure the herders have good clothes to wear, warm hats and gloves, and tools needed to maintain the fences. The Wyoming Farm Bureau Federation commented that ``[w]e believe that it is important to have proper tools and equipment provided for the ***worker*** as well as the necessary supplies for the work that needs to be done. For instance, a saddle for the horse or leather to repair the saddle or dog food for the herding and guard dogs.'' They requested further clarification on the type of boots referred to in the preamble to the NPRM. Larson Livestock commented their herders provide them with a list of the supplies they want, and that the employer purchases the items at no cost to the ***workers***, ``with the exception of any personal items they may order such as cigarettes, DVD players, etc.'' and deliver the supplies to the ***workers*** at their sheep camps. Employers and their associations commenting on this issue emphasized that required tools, supplies and equipment will vary among ranches ***due*** to differing climates, weather conditions, and assigned duties. Items required by the employer on one ranch may be completely unnecessary on another ranch ***due*** to the nature of the work. For example, Eph Jensen Livestock commented that ``[w]ith the diversity of size, location, and management practices of sheep ranches, it would be impossible to make a checklist of items that need to be provided. This is already monitored by the WHD and penalties are imposed for violations.'' The employer further commented that, in its view, the trouble is a lack of practical understanding in DOL investigations, and recommended that in enforcement actions, employers should be allowed the opportunity to explain why certain items were or were not provided. ***Due*** to variety in the items required, several commenters opposed including a list of typically required items in the regulation or in the job order. For example, Billie Siddoway of Siddoway Sheep Company commented that ``[b]ecause the provision of equipment varies among ranches and among employees on each ranch, it would be preferable to modify the proposed rule so that an exhaustive list of equipment is not required. Rather, an employer should be able to state generally that the equipment necessary to carry out the job duties will be provided.'' Ms. Siddoway further commented that ``[i]f the Department deems certain equipment to be significant (e.g., horse, herd dog, guard dog, gun, mobile telephone), then the employer could identify those specific items in addition to the more general statement that necessary equipment will be provided.'' Kay and David O. Neves, who own a sheep operation, commented that they ``do provide items necessary for [the] job'' but they ``do

not think all these items need to be specified in the job order. The statement that employers provide needed items should be enough.'' Mountain Plains and Western Range commented that the tools, supplies and equipment required to do the work safely and effectively depends on the time of year or location of the work. They explained that ``[t] he items suggested in the NPRM are among those used on the range, binoculars, firearm, boots, rain gear, an ATV or four-wheeler, and/or a horse, but this list should not be considered exhaustive nor mandatory. During different times of the year or in different parts of the West, some or all of these items would be strictly necessary while others would be entirely useless.'' Mountain Plains and Western Range further commented that including specific requirements of items to be provided ``will not increase job safety or efficiency but would simply provide a `gotcha' opportunity for ambitious plaintiffs lawyers.'' Additionally, some employer commenters noted that items provided should be ``within reason'' and that the Department's proposal does not take into account personal preferences or other factors. Sheep ranchers John and Carolyn Espil stated that ``[i]t is doubtful that the DOL investigators could, in the scope of their investigation, determine whether the charge was for an item requested by the herder for his personal possession or if it was an item that the employer should provide.'' They ***gave*** the example of ``boots'' as a required item, stating that the Department ***gives*** no variance for price of items, personal preference or frequency of purchase. They commented that they already provide all bedding, clothing and boots within reason, but that the Department's proposal would eliminate all expense for the ***worker***. Eph Jensen Livestock commented that ``there has been no accountability placed on the ***worker*** for neglect of tools or equipment that employers provide.'' On the other hand, the ***Worker*** Advocates' Joint Comment suggested that the regulation ``include an explicit non-exclusive list of such items that are typically required by the nature of the work under [this rule] to avoid employers circumventing this requirement with their own interpretation'' of what is required by the job. As they explained, foreign herders and range ***workers*** often bring little with them to the United States because they have been assured that ``everything will be provided.'' The ***Worker*** Advocates' Joint Comment stated that because the TEGLs have never ``described the precise items that need to be provided . . . there has never been a consistent understanding among the ***workers*** and the industry of what this promise truly encompasses,'' so that upon arrival in the United States, foreign ***workers*** learn that, while the employer will purchase many of the items needed for the job, the cost of the items is often deducted from the ***worker***'s pay. The ***Worker*** Advocates' Joint Comment listed several items that they find are required by the nature of the work to perform the job safely and effectively and should be provided free of charge, including binoculars, a rifle/gun, a knife, a trained horse, lighting, bedding, outer wear to protect the ***worker*** from the elements, and disposable gloves and disinfectant. They further recommended that, at a minimum, the Final Rule should specify ``those categories of items that the Department considers necessary for these jobs, such as `bedding' and `outerwear to protect ***worker*** from elements.' '' The ***Worker*** Advocates' Joint Comment also supported the NPRM provision requiring employers to list the items that will be provided in the job order, as this will ``help employers clarify with the Department the kind of tools that must be provided'' free of charge and ``the Department can then review whether an employer's job order specifies many of the common items discussed above and require clarification or correction of any deficiencies.'' They further recommended that the job order include the list they suggested of specific items and blank lines for any additional items. (2) Discussion As explained in the NPRM, although the H-2A regulations currently require employers to provide, free of charge, all tools, supplies and equipment necessary to complete the duties assigned, Departmental investigations have found instances where employers have failed to supply the necessary tools, supplies and equipment for the job, such as [[Page 62981]] boots, raingear or an ATV. 80 FR at 20304. The Department has also found instances where employers charged the ***workers*** for such tools, supplies or equipment, bringing the ***workers*** below the required wage. Id. To address these issues, the NPRM proposed that employers must provide tools, supplies and equipment required by the law, the employer, or the nature of the work to perform the job safely and effectively, and these items must be provided free of charge or deposit charge. Id. The NPRM also proposed to require employers to disclose in the job order those items that will be provided and inquired whether it would be helpful to include a list of typically required items in the regulations. Id. Based on the comments received, the Final Rule retains the NPRM provisions as proposed, and does not include a specific list of typically required items in the regulations. The Department concludes that it is appropriate to specify in the Final Rule that employers must provide, free of charge or deposit charge, all tools, supplies and equipment required by law, the employer, or the nature of the work to perform the job safely and effectively and to list which items will be provided free of charge or deposit charge in the job order. The comments reflected that although many employers provide all necessary items and provide them free of charge or deposit charge, it is helpful to include in the Final Rule the

requirement that the employer must provide all tools, supplies and equipment free of charge, because it provides clarity to ***workers*** and employers on the types of items considered required for herding and range production of livestock occupations. If items are only required at certain times of the year, the employer is only required to provide those items during those periods. However, DOL concludes that it is necessary for the employer to disclose that those items will be provided in the job order so that ***workers*** are aware of which items will be provided prior to accepting the job. If an employer wishes to further specify in the job order that certain items will be supplied only during specific periods, DOL would not object to this. Additionally, while the standard H-2A regulations require employers to provide, free of charge, all tools, supplies and equipment necessary to complete the duties assigned, the language ``by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively'' provides additional guidance on the type of items that must be provided free of charge or deposit charge. This provision does not require employers to provide items for the ***worker***'s entertainment, such as magazines, CDs and DVDs, or other items that are not required by the job, but employers may choose to do so. As many employers noted, they already supply all items requested by their ***workers***; the Department encourages ranchers to continue to these practices. Some charge the ***worker*** for personal items that the ***workers*** request, while others do not. We further conclude that requiring employers to list which items will be provided free of charge or deposit charge in the job order will ensure that ***workers*** are aware of what items to expect to be provided, in advance of accepting the job. Additionally, including this list will serve to notify the Department of the types of items required in these occupations, and, as noted by the ***Worker*** Advocates' Joint Comment, the Department may review those items and ask for clarification or correction of any deficiencies. In the event of an investigation, the Department may review those items included in the job order; however, the Department is not precluded from determining that additional items not included in the job order were required for a particular ***worker*** under the terms of the Final Rule. Additionally, we note that we currently allow, and will continue to allow, an employer in an investigation to provide its explanation of why certain items were or were not provided. Finally, as noted, we decline to include a list of typically required items in the Final Rule. As demonstrated by the comments received, the tools, supplies and equipment required by employers or by the nature of the work will depend on a number of circumstances, such as the terrain, the season, and the climate. As discussed above, the requirement that employers list in the job order those specific items that will be provided to herders will meet the goal of providing information to ***workers*** and to the Department, while avoiding the risk that specifically mandated requirements may become outdated, unnecessary or irrelevant. We note that the term ``required'' in Sec. 655.210(d)(1) means all tools required by law, by the employer, or by the nature of the work to perform the work safely and effectively. The Department further notes that the preamble discussions here and in the NPRM provide examples of items that may be required by the nature of the work, such as boots, binoculars, a gun, an ATV, or a horse. Additionally, Sec. 655.230 addresses range housing standards, and as fully discussed in preamble Sec. IV.E., certain items are required to be provided to meet those housing standards, such as bedding and heating equipment (or protective clothing where appropriate). As with all required tools, supplies and equipment, these items must be provided to the ***worker*** free of charge or deposit charge and listed in the job order. d. Section 655.210(e)--Meals i. Background Currently, as required under the sheep and goat herding TEGL, and pursuant to industry practice for the range production of cattle, H-2A employers employing ***workers*** in these range occupations must provide food, free of charge, to their ***workers***.\14\ The TEGL for sheep and goat herding established requirements for meals, and the cattle herding TEGL was silent on the issue of meals, leaving the issue to be covered by the standard H-2A regulations. The NPRM generally adopted the requirements from the sheep and goat herding TEGL for all range employers; we proposed to require all these employers to specify in the job order and provide to the ***worker***, without charge or deposit charge, either three sufficient meals per day, or convenient kitchen facilities and adequate food provisions to enable the ***worker*** to prepare his own meals.\15\ The terms ``sufficient'' and ``adequate'' were new introductions from the requirements in TEGL 32-10.\16\ The Department also sought comment on what constitutes a sufficient meal for range ***workers***, ***given*** the physically demanding nature of their work, as well as what constitutes adequate food ***given*** the remote location of these ***workers***. 80 FR at 20305. ---------- \14\ Additional background and comments received about the proposed requirement that food be provided without charge to ***workers*** are discussed in Sec. IV.C. of the preamble related to setting the herders' wage in Sec. 655.211 of the Final Rule. \15\ Cooking and eating facilities are discussed in Sec. IV.E.2. of the preamble, which addresses housing standards set in Sec. 655.235 of the Final Rule. \16\ Additionally, we proposed to require that employers provide ***workers*** with an adequate supply of potable water, or water that can

be easily rendered potable, and the means to do so, when working on the range. The potable water requirement is discussed in Sec. IV.E. of the preamble related to Sec. 655.235(b) of the Final Rule, which establishes the requirements that employers must follow in supplying water for range ***workers***. We have added a cross-reference in Sec. 655.210(e)(2), which governs meal standards, to Sec. 655.235(b), related to water standards. ---------- The Final Rule maintains the requirement that employers must provide either three sufficient meals a day, or furnish free and convenient [[Page 62982]] cooking facilities and adequate provision of food to enable the ***worker*** to prepare his own meals free of charge or deposit charge. The Department is also revising the proposed rule to provide additional guidance to employers on what constitutes ``sufficient'' and ``adequate'' meals and food. Under paragraph 655.210(e)(1) of this Final Rule, to be considered ``sufficient'' or ``adequate,'' the meals or food provided to range ***workers*** must include a daily source of protein, vitamins, and minerals. ii. Comments Comments received from ***worker*** advocates, private citizens, an industry magazine editor, a State government office, employers, and employer associations reflect general agreement that employers should provide range ***workers*** with ``adequate'' meals or ``sufficient'' provisions of food to prepare healthy, nutritious meals. For instance, in their joint comment, Mountain Plains and Western Range stated that, ``[t]he physical demands of the job call for a protein-rich diet for the hearty men that perform this work. . . .'' Billie Siddoway of Siddoway Sheep Company, Inc. also stated that ``[d]elivering food is a necessary part of range employment because employees do not have ready access to shopping markets.'' Other employers agreed that range ***workers*** ``need and deserve good food'' and should be ``adequately fed.'' One employer, in expressing his support for the proposal to require sufficient and adequate food, opined that ``if the ***workers*** are happy, well-nourished and content, they will properly care for our animals and properties.'' Commenters disagreed, however, on whether employers are currently providing adequate meals or sufficient food to range ***workers***. Several employers stated that they provide a variety of food, including meat and fresh produce, and accommodate ***worker*** preferences for specific foods and quantities. Billie Siddoway of Siddoway Sheep Company, Inc. described their practice of providing hot meals and food to ***workers*** as follows: During the winter lambing season, we employ[] a cook who prepares three hot meals each day. When the [***workers***] are on the range, they prepare their own meals. On our ranch, each [range ***worker***] provides us with a grocery list. Every eight to ten days, depending on terrain and conditions, we purchase the items on the list and deliver them to the requesting [range ***worker***]. This comment also noted that Siddoway provides meat to range ***workers***, such as lamb, mutton, elk, and buffalo, which are raised on the Siddoway ranch. Other employers described having similar practices of supplying food that is selected by the range ***workers*** and delivered by the employer at intervals that vary depending on the season, terrain, and other factors. At least one other employer indicated that he employed a cook who delivered fresh, hot meals to ***workers*** three times a day. On the other hand, the ***Worker*** Advocates' Joint Comment reported instances when food is not delivered to range ***workers*** in a timely manner, and provides accounts of ***workers*** ``being sent by employers to steal fruits and vegetables from the nearby orchards for their own consumption.'' A private citizen also recounted instances where employers have forgotten to deliver food supplies to range ***workers*** and where employers have supplied food unfit to eat. One other private citizen noted that she visited with range ***workers*** who reported going over a month without receiving food from the employer. The Department also received a number of comments about how and to what extent the Final Rule should specify the employer's food provision obligation. The ***Worker*** Advocates' Joint Comment emphasized that range ***workers*** need sufficient quantities of food for health maintenance, disease prevention, and preventing vitamin deficiencies. They stated that the terms ``sufficient'' and ``adequate'' used in the proposed rule do not provide clear guidance on the amount and kind of food necessary for ***workers*** engaged in physically demanding work. Thus, they requested that the Department require in the Final Rule ``a daily source of protein and vitamins and minerals'' and that employers provide range ***workers*** with ``fresh food when possible.'' They suggested meats, beans, and eggs as permissible sources of protein, and fruits, vegetables, and oils as examples of the remaining vitamins and nutrients. The ***Worker*** Advocates' Joint Comment also requested that we set minimum daily calorie requirements, variety recommendations, and food safety standards using federal guidelines, including guidelines from the National Institutes of Health and the U.S. Department of Agriculture. Specifically, they stated employers should provide to each range ***worker*** enough food to meet a minimum daily calorie requirement of 3,000 to 4,000 calories (or 21,000 to 32,000 calories per week), and provide range ***workers*** with more food during periods when they are engaged in higher levels of activity. One private citizen also suggested that, ***given*** the difficulty with refrigeration on the range, the Department should consider requiring employers to provide extra food in order to take spoilage into account. Comments from

employers and employer associations, on the other hand, requested that the Department adopt a flexible, case-by-case approach in defining the employer's food provision obligations. Mountain Plains and Western Range stated that food provision requirements involving calorie counts or menus are unnecessary, arbitrary, and would create ``a logistical nightmare'' for the Department to enforce and for employers to comply with. They also noted that each ***worker*** has his own preference for food, and a ``one size fits all'' approach mandating a particular diet for range ***workers*** would violate those preferences. One employer suggested that imposing calorie requirements and food delivery is beyond the Department's purview. A comment from the Wyoming Farm Bureau Federation suggested that the Department should simply provide clear language about what the employer is not required to provide (e.g., soda pop), rather than listing what it must provide. iii. Discussion Based on the comments received, the Final Rule retains the proposed standard, now found at paragraph 655.210(e)(1), requiring employers to specify in the job order and to provide to range ***workers***, without charge or deposit charge, either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable range ***workers*** to prepare their own meals. Comments from ***worker*** advocates, private citizens, employers, and employer associations revealed general agreement that, ***given*** the unique and isolated nature of range herding, employers should be required to provide range ***workers*** with adequate and sufficient meals and food. The Final Rule also revises the proposed regulation by adding a clause at the end of paragraph 655.210(e)(1), stating that to be ``sufficient'' or ``adequate,'' meals or food provided by the employer must include a daily source of protein, vitamins, and minerals. The Final Rule reflects a basic nutritional framework and also retains employers' flexibility to accommodate ***workers***' preferences, as well as delivery and storage realities. Such a requirement is appropriate ***given*** that range ***workers*** are often in isolated locations and entirely dependent upon their employers for adequate food to meet their nutritional needs. This provision also establishes a more objective standard for employers to [[Page 62983]] evaluate the type of food that they must provide to range ***workers***. Having established the general parameters for minimum food requirements, we conclude that further regulating food provisions by mandating a specific calorie count or specific food delivery intervals is unnecessary. In addition, a one-size-fits-all approach would create significant difficulties ***given*** that ***workers***' preferences may vary and food delivery schedules may depend upon the location of work. Nonetheless, we clarify that employers are encouraged to consult and may rely on existing federal guidelines for minimum calorie counts, variety requirements, and/or food safety standards when making decisions about food provision, taking into account the physical conditions and requirements of this work. We further clarify, consistent with the proposal from the ***Worker*** Advocates' Joint comment, that acceptable sources of protein include, but are not limited to, meats, beans, and eggs, and acceptable sources of vitamins and minerals include, but are not limited to, fruits, vegetables, and oils. Furthermore, in meeting the food provision requirements under this Final Rule, employers should strive to provide range ***workers*** with fresh food when possible. e. Section 655.210(f)--Hours and Earnings Statements i. Background The TEGLs for employers engaged in sheep, goat and cattle herding require job orders to comply with the standard H-2A requirements, ``unless otherwise specified'' in the TEGLs. TEGL 32-10, 4; Attachment A, I(B), (C); TEGL 15-06, Change 1, 4; Attachment A, I(B), (C). Both TEGLs provide, with regard to earnings records and statements, that an employer must keep accurate and adequate records with respect to ***workers***' earnings and furnish ***workers*** a statement of earnings on or before each pay day (a requirement consistent with the standard H-2A requirement, see 20 CFR 655.122(k)). The TEGLs further provide that, because ``unique circumstances'' (i.e., on call 24/7 in remote locations) prevent the monitoring and recording of hours actually worked each day as well as the time the ***worker*** begins and ends each workday, the employer is exempt from reporting on these two specific requirements at 20 CFR 655.122(j) and (k). However, all other regulatory requirements related to earnings records and statements apply.'' TEGL 32-10, Attachment A, Section I(C)(7); TEGL 15-06, Change 1, Attachment A, Section I(C)(5). The NPRM proposed to limit the special exemption from the standard recordkeeping requirements to the days ``when the ***worker*** is performing duties on the open range.'' 80 FR at 20340. The NPRM also proposed to require employers to keep daily records indicating whether the employee worked on the open range or on the ranch or farm, and to require employers to ``keep and maintain records of hours worked and duties performed over the course of the day when the ***worker*** is performing work on the ranch or farm.'' 80 FR at 20340. Finally, the NPRM proposed to require employers who chose to prorate a ***worker***'s wage, based upon the ***worker***'s voluntary absence for personal reasons, to keep a record of the reason for the ***worker***'s absence. Id. The NPRM stated that, because the proposal requires a monthly wage, keeping and maintaining records of hours worked was not necessary for days spent on the range. 80 FR at 20305. The daily record of where the work was performed would be sufficient for the Department to assess compliance with the requirement that at least 50 percent of the ***worker***'s days be spent

on the range. The preamble clarified that, where an employee spends some portion of the day on the range and some portion on the ranch, the day would count as a range day or a ranch day depending upon where the employee spent a majority of the hours worked during the workday. 80 FR at 20306. The NPRM explained that the proposed requirement to keep a record of the hours the employees worked and the duties performed for days spent on the ranch or farm would allow the employer and the Department to determine whether work that did not fall squarely within the definition of the production of livestock satisfied the proposed requirement that it be minor, sporadic, and incidental (i.e., occurring during no more than 20 percent of the workdays spent at the ranch). The proposed requirement to record the duties performed at the ranch similarly was intended to allow ``the Department to distinguish herder- or livestock production- related ranch work from unrelated ranch work to determine whether the work performed at the ranch is in compliance with the job order and the applicable wage rate.'' Id. As discussed in Sec. IV.A.3. of the preamble related to Sec. 655.201, the Final Rule eliminates the 20 percent cap on the performance of minor, sporadic, and incidental duties while ***workers*** are on the ranch or farm; therefore it also eliminates the requirement to maintain records of hours worked and duties performed while on the ranch or farm. The Final Rule retains the NPRM's other requirements to record whether each day is spent on the range or the ranch and, if the employer chooses to prorate the required wage, to record the reason for the ***worker***'s absence. ii. Comments Many employer commenters objected to the recordkeeping requirements associated with the proposed 20 percent cap on directly and closely related duties while at the ranch. In some cases their concerns were based upon a misunderstanding of those requirements. For example, some commenters thought the proposed rule required them to keep track of the number of hours that ***workers*** performed each individual duty while at the ranch, or at least to track the time spent on directly related work versus actual livestock production work, rather than simply to record the total hours worked each ranch day and a description of the duties performed during the day. Thus, one herding employer, Martinez Livestock, stated that requiring the employer to individually itemize each of the incidental chores and the time spent would be time consuming. The Colorado Wool Growers Association commented that the performance of additional related chores should not ``require the ranch to keep an onerous set of records, parsing out every single activity.'' Another rancher stated that ``[k]eeping track of time an employee works in a particular situation or site makes no sense!'' Other commenters specifically opposed any additional requirement to keep records of work performed on the range, stating that the added burden would be unnecessary and impractical. Other commenters addressed the proposed recordkeeping requirements. For example, the American Farm Bureau stated that keeping ``hourly records for work performed at the ranch and daily records of the work performed on the range'' was burdensome and the Department ``has presented no evidence that farmers have been using herding ***workers*** on the ranch more than the allowed 20 percent time.'' The Utah Farm Bureau Federation and the Michigan Farm Bureau agreed and further concurred with the statement that the proposal would be particularly burdensome for small ranchers; they stated that such family businesses do not have a human resources department for support, and they may not be familiar with the FLSA recordkeeping requirements because one H-2A ***worker*** may be their only employee. Another [[Page 62984]] ranch owner stated that trying to regulate hours and document what ***workers*** do every day is not practical, because animals can become sick and then ``the next 2 days is spent setting up corrals, treating animals along with all the normal daily chores . . . 20 different unexpected events can happen in one day!'' Another owner stated that the requirement to quantify hours spent on actual livestock tending, and the need for extensive record-keeping, is not practical or productive. Many other commenters agreed. For example, John Espil Sheep Company stated that keeping track of their ***workers***' time hourly or daily would be extremely difficult or impossible, both on the range and at the ranch, because every day is different. Another sheep rancher commented that the ***workers*** irrigate pastures, harvest livestock feeds, maintain fences, clean corrals, doctor sheep and feed them, and it would be ``absurd'' to require recordkeeping for this work. In contrast, Billie Siddoway, on behalf of the Siddoway Sheep Company, stated that it ``would not be unreasonable to track the days each employee works on the range or the ranch,'' but that it would be onerous to track hours of work and duties performed every day when ***workers*** are on the ranch. This commenter suggested that if an employee undertakes minor, sporadic or incidental work outside the definition of herding, ``the employer could track those hours and job duties only'' in order to allow the Department to evaluate compliance with the 20 percent rule. This commenter further stated that it ``would not be unreasonable to track the hours and duties associated with'' such incidental tasks as erecting temporary pens and corrals in anticipation of the lambing season, and that limiting the reporting requirement to only incidental work would likely lead to more accurate reporting. In contrast to the comments by employers or their representatives, the ***Worker*** Advocates' Joint Comment suggested that the normal

recordkeeping requirements should be extended to these ***workers***, regardless of where the work is performed, so that start and stop times (including for responses to emergencies), total daily hours, and duties would be recorded even for work on the range. They stated that this would allow a more accurate assessment of the appropriate number of hours per workweek to use for the monthly wage computation, and it would allow for enforcement of the hourly AEWR if ***workers*** perform duties that fall outside the scope of these regulations, such as if ***workers*** are required to repair irrigation ditches or harvest hay. They stated that relieving employers of the standard requirements to maintain ``records reflecting daily hours and job duties for open range work incentivizes misclassification.'' They also asserted that ``[w]ithout recordkeeping requirements, the Department cannot monitor compliance with those requirements,'' and that ***workers*** ``face the daunting task of having to reconstruct covered and uncovered work hours and of having to convince a judge or jury that they are telling the truth'' when they seek to recover back wages at the higher hourly AEWR rate. In the alternative, they sought clarification that the exemption from normal recordkeeping applies only when the ***worker*** spends an entire day on the range and not when both range and ranch duties are performed during a single day. The ***Worker*** Advocates' Joint Comment also noted that any burden from the extra recordkeeping would fall on the employees, not the employers, but that it could involve a simple daily timesheet or calendar that the employer collected each month. Finally, they stated that employers already have timekeeping systems for their other employees, and that the new requirements would add little cost but would provide records important for monitoring and enforcement. The Western Watershed Project concurred that records of actual hours worked should be required. iii. Discussion The Final Rule retains the proposed requirement to track days at the ranch versus days on the range because that is essential to allowing the employer, and the Department if necessary, to assess compliance with the requirement that a majority (more than 50 percent) of the ***workers***' days be spent on the range in order for these rules to apply. Moreover, that requirement imposes only a minimal recordkeeping burden. We understand from the comments that employees generally will work on the range for several months at a time, and then they may be on the ranch for two months, such as for lambing, before again leaving for months on the range. Because the employer simply needs to record (by, for example, checking a box) where the employee worked each day, and because that response will be the same for months at a time, the burden is inconsequential. Moreover, the employer commenters did not object to this aspect of the proposal. The Final Rule also retains the NPRM's requirement to record the reason for a ***worker***'s absence, if the employer chooses to prorate the required wage. The required wage may be prorated only if an employee voluntarily is unavailable for work for personal reasons, such as to return home ***due*** to a family member's illness. The notation of the reason for the ***worker***'s absence will allow the Department to verify whether any deduction that the employer chooses to make from the ***worker***'s required wage was made for appropriate reasons. The need to make such an entry is likely to arise only very rarely and for very few ***workers***; therefore, the burden is minimal. Moreover, employer commenters did not object to this requirement. Accordingly, the Department retains the requirement so that it will have available for later review a contemporaneous explanation for any deductions from the required wage. The Final Rule eliminates the proposed requirement to maintain records of hours worked and duties performed while on the ranch or farm, because the Final Rule eliminates the proposed 20 percent cap on the performance of minor, sporadic, and incidental duties while ***workers*** are on the ranch or farm. The proposed requirement to track duties performed at the ranch was intended to allow the Department to monitor compliance with the 20 percent cap, by preserving a record of the tasks performed each day, so it could be determined whether the tasks were solely those that fell squarely within the definition of the production of livestock or also included some tasks that simply were closely and directly related to herding or the production of livestock. The proposed requirement to track the hours worked while at the ranch was intended to provide the basis for a remedy for a violation when ***workers*** exceeded the 20 percent cap. In light of the decision to remove the proposed 20 percent cap from the Final Rule, the associated recordkeeping requirement is no longer necessary for these purposes. The Department recognizes that records regarding the duties performed and the hours worked would be relevant if the rancher violates the rules by assigning duties to the ***workers*** that fall outside the scope of the herding and range livestock regulations during periods when they are not working on the range. Thus if an employer assigned a ***worker*** general ranch hand work rather than work that falls within the definition of the production of livestock (which includes all duties that are closely and directly related to the herding or production of livestock), records of the hours worked would be relevant to determining the appropriate [[Page 62985]] remedy for such a violation. That benefit has to be weighed against the burden imposed on all employers by mandating such daily record-keeping regarding both total hours and the length of time various duties were performed. Imposing that burden does not seem

necessary because, if such a violation occurs, the Department's enforcement experience demonstrates that it can obtain the information necessary to prove such violations, including the information necessary to reconstruct hours to compute back wages, via ***worker*** and employer interviews during an investigation. For example, a broad variety of routine business records could provide an indication whether the ***worker*** and the herd were at the ranch or the range during various periods (depending upon the particular rancher's production methods), such as contracts with wool shearers, contracts with truck drivers or those purchasing lambs, veterinarian bills, water bills, gasoline bills, electric bills, and cell phone records. The Department's experienced investigators use all relevant records, as well as the results of their interviews, when evaluating the facts of cases in which time records do not exist or are inaccurate. f. Section 655.210(g) and (h)--Rates of Pay and Frequency of Pay i. Background The wage rate required by the standards in Sec. 655.210(g) of this Final Rule is also discussed in Sec. IV.C. of the preamble related to the wage methodology standards in Sec. 655.211, which also governs the applicable wage rate. In addition to the many comments received on the wage methodology, we received a handful of comments on paragraphs 655.210(g) and (h) related to commissions, bonuses, and other incentives, and pay frequency and access. The TEGLs do not address the issue of whether an employer may pay a wage rate based on commissions, bonuses, or other incentives. Under the standard H-2A rules, at 20 CFR 655.122(l)(1), employers are barred from offering or paying a wage rate based on commissions, bonuses, or other incentives unless the employer guarantees and pays at least the required wage for each pay period. Section 655.210(g)(1) of the proposed rule departed from the standard H-2A requirement, and barred pay rates based on commissions, bonuses, or other incentives entirely. The proposed rule further clarified that all payments must be made free and clear without any authorized deductions. Recognizing that herders are often paid through direct deposit or wire transfer ***given*** the remote nature of the work, the preamble further provided that if the employee: voluntarily requests that the employer deposit the wages into a bank account or send a wire transfer back to the ***worker***'s home country, for example, the employer is still responsible for ensuring that wages are paid when ***due***. The employer may not derive any benefit or profit from the transaction and must be able to demonstrate that the wage payment was properly transmitted to and deposited in the designated bank account or recipient on behalf of the employee. 80 FR at 20306. On the issue of pay frequency, Sec. 655.210(g) and (h) of the NPRM continued a long-standing practice based on the TEGLs and required ***workers*** to be paid not less frequently than monthly. We specifically invited comment on the issue of how frequently ***workers*** should be paid. Id. ii. Comments A few employers commented on the prohibition of wage rates based on commissions, bonuses, or other incentives in the NPRM. The joint comment from Vermillion and Midland opposed this requirement. This comment pointed out that a flat prohibition was inconsistent with the rule in the rest of the H-2A program and stated that such payments should be permitted, provided that the employer guaranteed the required wage. Siddoway Sheep recommended that DOL permit employers to withhold a portion of wages as an incentive for the employee to complete the contract period and to discourage ***workers*** from leaving to work in other industries. A third employer, Lava Lake Land & Livestock, stated that it was ``the American way'' to pay for performance and stated that such payments should be permitted if disclosed in the job order and advertised. This employer stated that the required wage should be assessed on an annual basis so that any bonuses could be counted toward compliance with the wage requirement. We received only a few comments on the issue of pay frequency. Both Edward Tuddenham, an attorney who represents ***workers***, and the ***Worker*** Advocates' Joint Comment stated that DOL should require ***workers*** to be paid at least twice monthly, consistent with the requirements in the rest of the H-2A program. See 20 CFR 655.122(m). They expressed the view that payment no less than twice monthly was preferred by ***workers***. One individual employer stated that its herders had never requested to be paid more frequently than monthly but had sometimes asked for advances on wages. This employer asserted that it did not object to paying its ***workers*** more frequently than monthly if they would prefer that. Both the ***Worker*** Advocates' Joint Comment and the Tuddenham comment further requested that DOL take additional steps to provide ***workers*** with ``real access to their wages.'' These commenters expressed concerns that ***workers*** are not provided with the means or time off to go to the bank or check cashing facility and thus are overly dependent on their employers in accessing wages. The ***Worker*** Advocates' Joint Comment noted that ***workers*** typically either receive wages by direct deposit or have wages sent directly to their families in their home countries. This comment recommended that DOL require by regulation that employers offer the ***worker*** the option to receive wages by check, cash, or direct deposit, and asked that DOL require employers to provide ***workers*** with physical access to banking facilities. Both comments asked DOL to impose additional regulatory standards, such as requiring by regulation that, if direct deposit is used, all banking information be

provided to the ***worker***, and that the ***worker*** be provided with the necessary bank cards or other items needed to withdraw these funds. iii. Discussion On the issue of bonuses, commissions, and incentives, we agree that the standard H-2A rule should apply. See Sec. 655.122(l)(1). Accordingly, under this Final Rule, employers may make payments based on bonuses, commissions, and incentives provided that the full rate required by Sec. 655.211 of this Final Rule is guaranteed and paid when ***due***. In addition, we agree that the full offered wage rate, including any commissions, bonuses, or incentives, must be included in the job order and advertised to U.S. ***workers***, because U.S. ***workers*** must be apprised of the full wage offered through the job opportunity. We decline to adopt the other recommendations suggested by commenters regarding commissions, bonuses, and incentives. As explained in the preamble to the NPRM, the requirement to pay the required wage necessarily means that payments must be made when ***due*** to the ***worker*** (in this case, twice monthly, as discussed below). 80 FR at 20306. Authorizing employers to withhold a portion of the ***workers***' pay after work has been performed would be wholly inconsistent with this requirement and with the standard H-2A regulation. The [[Page 62986]] recommendation that DOL only examine whether the required wage rate has been met at the end of the year would have the similar effect of permitting employers to withhold wages ***due*** for work performed and is, therefore, rejected. We agree with the comments recommending that we use the standard H- 2A pay frequency, and the Final Rule requires that payments be made at least twice monthly. See Sec. 655.122(m). No employers objected to more frequent intervals beyond a single monthly payment, and calculating the twice-monthly payment can be easily accomplished by evenly dividing the required monthly rate into two payments. On the issue of access to wages, we note that generally payment must be in the form of cash or instrument negotiable at par (i.e., cash or cash equivalent). See 29 CFR 531.27. WHD has interpreted this requirement to provide that payment may only be made through direct deposit with the ***worker***'s consent and only if the ***workers*** have the alternate option of receiving payment through cash or check. See WHD Field Operation Handbook 30c00(b) (June 30, 2000). The same requirement would apply to the voluntary assignment of wages through wire transfers to a designee of the ***worker***. See WHD Field Assistance Bulletin 12-3 (May 17, 2012). Neither these general rules nor the regulatory requirements of the general H-2A and H-2B programs require that the employer provide ***workers*** with options for how to receive their pay, provided that the ***worker*** receives payment either in cash or through an instrument negotiable at par. We decline to accept the invitation to develop special rules for the types of payments required to be made to ***workers*** in these occupations or to set intervals at which ***workers*** must be provided physical access to banking facilities, which would go beyond DOL's obligation to set standards that will protect against adverse effect to U.S. ***workers***. However, ***given*** the remoteness of the physical location of work covered by this rule, we encourage employers to continue what appears to be the widespread practice of providing the option for ***workers*** to receive payments through wire transfers to a designee or through direct deposit. We further clarify that, because direct deposit may only be used where the ***worker*** elects it, an arrangement under which the ***worker***'s pay is deposited into a bank account but the ***worker*** does not have the information needed to access the bank account, such as the account number, suggests that the ***worker*** has not consented to receive payment through direct deposit. Therefore such an arrangement is not permitted. C. Section 655.211 Herding and Range Livestock Wage Rate 1. Background: The TEGLs and the NPRM Proposals Under the standard H-2A program, an employer must pay the higher of the hourly Adverse Effect Wage Rate (AEWR), which is based on the combined wage rate for field and livestock ***workers*** reported in the Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture (USDA); the prevailing wage rate or piece rate; the State or federal minimum wage; or an agreed-upon collective bargaining wage rate.\17\ 20 CFR 655.120(a). ---------- \17\ The AEWR is established in order to neutralize any adverse effect on U.S. ***workers*** resulting from the influx of temporary foreign ***workers***. Employment and Training Administration, Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 FR 20496, 20502 (June 1, 1987); see also 75 FR 6884, 6891-6895 (Feb. 12, 2010). The AEWR provides that the wages of similarly employed U.S. ***workers*** will not be adversely affected by bringing in foreign ***workers***. ---------- Under the TEGLs, the AEWR for herder occupations is set at the prevailing wage rate of U.S. ***workers*** based on surveys conducted by the State Workforce Agencies (SWAs). For these herding occupations, the wage rate from the prevailing wage survey has most often been a monthly wage rate. The NPRM proposed significant changes to the wage methodology governing H-2A ***workers*** engaged in sheep, goat, and cattle herding. As discussed in the NPRM, the dearth of information on the wages of U.S. ***workers*** in these occupations has made setting the AEWR based on the SWA surveys unsustainable. 80 FR at 20306-20308. Few employers provide U.S. ***worker*** wage information in response

to prevailing wage survey requests for these occupations, making it difficult for SWAs to submit statistically valid prevailing wage findings to OFLC. Under the TEGLs, the SWAs use ETA Handbook 385 to collect prevailing wage results. Employers are not required to report data in response to the survey data request. Often, and almost always more recently, the SWAs determine that there are no survey results or the survey does not yield statistically valid results. Thus, for many years, the Department has been unable to determine a statistically valid prevailing wage rate in each State in which one is needed, requiring the OFLC Administrator to use the survey results from another area or State to set the wage, or, under earlier guidance, to set the wage based on a previous year's wage rate. See Field Memorandum 24-01, TEGL 32-10, TEGL 15-06, and TEGL 15- 06, Change 1. Because almost every State experienced years in which no wage report could be statistically verified, wage stagnation across these occupations has been the inevitable result in all but two States.\18\ Under the current procedures, wage rates are currently set at $750 per month for sheep and goat herders in most States and $875 per month for cattle in all States.\19\ The current minimum salary for sheep herders in California is $1,600.34 per month, and, effective January 1, 2016, the minimum monthly salary for sheep herders will be $1,777.98. Under Oregon's minimum wage law, the required rate is $1,603.33 per month for range ***workers*** (calculated based on the State minimum wage multiplied by 2,080 hours and divided by 12 months) and is adjusted annually based on increases to the State minimum wage that are based on the CPI-U. Or. Rev. Stat. 653.025(2). ---------- \18\ California and Oregon each have established wage rates applicable to these occupations. See Cal. Labor Code 2695.2(a) (West 2003); Or. Rev. Stat. 653.020(1)(e), 653.010(9); see also Technical Assistance for Employers in Agriculture, available at http://www.oregon.gov/boli/TA/pages/t_faq_taagric.aspx. Oregon's sheep and goat herder wage rate for the H-2A program was, until recently, set by a legal settlement in Zapata v. Western Range Association, Civ. N. 92-10-25, 244L (Ore. 1994). However, Oregon's current interpretation of its minimum wage law, which is applicable to these occupations, requires a payment higher than that required by the Zapata settlement. See http://www.oregon.gov/boli/TA/pages/t_faq_taagric.aspx. \19\ Although the most recent determination for cattle herders in Oregon was $875/month, the current wage rate required by the application of the State minimum wage law in Oregon, see footnote directly above, requires a significantly higher wage. ---------- Unlike the requirements in the standard H-2A program, sheep and goat herding employers are required to provide food to the ***workers*** free of charge under TEGL 32-10. Although the current cattle production TEGL 15-06, Change 1, does not prohibit employers from deducting the cost of food in accordance with the standard H-2A program regulations, since 2013 employers have been required to provided food free of charge based on the wage surveys from the SWA. Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Prevailing Wage Rates for Certain Occupations Processed Under H-2A Special Procedures; Correction and Rescission, 78 FR 19019, 19020 (Mar. 28, 2013). Section 655.211(a) of the NPRM proposed to require employers to [[Page 62987]] advertise, offer, and pay a wage that is the highest of the monthly AEWR, an agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action. We proposed to continue to use a monthly AEWR for these occupations because of the difficulties in tracking and paying an hourly wage rate to ***workers*** engaged in the herding or production of livestock on the range ***due*** to the remote location of the work and the sporadic and unpredictable nature of the duty hours on any ***given*** day.\20\ If the AEWR was increased during the work period, and the new rate is higher than the other wage sources considered, paragraph (a) of this provision proposed that employers adjust the wage rate they pay based on the new wage effective on the date of its publication in the Federal Register, consistent with the approach in the standard H-2A program, and with current requirements for these occupations. See 20 CFR 655.122(l) (requiring the applicable AEWR or other wage rate to be paid based on the AEWR or rate in effect ``at the time work is performed''); TEGL 32- 10, App. A at p. 1. ---------- \20\ Employers are similarly exempt from the hourly minimum wage and record-keeping requirements of the Fair Labor Standards Act for these ***workers***. 29 U.S.C. 213(a)(6)(E). ---------- Paragraphs (b) and (c) of Sec. 655.211 set the proposed methodology for establishing the monthly AEWR for these occupations. ***Due*** to the challenges in obtaining valid SWA wage results and the resulting wage stagnation from the existing methodology, we proposed to use a different wage source to set the monthly AEWR--the combined hourly wage rate for field and livestock ***workers*** from the FLS (``FLS- based AEWR'') used for all other H-2A occupations. In order to derive a monthly wage from this hourly rate, we proposed to use an estimate of 44 hours worked per week, which was a compromise between the pre-NPRM submissions of an attorney representing ***worker*** interests, Edward Tuddenham, and the three primary employer associations,

Mountain Plains, Western Range, and ASI.\21\ The 40-hour proposal from the employer associations was based on the Zapata settlement, in which employer associations agreed to pay sheep herders in Oregon on a monthly salary basis, adjusted annually. The 48-hour estimate from Mr. Tuddenham was based on a review of information provided by employers on Form ETA-9142A about the number of hours employers expected herders to work per week. Consistent with the approach in the sheep and goat herding TEGL and the current SWA prevailing wage determinations for cattle, the NPRM proposed that employers be required to provide food free of charge. ---------- \21\ These pre-NPRM submissions were included on the rulemaking record and were available for public inspection and comment. ---------- The NPRM further proposed a four-year transition of the new wage rates, with full implementation at the beginning of year five (the NPRM referred to this as a five-year phase-in). In many States in which the current monthly wage rate for sheep and goat herders is $750, the NPRM methodology would result in a required wage rate that triples (or more) the current rate at the end of the transition period. See 80 FR at 20318, Exhibit 6. For the reasons discussed below, and as we proposed in the NPRM, this Final Rule requires covered employers to pay a wage that is the highest of the monthly AEWR, an agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action. However, based on a review of all the comments on the rulemaking record, and for the reasons set out below, we have concluded that it is more appropriate and consistent with the Department's obligations under the INA to use the current federal minimum wage of $7.25/hour, rather than the FLS-based AEWR, as the basis upon which to set the monthly AEWR for these occupations. In addition, for the reasons discussed below, we have made an upward adjustment of the estimate of hours that herders work in a week, based on a review of data collected from Form ETA-9142A. Accordingly, we will calculate the monthly wage rate as: $7.25/hour multiplied by the revised 48-hour estimate of hours worked per week. Under the Final Rule, the wage rate for these occupations will be adjusted annually based on inflation, and implementation will be transitioned over two years, with full implementation at the beginning of year three. Finally, the Final Rule requires employers to provide three adequate meals without charge to the range ***workers***. 2. The Wage Methodology: Review of Comments and Discussion a. Comments and Discussion of Section 655.211(a) DOL received only a handful of comments on proposed paragraph 655.211(a) of the wage methodology. We received no comments on the requirement that an employer pay the collective bargaining agreement wage only if it is the highest applicable wage, which is consistent with the standard requirement governing the H-2A program, and no commenters objected to the requirement that the employer pay a higher applicable State or Federal minimum wage. In addition, Western Range and Mountain Plains incorporated the requirement to pay a higher applicable State wage into their joint wage proposal, which was supported by the ASI and many individual employers, which is discussed in greater detail below. Therefore, we retain these requirements as proposed in Sec. 655.211(a) with only three clarifying edits. First, the proposed rule stated that the State or Federal minimum wage applied only if the wage was ``specific to the occupation(s).'' Because that text might be read overly narrowly to exclude ***workers*** from a State or Federally required wage if the wage was generally applicable to ***workers*** (including herders engaged in the range production of sheep, goats, or cattle), this Final Rule deletes that text from Sec. 655.211(a).\22\ Second, for clarity, we have removed from Sec. 655.211(a)(2) the requirement to pay the adjusted monthly AEWR if it is ``higher than the highest of the monthly AEWR.'' Because adjustments will now be based on the Employment Cost Index for wages and salaries, as discussed below, this provision is no longer necessary. Third, we deleted the statement that the AEWR would be adjusted ``under the FLS'' because that survey will not be the basis of the wage, as proposed. This paragraph requires the application of State or Federal minimum wage law, if applicable, but as discussed below, employers employing ***workers*** in these occupations are currently exempt from application of the Fair Labor Standards Act (FLSA) Federal minimum wage. -------- \22\ We have made the corresponding deletion of the phrase, ``specific to the occupation[,]'' in Sec. 655.210(g) as well. ---------- Vermillion and Midland objected to the inclusion of the requirement that a higher wage required by judicial action be paid because that requirement is not included in the standard H-2A regulations, or in the H-2B regulations. In their view, this requirement is unnecessary, would encourage litigation, and creates the possibility of unpredictable wage obligations. This requirement that a higher wage required by judicial action be paid is consistent with ETA's years-long application of the legal settlement from the Zapata case as the required wage for sheep and goat herders in Oregon. Based on our experience with the Oregon settlement, we disagree that this requirement will incentivize litigation. In addition, we [[Page 62988]] note that even if the application of a settlement in a legal case related to the applicable wage was

not required by our regulation, an employer would nevertheless be required to pay a higher wage if required by a court order. Accordingly, we retain this requirement as proposed. We received a comment from one employer objecting to the requirement that the new AEWR rate be paid upon announcement in the Federal Register. Apparently not recognizing that this is a current program requirement, this employer questioned how employers would make immediate adjustments to the new wage rates when their contracts required a specified wage rate over a certain period. As discussed below, the required wage will be adjusted annually based on inflation, and following the transition period, we do not expect there will be significant adjustments in wage rates required from year to year as might have occurred under the TEGLs. As a result, we conclude that it will not be unduly difficult for employers to adjust to the annual changes. Because this requirement is our current practice, and presently applies both to range herding employers and employers governed by the standard H-2A regulations, we have decided to retain this existing requirement. Accordingly, we maintain this requirement as proposed. b. Use of the Farm Labor Survey-Based AEWR To Set the Monthly Wage Rate i. Comments Opposing Use of the FLS-Based AEWR Generally, we received hundreds of comments opposing the use of the FLS as the basis of the wage proposal from individual herding employers; employer associations including Mountain Plains, Western Range, and ASI; State and local government officials, including Governor Mead of Wyoming and Representative Jaggi of the Wyoming House of Representatives; others from Western States with a business interest in the sheep industry, such as accountants for sheep herding employers and wool processors; and SBA Advocacy. These comments primarily provided objections based on the size of the proposed increase, which, as noted previously, see 80 FR at 20318, Exhibit 6, would triple the current wage rate in many States. These comments stated that the proposed wage rate would jeopardize the entire herding industry. They asserted that the wage increase would cause many employers to either go out of business entirely or to downsize and greatly reduce the number of ***workers*** employed. Many commenters stated that wages lower than those proposed, and those required under the standard H-2A rules, were appropriate to reflect other costs paid by the employer, including food, housing, work supplies and protective clothing, and transportation. Commenters expressed the view that current wages were sufficient because H-2A ***workers*** continue to accept work at current rates. Some commenters stated that low wages for these occupations were justified, ***given*** that ***workers*** were not required to engage in productive labor at all times while on the range, and had time for relaxation and personal pursuits. The vast majority of comments were from commenters affiliated with the production of sheep; few comments were received specific to cattle herding, a much smaller part of the program compared to sheep and goat herding. The Colorado Wool Growers Association and others asserted that the wage proposal was ``not grounded in the market realities'' of the industry. Many employers stated that the wages proposed were too high, ***given*** that the result would be payment of higher wages for herders than for other ***workers*** in the U.S. economy, including ranch managers, or that the wages paid substantially exceed what H-2A ***workers*** would earn for the same work in their home countries. Some commented that because food and housing are paid by the employer, foreign ***workers*** are able to send their paychecks in full back to their home countries. SBA Office of Advocacy reported that, based on its discussions with small livestock and sheep herding operations in California, Colorado, Oregon, Montana, Utah, and Wyoming, every business contacted predicted that it would reduce its operations or close operations within a few years. SBA Office of Advocacy cited a Mountain Plains Survey, in which nearly every one of the association's 214 member respondents commented that it would downsize or shut down operations because of the high wage rates proposed. Individual employers and associations provided similar reports. The following comment from one sheep herding employer, F.I.M. Corporation, is illustrative: For the period 2006 to 2013 our gross income from sales of wool, lambs, sheep, and hay averaged about $1,100,000 per year. After our operating expenses our net income averaged about 2.5% to 3% of gross or approximately $35,000 per year. This proposed tripling of sheepherder wages will require approximately $250,000 per year in additional wage payments . . . . That much money is simply not available so the Dept of Labor will force FIM Corp and most other sheep producers that employ sheepherders to send the sheepherders home and sell the sheep. Some individual employers also submitted their profit-and-loss statements in support of their comments that the wage increases in the proposal could not be absorbed. The Texas Sheep and Goat Raisers Association provided estimates based upon the Idaho enterprise sheep budget \23\ showing that hired labor comprises 24 percent of total operating costs for these employers, and that a three-fold wage increase would result in an 80 percent reduction in profitability (from $83,000 in profit to less than $17,000). Similarly, Mountain Plains and Western Range submitted an analysis based on the Wyoming enterprise sheep budget and an analysis of lamb and wool market trends for the past 20 years, which, in their view, demonstrated that using the wage rate proposed would allow the average sheepherding

employer to break even only 30 percent of the time, concluding ``[t]hat is an extinction scenario for employers . . .'' The American Farm Bureau used data from the Utah enterprise budget in its analysis, which similarly purported to show that the proposed wage increase would result in a loss of $16,444. The Texas Sheep and Goat Raisers Association and others commented that impacts from the wage proposed would not be felt only by ranchers but also through ``multiplier'' effects in related industries, including by lamb processors, wool warehouses, textile mills, trucking and feed companies, veterinarians, and fencing businesses. ---------- \23\ An enterprise budget is a listing of all estimated income and expenses associated with a specific enterprise (i.e., single crop or livestock commodity), which will provide an estimate of its profitability and break-even values. Enterprise budgets are developed and published on an irregular basis by university-based agriculture extension services with inputs from ranchers on price, yield, and costs. ---------- Multiple commenters, including Mountain Plains and Western Range, stated that because American wool and lamb represent a small fraction of the world market (less than one percent of wool and meat production worldwide, according to an analysis from Dr. Stephen Bronars submitted with the Mountain Plains and Western Range comment), producers are unable to pass increased labor costs on to consumers. In addition, the Bronars analysis similarly provided that range cattle account for only eight percent of world beef production. Vermillion and Midland provided an economic analysis of the impact of the [[Page 62989]] wage increases under the proposal performed by a national resource law and economic policy analyst at the Linebery Policy Center for Natural Resource Management. Largely relying on data from the NPRM, this analysis contained little new data, but rather determined that the total overall wage costs under the proposal would be greater for employers with a larger number of ***workers*** than those employing the three ***workers*** estimated in the proposal. The analysis asserted that ``[w]ith fluctuating prices for livestock products, and ever increasing input costs, the cattle and sheep industries struggle to break even, much less expect a profit.'' The analysis further concluded that the wage increases would raise production costs to ``untenable levels'' and stated that even in the highest price years ``the price volatility of the livestock product market could make it difficult to absorb the added wage increase.'' The analysis cited an earlier report for the proposition that livestock operations are marginal, with net ranch income per acre of $.55.\24\ ---------- \24\ See Seawolf, R., Fowler, J., & Schickedanz, J., The Legacy of New Mexico Property Tax, RITF Report 81 (Jan. 11, 2011), available at: http://aces.nmsu.edu/pubs/_ritf/RITF81.pdf. ---------- In addition, in opposing the wage increase, the American Farm Bureau Federation (American Farm Bureau) submitted an analysis of the effect of the proposed wage rates based on historic price data from 2000-2014. That comment stated that prices for wool and lamb over the past five years ($1.70/lb for lamb and $1.45/lb for wool) are significantly higher (63 percent for lamb and 113 percent for wool) than averages over the 10 preceding years ($1.04/lb for lamb and $.68/ lb for wool). Although the comment acknowledged that a wage increase of the size set out in the proposal was ``manageable'' at current prices, it provided alternate scenarios to evaluate the ability to absorb the wage increase ***given*** average prices for the 2000-2014 period, as well as the lowest prices for the 15-year period ($.80/lb for lamb and $.53/lb for wool). At the 15-year average prices, the comment projected significantly reduced profits in all States if the FLS-based AEWR was paid as compared to the profits that would be achieved with current wage rates; at the lowest prices for this period, the comment forecasted a loss in all States if the full rate proposed in the NPRM was paid compared to a slim profit with current wage rates. Further, the Utah Governor's Office submitted a comment asserting that because prices per lamb have increased from $67.94 in 1994 to $157.15 in 2014 (an inflation-adjusted increase of $48.61 according to the comment) based on analysis from the Iowa State University Extension and Outreach Program, the wage increase proposed could not be absorbed by employers.\25\ ---------- \25\ See Schulz, Lee, Ag Decision Maker: Historic Hog and Lamb Prices, File B2-10 (Feb. 2015), at Table 6, available at: https://www.extension.iastate.edu/agdm/livestock/pdf/b2-10.pdf. ---------- Commenters opposing the use of the FLS-based AEWR used varying economic data and budget sources in attempting to demonstrate that the wage increase would force ranches to close and the industry to contract significantly. Overall, DOL received comments reflecting significant variation in estimates of wage costs through the American Farm Bureau, the Wyoming and Idaho budgets provided by commenters, and the estimates of individual commenters. Some provided analysis of wage costs compared with overall revenue to show the impact. Others used ``labor costs,'' for purposes of comparison, which may include other expenses such as housing or food, making any analysis of the impact of the wage increase necessarily imprecise. Further, while it also opposed the

wage increase, the American Farm Bureau comment provided less dire predictions than other commenters or the Wyoming and Idaho analyses. In addition to economic objections, many of these employers and associations further objected to the wage increase based on their view that the limited number of U.S. ***workers*** in these occupations foreclosed the need to provide for any adverse effect. According to Western Range, in 2012 twenty-two U.S. ***workers*** applied for 1,000 openings. Western Range stated that only two U.S. ***workers*** were ``qualified'' and were hired, and neither completed the job contract. Mountain Plains stated that in more than 1,000 openings in 2014, only two qualified U.S. ***workers*** applied. According to Mountain Plains, one U.S. ***worker*** was not interested in the job and the other was hired but quit before completing his contract. Further, Mountain Plains and Western Range commented that, based on their experiences, higher wages in California have not resulted in increased numbers of U.S. ***workers*** applying for jobs in these occupations. According to these associations, since 2011, Mountain Plains has received 18 applications for approximately 400 sheepherder or goat/sheepherder positions in California. No similar data was provided for Western Range. The comment stated that of those 18 prospective ***workers***, 10 were not qualified for the work and the remaining eight withdrew their applications because they were not interested in the job. According to these commenters, in their experience, there are actually fewer applicants in California and fewer U.S. ***workers*** who take the jobs advertised there as compared to states like Wyoming or Colorado. Many employers and associations expressed the view that U.S. ***workers*** are unwilling to perform this work ***due*** to the remote nature of the work rather than because of low wages, and some expressed disappointment with what they view as the unreliability of the few qualified U.S. ***workers*** who apply, stating that they often do not complete the work contract. Other commenters, such as the Utah Farm Bureau Federation, misunderstood the data in the proposal, and stated that the Department ``concedes'' that there are only 18 U.S. ***workers*** in range herding occupations because 18 U.S. ***workers*** were included in the 2014 SWA sheep herding surveys and worked in States with a statistically reportable wage. On the other hand, one SWA employee expressed the view that ``[q]ualified job seekers often ***give*** low wages as one of the reasons they do not apply for these jobs, even though housing and meals are also provided. The number of U.S. job applicants has decreased over the past few years. Increased wages could help to encourage more ***worker*** interest in the jobs.'' In addition, several employers noted that they have hired U.S. ***workers***, with varying degrees of success. Further, one herding employer admitted that it could not attract U.S. ***workers*** because ``Americans don't like the conditions or low pay.'' Finally, some commenters also objected to the FLS-based AEWR based on their view that it was inappropriate as a wage source for these occupations.\26\ For example, the New Mexico Department of Agriculture and Wyoming Department of Workforce Services objected to the use of the FLS-based AEWR on the view that the rate is based on ``generic agricultural operations'' and not specific to range herding. Similarly, Western Range and Mountain Plains expressed the view that the FLS is ``a survey of aggregated farmworker positions except herders. Those positions pay by the hour, and do not provide housing or food, making those rates of pay completely inapposite to the range production of livestock.'' [[Page 62990]] Mountain Plains and Western Range asserted that the AEWR was a measure of ``take home pay'' from which U.S. agricultural employees need to pay a number of expenses not applicable to ***workers*** in these occupations. One herding employer stated that it has provided wage data on its ***workers*** for purposes of the FLS ``for many years'' but nevertheless objected to the FLS-based AEWR because, in its view, DOL had not properly consulted with USDA before proposing use of the FLS for these occupations and because H-2A ***workers*** receive additional ``benefits'' not paid to other ***workers***. Siddoway Sheep stated that the use of the FLS-based AEWR was arbitrary because in its view sheepherder wages have always been ``well below average,'' and instead asked DOL to conduct a comparison of the wage rate from the FLS with the monthly herding AEWR from a point ``when adequate information regarding sheepherders was available'' and set the current wage based on that historic but, in their view, valid differential. ---------- \26\ Some employers also objected to the proposed wage based on the misunderstanding that the proposal required payment for all hours worked and tracking of hours on the range. ---------- ii. Comments Supporting Use of the FLS-Based AEWR We received only a few comments in support of the wage proposal in the NPRM, and most of the supportive comments were from individual commenters, including a former SWA employee responsible for surveys from the 1980s until 2005. We also received comments generally supporting the wage proposal from groups such as Public Citizen, a public interest group, and Western Watersheds Project, a project that works to protect and conserve the public lands of the American West. Most group comments, including the comment from Public Citizen, were undetailed and expressed only general support. These commenters asserted that the wage methodology was appropriate and necessary to protect against adverse effect

on U.S. ***workers***. Similarly, while he did not comment on the NPRM, Edward Tuddenham, an attorney representing ***workers***, submitted a comment before publication that is part of the administrative record. That comment recommended either that ***workers*** be paid for a set estimate of hours multiplied by the FLS-based AEWR rate for time on the range and at the FLS-based AEWR for each hour spent in non-range work, or be paid the FLS-based AEWR for all hours actually worked regardless of location. The ***Worker*** Advocates' Joint Comment was by far the most detailed comment supporting the use of the FLS-based AEWR to set the monthly rate. That comment characterized using the FLS-based AEWR to set the monthly rate as a ``practical and commonsense approach.'' However, this comment expressed the view that DOL's use of a transition to the FLS- based AEWR in the proposed rule was misguided, and that requiring anything less than immediate implementation would have an adverse effect on U.S. ***workers*** performing work as ranch hands, who, like ***workers*** covered by this rule, may also perform work that is closely and directly related to the production of livestock. This comment provided an analysis of purported data flaws in the SWA survey methodology and asked that DOL take into account the ``immense losses'' from prior SWA survey use to immediately implement the FLS-based AEWR as the base wage source. The comment attributed wage stagnation to DOL's ``outdated'' methodology and to DOL's settlement of various employer lawsuits over past wage increases, which in the commenters' view has been ``strongly pro-employer to the detriment of ***workers*** in this area and justifies immediate ameliorative action.'' In support of the view that the FLS-based AEWR should be immediately effective, the ***Worker*** Advocates' Joint Comment pointed to several examples of jobs that, in their view, demonstrated that the ranching industry already supports ***workers*** earning the full FLS-based AEWR who perform similar work, particularly citing ``Sheep, Farmworker General'' in Wyoming, ``Closed Range Herders'' in Texas, and ranch hands performing livestock as well as other tasks. They further cited wage rates paid by employers ``in states without large herder populations,'' such as for Maine sheep farmers and sheep farm ***workers*** in North Dakota (both paid on an hourly basis). Further, they noted that California has a wage rate significantly higher than the current TEGL wages in other States. Finally, the commenters conclude ``the sustained scarcity'' of U.S. ***workers*** in these occupations: is no doubt in large part a function of the fact that U.S. ***workers*** have the freedom to earn at least the federal minimum wage of $7.25 per hour, which is substantially higher than the herder minimum wage. Several of these commenters asked DOL to require payment for all hours worked, or at least for all hours worked when not on the range.\27\ Western Watersheds asked that ***workers*** either be paid for all hours worked or not be required to work longer than the hours estimated by DOL. The ***Worker*** Advocates' Joint Comment stated that ***workers*** should be paid the AEWR for all hours worked while living ``at or near the ranch,'' based on the view that the exception to payment for all hours worked should be limited to the circumstances animating the FLSA exemption for this work, namely, that hours worked be extremely difficult to calculate. Edward Tuddenham similarly supported that ***workers*** should be paid for all hours at the ranch. ---------- \27\ A single employer also stated that an hourly wage would be appropriate during the shed lambing season. ---------- iii. Discussion and Decision--Change in Wage Rate After reviewing all of the comments, we conclude that using the FLS-based AEWR to set the monthly wage for these occupations, which would triple the wage costs of many employers, is likely to result in adverse effect on U.S. ***workers*** by causing a substantial number of herding employers to close or significantly downsize their operations--leaving fewer herding jobs available to U.S. ***workers***. Accordingly, we select a different wage source in this Final Rule, as discussed in greater detail below. In reaching this conclusion, we do not base our analysis on a single comment or set of comments, but on the record as a whole, including data from budget documents submitted, reports from individual employers and associations, and historic pricing data. We recognize limitations on the data provided by employers, their associations, and their other supporters. For example, in some instances, employers used ``labor costs'' to attempt to demonstrate the impact of a wage increase, although labor costs may include more than just wages. In addition, enterprise budgets, which we examined carefully, typically include a line item for payment to the owner/operator, so that even with reduced or eliminated profits, there is still some payment to the owner. In addition, we cannot assume, as some commenters have done, that all labor in the enterprise budgets is paid at the TEGL wage levels. This is particularly true ***given*** that some H-2A employers noted in comments that they pay ***workers*** more than the current TEGL wages. We further recognize that only sparse data was provided on the impact of the proposed increase for cattle employers, which comprise a small subset of H-2A herding employers. However, despite these limitations, based on the size of the proposed increase and the data provided, the record provides a reasonable basis to conclude that the proposed wage increase is too great to be borne by the industry, and thus will result in adverse effect on U.S. ***workers*** [[Page 62991]] because fewer herding jobs will be

available.\28\ ---------- \28\ Although the American Farm Bureau comment characterized the proposed wage increase with prices at the current levels as manageable, that is not determinative. We agree with the commenter that it is more reasonable to look to data assessing historic swings in prices. Examining those historic price swings helped guide our conclusion that adverse effect on U.S. ***workers*** likely would result from using the FLS-based AEWR. ---------- As discussed further below, this Final Rule imposes a significant wage increase on the industry as compared to the current, stagnated wages required under the TEGLs, albeit of a magnitude lower than the wage originally proposed. However, for several reasons we disagree with ***worker*** advocates' comments that setting the wage based on anything other than the Farm Labor Survey is inconsistent with DOL's obligation to protect against adverse effect. First, although we acknowledge that wages under the SWA survey methodology have been stagnant for some time, we are concerned, based on the comments received, that the three- fold wage increase in the proposal would, if implemented, likely result in a significant number of employers choosing to down-size or close their herding operations, resulting in adverse impact on U.S. ***workers***.\29\ Second, although ***worker*** advocates cite in support of the proposed FLS-based wage other ranch jobs they view as similar and that are paid the FLS-based AEWR, those occupations do not appear to be primarily engaged in range work. To the extent that the ***worker*** advocates cited range jobs in Texas to support the proposition that ranchers overall can absorb a wage increase in the magnitude of the FLS-based AEWR, the data provided either reflects a prevailing wage rate significantly below the FLS-based AEWR or it is of such a small sample size to be unreportable under existing guidelines. In addition, we disagree with the suggestion that practices in sheep production ``in states without large herder populations'' and without range ***workers*** are relevant to the determination of whether employers using the current special procedures can absorb an increase of the scope proposed. Nor are we persuaded by the fact that some individual employers voluntarily provide higher wage rates than will be required under this Final Rule demonstrates that most employers will be able to absorb increases on the scale proposed. Third, we agree that the California sheep herding wage rates provide evidence that some employers can viably pay a higher wage, as discussed further below, but it does not support setting wage rates across the United States based on the FLS-based AEWR. Finally, we conclude that although we use a lower wage rate than is required for ranch hands, this will not have an adverse effect for U.S. ***workers*** similarly employed. As discussed in Sec. IV.A.2. in the preamble, we have further defined what work may be performed at the ranch under this Final Rule to prevent herders from being used to perform general ranch hand work. ***Given*** this protection, we conclude that the lower wage established for herders will not displace U.S. ranch hands.\30\ ---------- \29\ We note that in its analysis of the SWA survey data, the ***Worker*** Advocates' Joint Comment appeared to misunderstand data presented in the NPRM. The comment stated that in the NPRM, 80 FR at 20314, DOL ``admitted'' that surveys with results of between 18 and 30 ***workers*** were insufficient. However, the NPRM was discussing the total number of U.S. sheep herders identified in the SWA surveys with reportable results located in the mountain plains/western regions. This passage was not a discussion about the minimum sample size for any individual State. For these occupations, a survey of as few as six U.S. ***workers*** is consistent with the methodological requirements of ETA Handbook 385, provided a sufficient number of employers is represented by the sample. \30\ Although we have decided not to use the FLS-based AEWR as the basis for the wage in this Final Rule, we must clarify the record with respect to two objections to its use for these occupations. First, we note that the FLS does, in fact, survey the wage of herding ***workers*** engaged in work on the range, though it is likely that, because there are few ***workers*** in these occupations, they may be a small portion of the sample in any State. Indeed, one herding employer expressly acknowledged that it reports its ***workers***' wages to the FLS. In addition, while some commenters asserted that the FLS-based AEWR is inappropriate for range occupations because it fails to account for items such as meals, housing, transportation, ***workers***' compensation, and work supplies, we note that (with the exception of meals), these items are also required to be provided without charge by H-2A employers paying the FLS-based AEWR and therefore do not support herding employers paying a lower wage. See 20 CFR 655.120(d)(1) (requiring housing to be provided to H-2A ***workers*** and any U.S. ***workers*** in corresponding employment not reasonably able to return to their residence within the same day); 20 CFR 655.120(e) (***workers***' compensation); 20 CFR 655.120(f) (tools, supplies, and equipment); 20 CFR 655.120(h) (governing transportation payment requirements). The reasons for applying these requirements throughout the H-2A program are set out in the 2010 H- 2A rule, Temporary Agricultural Employment of H-2A Aliens in the United States, Final Rule, 75 FR 6884 (Feb. 12, 2010) and earlier H- 2A regulations. ---------- ---------- We further decline to require payment of the FLS-based AEWR for

all hours herders work while at the ranch. We note that this decision is consistent with the FLSA exemption, which permits the exemption to be taken for the entire year provided that the ***worker*** is ``principally engaged in the range production of livestock.'' 29 U.S.C. 213(a)(6)(E). ***Given*** the limitation on duties that may be performed by range ***workers*** when they are working at the ranch as discussed in Sec. IVA.2., we conclude that this is not likely to have an adverse effect on U.S. ***workers*** at the ranch because ranch hands can perform a much broader array of work duties. This is particularly true ***given*** that range sheep and goat herders have traditionally been granted certifications for a 364-day period to tend the herd throughout the production cycle, including times at the range and on the ranch. This practice is continued in this Final Rule, which specifically provides that it applies only to ***workers*** who spend more than 50 percent of the job order period working on the range, further distinguishing these ***workers*** from general ranch hands. Finally, we decline to adopt Siddoway Sheep's suggestion that DOL conduct a comparison of the wage rate from the FLS with the TEGL wage from a point ``when adequate information regarding sheepherders was available'' and set the current wage based on that differential. In the absence of underlying records from historic SWA surveys, which are unavailable, we cannot pinpoint the year when adequate information may have been available. However, we reiterate that the TEGL wages have suffered significant stagnation when compared to the FLS-based AEWR for more than 20 years.\31\ ***Given*** this significant wage stagnation compared to other H-2A occupations, it is appropriate to require a wage rate under this Final Rule that is well above the TEGL levels in most states. As discussed below, this Final Rule accomplishes that result. ---------- \31\ For example, the Nevada TEGL wages were $700 in 1994 and are currently $800, an increase of approximately 14 percent over two decades. By comparison, the FLS-based AEWR for Nevada in 1994 was $5.57 per hour, and the 2015 rate is $11.37, a greater than 100 percent increase. Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2015 Adverse Effect Wage Rates, 79 FR 75839 (Dec. 19, 2014); Whittaker, William G., Farm Labor: The Adverse Effect Wage Rate, CRS RL32861 (Apr. 14, 2005). Similarly, the 1994 sheep TEGL wage in Wyoming was $700 and is currently $750, an increase of approximately seven percent. By contrast, the hourly AEWR in Wyoming in 1994 was $5.59 per hour in 1994, and is now $11.14, nearly a 100 percent increase. Id. ---------- We are mindful of our statutory obligation to protect against adverse effect to U.S. ***workers***, even in cases where the number of U.S. ***workers*** may be small. As a result, we are not persuaded by employer comments suggesting that U.S. ***workers*** will not be qualified or available for this work, regardless of the wage required.\32\ [[Page 62992]] Although we agree that the remoteness of the job and skills required are significant factors influencing availability of U.S. ***workers***, it would be unreasonable to conclude that wages are without any influence on U.S. ***worker*** availability. As we have noted before with respect to our certification of temporary foreign ***workers***, a basic principle of economic supply-and-demand theory is that in market economies, shortages signal that adjustments should be made to maintain equilibrium. Therefore, compensation should rise to attract more ***workers*** where employers are experiencing a shortage of available ***workers*** in a particular region or occupation. Wage increases may not occur as expected because of the availability of foreign ***workers*** for certain occupations, thus preventing the optimal allocation of labor in the market and dampening increased compensation that should result from the shortage. ---------- \32\ Though several commenters viewed the data in the NPRM as evidence that DOL had ``conceded'' there were at most 18 U.S. ***workers*** in these occupations, this is a misinterpretation of the data. The 2014 survey identified 18 U.S. sheep herders among the States with a statistically reportable wage result located in mountain plains/western regions of the United States. However, overall in 2012, 25 ***workers*** were included in surveys of sheep herders across those States. In addition, SWA surveys in other years included a higher number of ***workers***, including in 2015. In 2015, 19 U.S. sheep herders were identified in SWA surveys across the mountain plains/western regions. In addition, because completion of the SWA survey is not mandatory, there are likely a significant number of additional U.S. ***workers*** not reported in the survey. For example, in California in 2015, the SWA survey included 10 U.S. sheep herders, and the SWA received a response from approximately 36 percent of sheep herding employers in the State. There are almost certainly additional U.S. ***workers*** among the remaining 64 percent of employers in that State. Finally, employers may have had an incentive to not report wages of U.S. ***workers*** in some circumstances because the TEGLs permit a different (and often lower) State wage to be used in the event that the SWA survey did not report a wage finding. ---------- The experience cited by Mountain Plains and Western Range in California (and by employers and others in other States)--that few U.S. ***workers*** are available for these jobs--does not undermine this basic economic theory for a number of reasons. First, we note that the ***Worker*** Advocates' Joint Comment indicated

that some employers are using experience requirements as a basis to require references on letterhead of a previous employer. Such a requirement would be difficult for U.S. ***workers*** in many occupations, and this is even more true of U.S. ***workers*** seeking work in herding occupations.\33\ In addition, though Mountain Plains and Western Range state that, in their experience, fewer U.S. ***workers*** apply for jobs in California than in other States even though the wage is higher in that State, the evidence they provide is contrary to the evidence from the SWA surveys, which suggest that higher wages in California may, in fact, be attracting greater numbers of U.S. sheep herders than in other states in the mountain plains/western regions of the United States. In fact, California is consistently among the states with the largest number of U.S. sheep herders identified in SWA surveys in these regions. In 2012, California had the largest number of sheep herders who were U.S. ***workers*** included in the SWA survey (10 in California out of 31 overall); in 2013, it was tied for the largest number of U.S. sheep herders in the SWA survey (13 in California out of 38 overall); in 2014, it was tied for the second largest number of U.S. sheep herders in the SWA survey (three out of 25 overall); and in 2015, it had the third largest number of U.S. sheep herders in the SWA survey (10 out of 52 overall).\34\ ---------- \33\ We have clarified in Sec. IV.B.2.A. of this preamble that such a written reference requirement cannot be imposed because it may result in U.S. ***workers*** who are otherwise qualified being rejected for work. \34\ In addition, the SWA surveys suggest that a significant percentage of California employers are hiring U.S. sheep herders. In 2012, approximately 13 percent (6/45) of sheep herding employers in California responding to the SWA survey hired at least one U.S. sheep herder; in 2013, that percentage was 16 percent (5/32); in 2014, that percentage was seven percent (2/29); and in 2015, that percentage was 13 percent (4/30). ---------- Further, that the TEGL wages are higher than those H-2A ***workers*** could receive in their home countries should not have any bearing on the wage set by DOL. This will ordinarily be the case with foreign temporary ***workers***. This fact supports, rather than refutes, DOL's obligation to require that wages are set at a rate that will not undercut the wages of U.S. ***workers***, who have different economic incentives than foreign ***workers*** and must support themselves in this country, not abroad. Finally, we have considered the commenters' anecdotal concerns about the unreliability of the domestic workforce. However, even if those concerns had been supported by more substantial evidence, the potential costs that may be incurred as a result of U.S. ***workers*** leaving before the end of the job order period are outweighed by the benefit to U.S. ***workers***, and by our statutory responsibility to provide that U.S. ***workers*** continue to have access to these jobs. c. Alternatives To Use of the FLS-Based AEWR To Set the Base Wage Rate i. Comments on Alternatives Where specific wage proposals were made by those opposed to using the FLS-based AEWR as part of the formula to set the base wage, these commenters generally either recommended that DOL not set any wage minimum for these occupations, that DOL continue to use the TEGL methodology, or that DOL adopt one of the two counter-proposals submitted jointly by the three primary employer associations (Mountain Plains, Western Range, and ASI), discussed further below. For example, several ranchers asserted that the federal government should have no role in setting wages for these occupations, but instead wages should be based on the agreement between the ***worker*** and employer based on the ``market.'' Although some comments opposed any increase to current wage rates, many, including ASI and a number of individual employers, acknowledged that it was important for DOL to adopt a methodology to address wage stagnation in these industries. Mountain Plains and Western Range recommended that DOL either set the monthly AEWR for these occupations based on an inflation-adjusted value from the 1994 sheep TEGL wages cited in the NPRM or based on the current FLSA minimum wage multiplied by a set estimate of hours, recommendations that were endorsed by ASI and a number of individual employers. This comment selected $800/month as the appropriate wage to index, stating that it was the highest wage in the 1994 survey.\35\ In support of using an inflation-adjusted TEGL methodology, the comment asserted that the single problem identified in the NPRM with the TEGL methodology was the lack of usable wage results from SWA surveys, which has resulted in wage stagnation. The comment further cited the 1994 sheep wage data cited in the NPRM as data identified by DOL ``as the last year for which such surveys were conducted with statistically valid results.'' The comment clarified that its proposal would set a national rate for herders, except that if a State had a higher required rate, the State rate would apply. The associations justified a national rate on the basis that ***given*** that living expenses would be paid by the employer, differences in the cost of living in various states need not be considered. ---------- \35\ Arizona had the highest wage in 1994, and it was $820/ month. 80 FR at 20307. ---------- For this approach, the associations recommended adjusting the 1994 TEGL wages using a capped version of the Bureau of Labor Statistics' Employment Cost Index for wages and

salaries (ECI), with a three year transition followed by full implementation in year four.\36\ The comment stated that the ECI is ``the [[Page 62993]] most accurate measure of inflation in wages and salaries.'' \37\ The comment suggested that, in each year, the 1994 wage rate should be adjusted by 1.5 percent if the percentage increase in the ECI during the previous calendar year was less than 1.5 percent; by the percentage increase in the ECI if such percentage was between 1.5 percent and 2.5 percent, inclusive; or by 2.5 percent if the percentage increase in the ECI exceeded that amount.\38\ ---------- \36\ In a pre-NPRM comment submitted by ASI, Western Range, and Mountain Plains, the associations recommended using the ECI for total compensation and capping it at 2 percent. \37\ See, e.g., Russer, John W., The Employment Cost Index: What is it?, Monthly Labor Review (Sept. 2001), available at http://www.bls.gov/opub/mlr/2001/09/art1full.pdf. \38\ The commenters borrowed this formula from the W-agriculture visa program proposed in Section 2232 of the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Congress (2013), passed by the Senate in 2013. The associations note that that program, including the wage rate applicable to that program, was the result of negotiations between employer representatives and farmworkers. ---------- As further support for this approach, the associations noted that the wage rate in 2019 under this recommendation, which would be above $1,350 per month, would be consistent with the wage that one of the Mendoza plaintiffs stated in court filings would be acceptable in order to permit him to resume herding. The named plaintiff, Reymundo Mendoza, stated that he would ``be willing to work as a herder if the employer paid $1,300 to $1,500 per month,'' along with other benefits not required by this Final Rule, including paid vacation. Other plaintiffs in that litigation quoted higher rates necessary in order for them to return to herding, such as the minimum wage for all hours worked, or $12.50 per hour. All of the plaintiffs in that action requested additional benefits in excess of those required by this Final Rule in order to resume herding. The second alternative recommended by these associations, which was also endorsed by ASI and many individual employers, was to use the Federal minimum wage, multiplied by the estimate in the NPRM of 44 hours per week, to establish a monthly required wage. This alternative was also presented with a three-year transition period, with full implementation in year four. As with its first recommendation, if a higher State wage was required, it would apply. This comment states: If DOL is determined to transition away from a survey-based monthly salary in favor of a monthly salary using the 44-hour week estimate and a base wage rate, Commenters submit that the Federal Minimum Wage of $7.25/hour is a more reasonable starting point than the Farm Labor Survey based AEWRs. . . . Since many of these herds and ***workers*** travel across state lines, because food, housing, and clothing are already provided for free, and in order to create a more uniform process, Commenters would propose this single monthly rate in all states, except to the extent that the California or Oregon state statutes or judicial settlements require a higher rate already. While this will place a greater burden on employers in some states more than others, the FLSA wage rate applies uniformly across the nation and serves as a model for this proposal. As with their first recommendation, the associations cited an affidavit from the Mendoza litigation, in which one of the plaintiffs stated that he would return to herding if a wage rate of $1,300-1,500 per month, plus other benefits, was offered. As with their first proposal, the associations recommended use of the same ECI methodology to adjust future wage rates if DOL remained concerned about the potential for wage stagnation. In addition to these two primary recommendations, two commenters suggested that DOL use the California herder wage to set wages in the program. An electric fencing supplier for commercial sheep ranches expressed the view that California's wage ``leads the trend'' in wages and asked DOL to use California's wage for all employers. The Chairman of ASI's Legislative Action Council similarly stated that Oregon and California wages provided useful ``reference'' points. The ***Worker*** Advocates' Joint Comment similarly used the California wage as evidence that herding employers could remain viable while paying a wage significantly above those currently required under the TEGLs. Other commenters viewed the California wage rate less favorably. Without offering evidence in support, one individual employer stated that the higher California wage rate had been ``detrimental'' to the herding industry. Western Range and Mountain Plains asserted, again without evidence to support the assertion, that the California wage rate had forced employers to reduce the size of their businesses, hire fewer U.S. and foreign ***workers***, and ask remaining ***workers*** to take on additional duties. These associations stated that proposed wage rates in the NPRM would be even more problematic because ***workers*** would be required to be paid significantly more but permitted to perform fewer duties. We also received several alternate recommendations from individual commenters, which were not supported by other comments. One sheep herding employer stated its operation could afford a wage rate of up to $2,500/month, although no methodology or data was provided in support of the $2,500 figure. Based on the employer's belief that U.S.

workers will not apply for herder jobs, another employer recommended that DOL set a higher wage rate for domestic ***workers*** as compared to foreign ***workers***, stating that this ``would address the Secretary's statutory responsibility to consider the domestic ***workers*** without challenging the viability of the businesses offering employment.'' Finally, a documentary filmmaker recommended that DOL compare the wage rates in States where large numbers of foreign ***workers*** abandon H-2A work with wage rates in States with lower levels of abandonment to determine the appropriate wage. ii. Discussion of Alternatives and Decision To Use Federal Minimum Wage as Base As discussed above, DOL received a number of comments asking DOL to retain the current TEGL methodology for setting wages or to let the market establish wage rates for these occupations. Neither of these recommendations is viable or consistent with the Department's statutory obligation to protect against adverse effect on U.S. ***workers***. As explained in detail above and in the NPRM, SWA surveys no longer provide sufficient information to permit DOL to use their results to set the AEWR for these occupations, and the persistent lack of wage results has led to wage stagnation that may result in adverse effect to U.S. ***workers***. Nor can the ``market'' set wages for these ***workers***. The requirement that DOL protect against adverse effect is based on Congressional recognition that bringing in foreign labor has the potential to distort the market for these occupations, and a negotiation between a foreign ***worker*** with little bargaining power and a U.S. employer would invariably lead to a wage below what a U.S. ***worker*** would accept. For similar reasons, we will not base the wage rate in this Final Rule on whether wages are so low that even foreign ***workers*** abandon employment, because such a rate would still be substantially below that which a U.S. ***worker*** could be expected to accept. Further, we decline to adopt a two-tiered system by which U.S. ***workers*** must be offered a higher wage rate than that offered to foreign ***workers***. To do so would disincentive the hiring of U.S. ***workers***, and would institutionalize a second tier of foreign ***workers*** willing to accept wages below that required for U.S. ***workers***, thus creating the adverse effect on U.S. ***workers*** we must avoid. Further, the three primary employer associations have proposed setting the wage based on a methodology that will result in wages significantly above the current TEGL rates. The employer [[Page 62994]] associations' proposals acknowledge that employers in livestock production can absorb a substantial wage increase, which we view as compelling evidence that the industry will remain viable even where employers pay a significantly higher wage rate to employees in these occupations. This acknowledgment is consistent with the fact that employers in Oregon and California are currently paying higher wages, and the industry remains viable at those rates in those States. This conclusion is further consistent with the historic pricing data provided by the Utah Governor's Office and American Farm Bureau, which, overall and considering variations from year to year, reflect that increases in the prices of livestock commodities (e.g., wool and lamb) have outpaced any increases wages. For several reasons, we decline to adopt the associations' first recommendation to index the 1994 TEGL data. First, this recommendation was based on a mischaracterization of the 1994 TEGL data as the ``last year for which such surveys were conducted with statistically valid results.'' The NPRM cited the 1994 TEGL data not because it was the last year that the SWA survey produced statistically valid results, but rather because it was the earliest year for which there was documented wage data when we published the NPRM.\39\ In any event, the Department no longer has access to the underlying wage survey data for any of these historic wage rates to determine how many U.S. ***workers*** were included in any of these early surveys or otherwise assess their validity. ***Given*** that many commenters discuss the persistent lack of U.S. ***workers*** in these occupations for decades, and the absence of any data to assess an appropriate year and wage rate to index, we are concerned that continued reliance on the TEGL wages, even in indexed form, would be inconsistent with DOL's obligation to protect against adverse effect on U.S. ***workers***.\40\ ---------- \39\ Since publication of the NPRM, we have located additional data for 1990, and Vermillion and Midland submitted partial data for 1981 with their comments. \40\ We also view a single employer's statement that it could afford to pay $2,500/month as an insufficient basis to set the AEWR at that rate. ---------- In addition, we decline to adopt the alternate recommendations to use the California wage rate to set the national AEWR. We agree, despite differing opinions of some commenters, that the California and Oregon wage rates provide evidence that employers can afford a significantly higher wage rate for these occupations than is currently paid, and can do so without job losses. Despite Mountain Plains and Western Range's assertion that the salary paid by California has led employers to reduce the number of U.S. and H-2A ***workers*** employed, this assertion not supported by any evidence. Labor certification data from 2013 and 2014 shows that California remains the second largest user of the herding special procedures. In any event, the California sheep herder wage rate is set through State law, Cal. Labor Code 2695.2(a)(2), and undoubtedly reflects local considerations that may not be appropriately applied across the other

States where employing sheep, goat, and cattle herders typically are employed, which generally have lower wage rates than California.\41\ ---------- \41\ See http://www.bls.gov/oes/current/oessrcst.htm. ---------- Instead, in view of the necessity to exercise our discretion in setting the wage rate, we view using the current Federal minimum wage rate of $7.25 per hour (which will be adjusted annually based on the ECI), multiplied by an 48 hours per week, to be a more reasonable basis on which to set the AEWR for several reasons.\42\ First, we agree with the Joint ***Worker*** Advocates' Comment that the persistent lack of ***workers*** in these occupations is likely ***due*** in part to the fact that U.S. ***workers*** can earn at least the federal minimum wage elsewhere, so if the new herder wage at least meets the hourly Federal minimum wage, more U.S. ***workers*** will likely be available.\43\ We further note that, although requesting additional non-wage benefits, three of the four Mendoza plaintiffs, all U.S. ***workers***, stated that they would return to herding if offered either the wage that results from our methodology or the minimum wage rate (although one qualified that he was seeking the minimum wage for all hours worked). Second, we agree with Mountain Plains and Western Range that because many of these ***workers*** travel across State lines, and because most living expenses are required to be provided from the employer free of charge, a single national rate is appropriate, unless a higher State wage applies. We view the hourly wage requirement of the current Federal minimum wage as the logical, non-arbitrary starting point on which to base the calculation of a national monthly wage rate, which sets the herder hourly wage no lower than the hourly minimum wage required for all other jobs in the U.S. economy is consistent with DOL's obligation to protect against adverse effect. Although $7.25 for each hour worked is generally a floor, using the $7.25 wage rate multiplied by 48 hours is reasonable in this circumstance because of the necessity of setting a monthly wage and because employers must provide housing and food without charge to ***workers*** in these occupations. Thus it is a reasonable exercise of DOL discretion and consistent with DOL's obligation to protect against adverse effect to set the wage rate as $7.25 times 48 hours. ---------- \42\ The hourly calculation is discussed below. \43\ Although they did not support the use of the Federal minimum wage to set the herder wage, the ***Worker*** Advocates' Joint Comment attributed the scarcity of U.S. ***workers*** in these occupations to the availability of the minimum wage in other occupations stating, ``the sustained scarcity is no doubt in large part a function of the fact that U.S. ***workers*** have the freedom to earn at least the federal minimum wage of $7.25 per hour, which is substantially higher than the herder minimum wage.'' ---------- We are borrowing the current federal minimum wage rate for these occupations as the starting point for part of the new wage methodology, which will be indexed, as discussed below, and we do so with full recognition that ***workers*** ``principally engaged in the range production of livestock'' are not required to be paid the Federal minimum wage under 29 U.S.C. 213(a)(6)(E). We note that, in recommending use of the Federal minimum wage as the starting point for these calculations, the three primary employer associations and many individual commenters have accepted the use of this wage rate as appropriate for calculating the wage rate for these occupations. Further, it is clear from the legislative history that the exemption from the Federal minimum wage for these occupations is based not upon the wage rate itself, but rather on the remoteness of these occupations and the difficulty of tracking hours worked. See Hodgson v. Elk Garden Corp., 482 F.2d 529, 531-33 (4th Cir. 1973); Hodgson v. Mauldin, 344 F. Supp. 302, 313 (N.D. Ala. 1972), aff'd by Brennan v. Mauldin, 478 F.2d 702 (5th Cir. 1973). Therefore, using the $7.25 per hour rate, multiplied by an approximation of hours to set a monthly salary, is consistent with the exemption or its purposes because it is not an hourly wage that requires hourly recordkeeping. This approach is also consistent with the way Oregon has interpreted its own State laws for these occupations, which requires the State minimum wage to be multiplied by a set number of hours (the equivalent of approximately 40 hours per week) to establish the herder's minimum required salary. Or. Rev. Stat. [[Page 62995]] 653.020(1)(e), 653.010(9).\44\ Similarly, the California monthly sheep herder wage is adjusted each time the State hourly minimum wage rises by the same percentage as the minimum wage increase. See Cal. Labor Code. Sec. 2695.2(a)(2). The current California wage rate requires ***workers*** to be paid for the equivalent of approximately 41 hours per week based on the California minimum wage. ---------- \44\ See also Technical Assistance for Employers in Agriculture, available at http://www.oregon.gov/boli/TA/pages/t_faq_taagric.aspx. ---------- In order to prevent wage stagnation from again occurring, we have determined that the new base wage rate should be subject to an adjustment methodology. We agree with those commenters who recommended that we use the ECI for wages and salaries to address the potential for future wage stagnation. Our primary concern in setting the adjustment methodology for these occupations is to confirm that the wages for these occupations will continue

to rise apace with wages across the U.S. economy. Although the Department has previously used the Consumer Price Index for All Urban Consumers (CPI-U) in other circumstances where adjustment for inflation is warranted, we conclude that it is reasonable to use the ECI for these occupations, ***given*** that housing and food must be provided by the employer under this Final Rule, making the cost of consumer goods less relevant than under circumstances in which ***workers*** are paying these costs themselves. However, we decline to adopt the minimum and maximum ECI calculations provided by Western Range and Mountain Plains, which did not provide any economic rationale for the imposition of a cap, and we will instead use the uncapped ECI to adjust wages, beginning with the rate for calendar year 2017. The 1.5 percent minimum adjustment recommended by the employer associations is illusory, because the ECI has very rarely fallen below 1.5 percent since it was first used in 1981. On the other hand, the ECI has often been above 2.5 percent. Accordingly, the methodology recommended by the employer associations would typically be relevant only in circumstances where the ECI exceeds 2.5 percent. Placing a cap on the ECI-based adjustment has the potential to produce wage stagnation; thus, to protect against adverse effect to U.S. ***workers***, we will not use a capped ECI to adjust wages because herders' wages should not be outpaced by changes to the wages of ***workers*** across the U.S. economy in order to avoid adverse effect for U.S. ***workers***. d. Estimate of Number of Hours per Week That Herders Work i. Comments on the Proposed Estimate of 44 Hours per Week In order to set the monthly salary, the NPRM proposed a wage based on the estimate that herders work approximately 44 hours per week. This estimate was an average of the 40-hour-per-week estimate suggested by ASI, Western Range, and Mountain Plains, and the 48-hour-per-week calculation submitted by Edward Tuddenham, an attorney representing ***workers***, both of which were submitted before publication of the NPRM. The 40-hour calculation submitted by the employer associations was based on the calculation in the Zapata settlement. The Tuddenham comment based the 48-hour calculation on estimates of hours submitted by employers on the Form ETA-9142A, which the comment characterized as a ``conservative'' estimate.\45\ This comment stated that the 48-hour weighted average of employer-reported data from Form ETA-9142A is ``the most diverse data set available'' on the number of hours worked by herders. The data reported hourly estimates from the two primary employer associations, Mountain Plains (60 hours) and Western Range (40 hours), and is the only data source identified by any commenter that includes data collected across States. ---------- \45\ Tuddenham collected data from 195 applications for certification on which employers stated the number of hours per week that herders were expected to work. Data supplied in the ***Worker*** Advocates' Joint Comment replicated the Tuddenham analysis. Based on employer-reported hours on the Form ETA-9142A from sheep and goat herder applications filed between October 2013 and October 2014, the ***Worker*** Advocates' Joint Comment also concluded that the average number of ***worker*** hours was 48. ---------- Employers essentially agreed to the 44-hour estimate from the proposal. Although the pre-NPRM submission from Mountain Plains, Western Range, and ASI used a 40-hour calculation, Western Range and Mountain Plains used DOL's compromise 44-hour calculation in their comment submitted in response to the NPRM, and that proposal was endorsed by ASI and many commenters. We received no other concrete estimate of hours from employers or their representatives, nor did these commenters suggest an alternative data source for an estimation of herders' work hours. Employers generally stated that the exact number of hours varied based on a number of factors, such as seasons and weather. Where they did provide estimates of hours, they were imprecise (for example, stating that herders generally work 4-6 hours per day). On the other hand, the ***Worker*** Advocates' Joint Comment objected to the 44-hour calculation from the proposal. While acknowledging that ``a monthly AEWR based on average hourly totals will never be completely accurate,'' this comment pointed out that the 40-hour calculation from the Zapata settlement did not appear to be based on any judicial finding that ***workers*** are actually engaged in work 40 hours per week, but rather was likely calculated as a salary derived from a standard 40-hour workweek. They asserted further that employers have an incentive to under-report hours on the Form ETA-9142A in order to recruit ***workers***, so that basing an hourly calculation on only employer- submitted data would be arbitrary and inconsistent with DOL's obligation to protect against adverse effect. In the commenters' view, DOL must therefore either directly survey ***workers*** or, if that is not feasible because gathering data from remotely-located employees is difficult, include data from existing ***worker*** surveys in establishing an estimate. Commenters cited only a single ***worker*** survey, Overworked and Underpaid: H-2A Herders in Colorado, conducted by Colorado Legal Services, in which Legal Services surveyed 90 H-2A Colorado sheep herders about their pay.\46\ This study found that 62 percent of herders actively worked at least 81 hours per week. Two individual employers expressly disputed the methodology in the Colorado study, stating that it was not a reliable source and was based on biased questions

from interviewers. In addition, a SWA employee commented that the 44-hour estimate was unrealistic ***given*** the requirement to be available up to 24 hours a day, seven days per week, but did not offer an alternative recommendation. ---------- \46\ The Colorado study was attached to the comment, and is also available online at https://www.creighton.edu/fileadmin/user/StudentServices/MulticulturalAffairs/docs/OverworkedandUnderpaidReport.pdf. ---------- ii. Discussion and Decision To Use 48-Hour Week Employers have been exempt from FLSA and H-2A recordkeeping requirements, so we agree with the ***Worker*** Advocates' Joint Comment that any estimate of hours worked will necessarily be imprecise. We further agree with the ***worker*** advocates that we should not base the hourly projection in any part (as we did in the NPRM) on the 40-hour estimate from the Zapata settlement. As discussed above, based [[Page 62996]] on data supplied in comments, employers across States have indicated through their Form ETA-9142A filings that herders work on average 48 hours, and so it would be improper to require them to pay for fewer hours. We concur with the assessment from Edward Tuddenham that the 48- hour estimate from ETA's own data is based on the most comprehensive and detailed data source from which to establish an hourly calculation. Accordingly, we will use that 48-hour calculation, which was also replicated in the submission by the ***Worker*** Advocates' Joint Comment, to set the number of hours for the monthly salary formula. ***Given*** the challenges with collecting data for these occupations, we conclude that it would be very difficult and resource-intensive for DOL to collect from sources outside ETA data on hours worked. Further, the Colorado study on herder wages, hours and working conditions submitted by ***worker*** advocates is informative, but very limited because it is data from a single State and thus not representative of the industry as a whole. Finally, we disagree that employers are likely to under-report hours on the Form ETA-9142A to make the job appear more attractive because employers already advertise in their job orders that herders must be available up to 24 hours per day, 7 days per week. We recognize that this 48-hour estimate will result in a higher wage than the industry-consensus proposal. However, we conclude that requiring payment for four hours a week in excess of the calculation proposed by the primary employer associations, and supported by many employers, is unlikely to have a substantial effect on the ability of employers to absorb the wage increase required by this Final Rule. Moreover, we conclude that, because it more accurately reflects the likely actual hours worked, it also more accurately reflects the wage that will prevent adverse effects on U.S. ***workers***. Indeed, it would be inconsistent with DOL's obligation to protect against adverse effect to allow employers to pay for fewer hours than is indicated on their own Form ETA-9142A. e. Food Deductions i. Comments In the NPRM, we invited comment on the issue of whether employers should be permitted to deduct some food costs from the required wage rate ``in light of the proposed increase in wages,'' and, if a food deduction was to be permitted, the appropriate amount of the deduction. 80 FR at 20305. Under the standard H-2A program regulations, employers are permitted to deduct the actual cost of meals up to a rate set each year (which is annually adjusted based on the CPI-U) to offset costs for providing the ***worker*** with three meals, unless a higher amount is authorized by the Certifying Officer. 20 CFR 655.173. The maximum standard deduction is currently $11.86 per day ($355.80 for a 30-day month). Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2015 Allowable Charges for Agricultural ***Workers***' Meals and Travel Subsistence Reimbursement, Including Lodging, Notice, 80 FR 9482 (Feb. 23, 2015). Under both of the primary wage recommendations from Mountain Plains and Western Range, employers would be responsible for paying for food, which is consistent with the NPRM, the existing sheep and goat herding TEGL, and the current cattle wage rates. But while neither of these recommendations proposed a food deduction, Mountain Plains and Western Range ``encourage[d] the Department to consider permitting one, or at least permitting a deduction reflecting the difference between the more extensive and more expensive food provided to these ***workers*** compared to the subsistence and meal charges that the Department uses for other ***workers***.'' These commenters stated that both the California State wage and the Zapata settlement in Oregon permit employers to take a food credit. In addition, Mountain Plains and Western Range asked DOL to consider the pre-NPRM letter from these associations (and also from ASI) in addition to the two new proposals in its comment. That pre-NPRM letter, included in the administrative record, asked DOL to set the wage rate at the FLSA minimum wage multiplied by 40 hours with a deduction for food based on the USDA ``liberal'' meal plan for a male, aged 19-50 years, which they stated would ``best reflect the protein- rich diet appropriate for active young to middle-aged men working outdoors in high-altitude environments.'' \47\ The pre-NPRM letter also requested that the 20 percent increase for a single individual--rather than a family--in the USDA plan be used, even though, in most instances, the employer would be purchasing food for multiple ***workers***.\48\ Based on the April

2015 USDA release, the permissible deduction under this proposal would be $448.80 per month. ---------- \47\ See Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, April 2015, available at http://www.cnpp.usda.gov/sites/default/files/CostofFoodApr2015.pdf. \48\ Under the USDA plan, the costs ***given*** are for individuals in 4-person families. For individuals in other size families, the following adjustments are suggested: 1-person--add 20 percent; 2- person--add 10 percent; 3-person--add 5 percent; 4-person--no adjustment; 5- or 6-person--subtract 5 percent; 7- (or more) person--subtract 10 percent. To calculate overall household food costs, (1) adjust food costs for each person in household and then (2) sum these adjusted food costs. See footnote directly above. ---------- Other employers and associations supported some type of food deduction. For example, the comment from Siddoway Sheep suggested three alternatives for food deductions: (1) Deducting the cost of purchasing food on each employee's grocery list from that employee's wages, (2) a standard ranch-specific deduction based on annualized actual expenditures from the prior three year period, \49\ or (3) a standard industry-wide deduction equal to 128 percent of the liberal USDA Food Plan Cost, which the employer states is ``comparable to the actual amount that we spend on meals.'' This employer stated that ***workers*** sometimes waste food and that requiring ***workers*** to pay for food might reduce this incentive. Other commenters, including the Wyoming Farm Bureau Federation, offered more general support for the concept that either food costs should be deducted or wages should be set at a level that reflects employer costs, including food and housing. ---------- \49\ The comment cited two different amounts for its cost per ***worker***: $476 per ***worker*** per month and $467 per month. ---------- Vermillion and Midland stated that a food deduction should be permitted for several reasons. The employers cited two legal ``precedents'' for its position that a food deduction should be allowed, an administrative case \50\ and Section 3(m) of the FLSA, 29 U.S.C. 203(m), which generally permits deduction of the ``reasonable cost'' of ``board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees.'' 29 CFR 531.2.\51\ The Wyoming Farm Bureau Federation and an individual employer asked DOL to clarify that employers were not required to pay for items like soda and tobacco. ---------- \50\ In the Matter of Western Range Association, 95-TLC-4 and 5 (1995). \51\ In addition, this comment stated that SWA surveys demonstrated that whether meals are required to be provided has a significant impact on the wage rate, stating that the 2010 Wyoming range rate was $1600, with deduction of board permitted, but in 2013, it was $875 with board required to be provided free of charge. We note that this change was actually based on a change in the State that was used to set the wage rate. The 2010 survey was based on a Wyoming survey, while the wage rate was later based on the Colorado survey ***due*** to insufficient data in a later year. ---------- [[Page 62997]] On the other hand, several individual employers opposed a food deduction. For example, one noted that payment of food by the employer is a ``longstanding practice of the industry.'' Another stated that it would be difficult to calculate the cost of food provided to an individual ***worker*** when food is delivered to a sheep camp containing multiple ***workers***. Similarly, the ***Worker*** Advocates' Joint Comment stated that food deductions should be permitted only if employers paid the full FLS-based AEWR required by the proposal at the end of the transition period, reasoning that once the wages of these ***workers*** were aligned with the wages in the rest of the H-2A program, the ***workers*** could afford their own food. This comment recommended that the deduction be limited to the ordinary H-2A wage deduction. The Western Watersheds Project opposed any food deductions. ii. Discussion This Final Rule maintains the current practice under the TEGLs for these industries, and does not permit employers to deduct the cost of food from ***workers***' wages. The decision to use the $7.25 per hour rather than the full FLS-based AEWR, we think it is reasonable to disallow deduction from wages for the costs of providing food to these ***workers***. This is particularly true ***given*** that sheep and goat herding employers have continually been required under the TEGLs to provide food without cost to the ***workers***, and cattle herding employers have been required to pay these costs ***due*** to the wage finding in the SWA survey since 2013. In addition, as the pre-NPRM comment from ASI, Western Range, and Mountain Plains demonstrates, in adopting a lower base wage rate than the FLS-based AEWR, a food deduction would prevent DOL from fully addressing the wage stagnation in these occupations. Allowing a food deduction would offset a substantial amount of the benefit to the ***workers*** of the increase in the wage rate and result in setting effective wages not significantly above the rates required two decades ago. The legal precedents cited by commenters do not suggest a different result. The administrative case cited by Vermillion and Midland only states that those employers providing meals without charge should be separately surveyed from those that do not, but takes no position on whether a food deduction

should or should not be permitted. Further, Section 3(m) of the FLSA applies only where the FLSA applies. Although a few commenters stated that California law permits a food deduction from its sheep herder wage, this is incorrect. California Industrial Welfare Commission (IWC) Order No. 14-2001, Sec. 4(E), 10(F) (amended Jan., 1 2002) expressly bars employers of sheep herders from offsetting the required wage by meals or lodging and incorporates by reference the requirement under the H-2A special procedures for employers to pay for meals.\52\ In addition, Oregon does not appear to authorize a food deduction for ***workers*** exempt from the minimum wage. Or. Rev. Stat. Sec. Sec. 653.020(1)(e), 653.010(9).\53\ ---------- \52\ Available at: http://www.dir.ca.gov/Iwc/IWCArticle14.pdf; see also State of California, Department of Industrial Relations: Minimum Wage FAQ, available at http://www.dir.ca.gov/dlse/faq_minimumwage.htm. \53\ See also Technical Assistance for Employers in Agriculture, available at http://www.oregon.gov/boli/TA/pages/t_faq_taagric.aspx. ---------- As discussed above, applying a food deduction would substantially erode the wage increases in this Final Rule after decades of wage stagnation, and is therefore inconsistent with DOL's statutory obligation under the INA. Finally, in response to comments, we clarify that the employer is only required to pay for sufficient and adequate food, and water, as discussed in Sections IV.B. and E. in the preamble related to Sec. Sec. 655.210(e) and 655.235, and is not required to provide ***workers*** with other items, such as tobacco or soda, free of charge, although the employer is free to do so. f. The Transition Period i. Comments ***Given*** the size of the wage increase in the NPRM, we proposed a four-year transition with full implementation in year five. 80 FR at 20310. Under the proposal, wages would have been set at 60 percent of the full wage rate in year one, 70 percent in year two, 80 percent in year three, and 90 percent in year four. In proposing this approach in the NPRM, we reasoned that a transition period was needed in order to avoid the unintended consequence of significant job losses that could be prevented by a gradual implementation. Both the primary Mountain Plains and Western Range recommendations supported a transition, mirroring DOL's concerns in the NPRM about significant job losses if the wage increase were implemented immediately. For each proposal, Mountain Plains and Western Range recommended a three-year transition, with full implementation in year four. For their proposal to use an indexed TEGL wage rate, they proposed to start at 80 percent of the fully adjusted wage; for their proposal to use the FLSA minimum wage, they proposed to start at 75 percent of the adjusted wage. The comment did not provide for any inflation adjustments to the FLSA-based wage until after full implementation, and did not explain the basis of that recommendation. Several individual employers and associations, including the Colorado Wool Growers Association, asked for a longer transition period than proposed if the FLS-based AEWR was used to establish the monthly rate. Conversely, the ***Worker*** Advocates' Joint Comment stated that a transition to a new wage could not be squared with DOL's statutory obligation to protect against adverse effect. This comment asserted that no transition of new wage rates was appropriate ***given*** the long history of wage stagnation, which, as discussed above, they attributed to DOL's policy of using SWA survey results and implementation of those results. As discussed above, they cited wage rates for several occupations that do not primarily involve range work, were below the FLS-based AEWR, or were based on sample sizes too small for the SWA to report a wage. They also cited the current California sheep herder wage rate for the proposition that employers could immediately adjust to the full FLS-based AEWR. This comment stated that a transition would cause adverse effect to U.S. ***workers*** employed as ranch hands by permitting a much lower wage to be paid for similar work. It further asserted that DOL provided no ``empirical support'' for the need for a transition in the NPRM, and asked DOL to consider the scope of previous wage stagnation from the SWA surveys as the basis to reject any transition period, or at least in deciding what percentage level to set the wage during a transition period. Several other comments from the Western Watersheds Projects and a few individual commenters stated, without additional elaboration, that the proposed wage rates should apply immediately. ii. Discussion The wage increase under this Final Rule is less than under the proposal, but it remains significant; the final wage rate approximately doubles the current required wage rate for sheep herders in a number of States. For the reasons discussed above, consistent with our decision to use an alternative to the FLS-based AEWR to set the monthly AEWR, we conclude that the data submitted in the ***Worker*** Advocates' Joint Comment does not require immediate implementation of the new wage. Although the California wage [[Page 62998]] provides some evidence that a higher wage can be tolerated, we note that the current California rate was implemented over a number of years, and therefore does not provide strong evidence that employers outside of California can absorb a significant increase quickly without job losses.\54\ As discussed above, we disagree with several of the conclusions raised by the ***Worker*** Advocates' Joint Comment about DOL's conduct in administering the SWA surveys, but agree that the lack of wage results from U.S.

workers in the surveys has led to wage stagnation for these occupations. ---------- \54\ The California wage rate was first established in 2001 at a rate of $1050 per month. See California IWC Order No. 14-2001, Sec. 4(E). Adjustments are now made to the California monthly sheep herder wage rate each time the State hourly minimum wage increases (with the monthly wage increased by the same percentage as the State hourly minimum wage increase). Cal. Lab. Code 2695.2(a)(2). ---------- In light of the scope of the increase and the economic data provided by commenters, we conclude that a limited transition period to the new wage is necessary. However, we recognize that any transition must not be longer than necessary to prevent adverse effect. As a result, this Final Rule requires a two-year transition (rather than the four years proposed, or the three years recommended by Mountain Plains and Western Range) with full implementation in year three. A transition is particularly needed ***given*** that the new wage rate must be paid by all employers one month after publication of the Final Rule, even if the employer is operating under a current certification, as provided in the discussion above related to paragraph 655.211(a). In addition, consistent with the consensus proposal submitted by Mountain Plains and Western Range, we will require the wages to be set at higher percentage levels during the transition years than those proposed, with 80 percent of the full wage rate required in year one and 90 percent in year two. This methodology requires employers to pay more than half of the required increase in in the first year of implementation. The Western Range and Mountain Plains proposal did not apply any inflation adjustment until after the transition period in their proposal. We conclude that this is inconsistent with DOL's obligation to protect against adverse effect, because it would result in wage rates in future years being lower than if no transition had been applied. Accordingly, after setting the wage rate in year one, we will begin to apply the ECI adjustment in year two so that wages in future years will not be reduced by DOL's decision to apply a transition period. D. Filing, Processing and Post-Acceptance Procedures 1. Sec. 655.215 Procedures for Filing Herding and Range Livestock Applications a. Geographic Scope, Who May File, What To File The TEGLs provide a variance from the geographic scope limitations applicable to Applications for Temporary Employment Certification filed under the standard H-2A regulations, specifically the geographic limitations of 20 CFR 655.132(a) for H-2ALCs and 20 CFR 655.131(b) for master applications. The variance set out in the TEGLs permits an employer (whether an individual, an association, or an H-2A Labor Contractor) engaged in range herding or livestock production to file an application and Form ETA-790 covering work locations in multiple areas of intended employment and within one or more States. The TEGLs require those employers to include an attachment listing the locations, estimated start and end dates, and the names and contact information of all employers where work will be performed under the job order when filing an H-2A Application for Temporary Employment Certification. Employers are expected to identify the locations with as much geographic specificity as possible in order to apprise potential U.S. ***workers*** of where the work will be performed and to ensure recruitment in all areas of intended employment. The NPRM proposed continuing the TEGLs' approach to the geographic scope of work permitted in Applications for Temporary Employment Certification, which would allow applications for both range herding and production of livestock positions to encompass work in multiple areas of intended employment and in more than two contiguous States, and require the employer to submit a work location list with its application. The Department did not receive any comments directly addressing the proposal related to geographic scope limitations for job orders and applications. However, we continue to recognize the transient nature of range herding and livestock production work, as was apparent in other comments received and has been long recognized by the Department. Accordingly, we have adopted this provision in the Final Rule without change. For master applications, the TEGL covering sheep and goat herding range ***workers***, but not the TEGL for range livestock production ***workers***, allows an association filing as a joint-employer with its members to submit annually a single Form ETA-790 for a master job order directly with the NPC that identifies all included employer-members, dates of work, and work locations and will remain open year-round, unless modifications are required. The employer-members included in the sheep or goat herding master job order are not required to have the same date of need, which is a variance from the date of need requirement in the standard H-2A regulations, at 20 CFR 655.131(b). Because the TEGL covering range ***workers*** engaged in livestock production does not include this variance, an agricultural association filing a master application seeking range livestock production ***workers*** must submit a new Form ETA- 790 to the appropriate SWA in advance of filing each H-2A Application for Temporary Employment Certification, and that job order may only include employer-members who share the same date of need. In the NPRM, we proposed to allow an agricultural association filing a master application for a range occupation eligible for processing under these rules to include employer-members with different dates of need in a single application and job order. This proposal would expand

current practice for sheep and goat herding employers to livestock production employers. We also proposed to retain as a variance only for sheep and goat herding positions the allowance for an association to submit a single Form ETA-790 for a master job order annually. The Department did not receive comments addressing the filing procedures in proposed Sec. 655.215, and we adopt the provision largely as proposed. Specifically, the Final Rule adopts without change the proposed provisions identifying the forms and documents range employers must submit to the NPC and allowing employer-members with different dates of need to be included in a single master application, regardless of whether the job order and application involves range sheep or goat herding or other range livestock production. The Final Rule also adopts without change the provision allowing annual submission of Form ETA-790 for master application job orders for range sheep and goat herding occupations, unless the job order requires modification. We conclude that these filing procedures [[Page 62999]] will increase consistency of processing job orders and applications for range occupations. For greater clarity, however, we have made a minor deletion from proposed Sec. 655.215(b)(2); we have removed the word ``total'' in both places that it appeared in this provision regarding the period of need identified on an H-2A Application for Temporary Employment Certification and Form ETA-790 submitted for processing. The dates of need identified on all Applications for Temporary Employment Certification and job orders must be continuous, making the ``total'' term unnecessary. As we have stated above, this section of the Final Rule contains the only variances the Department is making from the general H-2A filing procedures for eligible employers seeking ***workers*** in range herding and production of livestock occupations. Unless specifically addressed in these provisions, employers must comply with the processing procedures in the standard H-2A regulations, at 20 CFR 655.130-655.132. b. Period of Need i. Background The range livestock production TEGL does not address the period of need an employer must identify on its H-2A Application for Temporary Employment Certification. As a result, these employers must demonstrate that the period of need identified on the application satisfies the temporary, seasonal need standard in the standard H-2A regulations, at 20 CFR 655.103(d). The range sheep and goat herding TEGL, however, permits an employer seeking temporary range sheep or goat herders to identify a period of need of up to 364 days and provides for year-round posting of master job orders. The NPRM proposed continuing the TEGLs' distinction between sheep and goat herder employers' period of need and the period of need allowed for the range production of livestock. Thus, the NPRM proposed allowing employers of range sheep and goat herders to identify a period of need of up to 364 days on the H-2A Application for Temporary Employment Certification and for the Form ETA-790 for a master job order to be submitted once annually. In addition, the NPRM proposed allowing employers of range livestock production ***workers*** to identify a period of need of up to 10 months and proposed to require a separate, application-specific Form ETA-790, including those associated with master applications, to be filed with each H-2A Application for Temporary Employment Certification, Form ETA-9142A, as described in proposed Sec. Sec. 655.205 and 655.215. Also as set out in the NPRM, the proposed continuation of this distinction between range occupations for the purposes of the period of need was intended to maintain overall consistency with the standard H-2A regulations, at 20 CFR 655.103(d), and at the same time preserve the unique history of and experience with range sheep and goat production employers. The NPRM sought comment specifically on the issue of the temporary and seasonal nature of herder work, including the amount of time spent on the open range during a year. 80 FR at 20311. We asked about whether the unique characteristics of herding work exist year-round. Id. Specifically, we sought comment about ``whether sheep and goat herding involve distinct temporary positions at different times of the year that require more than one certification to reflect distinct temporary and/or seasonal needs under the INA.'' 80 FR at 20303. The NPRM noted that we would consider the application of a similar 10-month limitation to sheep and goat herders, to reflect more appropriately their temporary or seasonal need as required by the INA. Id. We asked several specific questions about seasonal or cyclical variations in herder work, worktime spent on the range versus the ranch, and duties performed during the different periods, among other questions. 80 FR at 20303. ii. Comments on Temporary Need Many comments by employers of sheep and goat herders indicate that they use the 364-day maximum period of need permitted under current practice. Several employer comments indicate that they re-employ the same H-2A ***workers*** over the years. Mountain Plains and Western Range urged the retention of the 364-day limit on sheep and goat herding, and suggested the extension of the cattle herding limit from 10 to 12 months, because ``[a]ll of these animals require year-round care[.]'' However, this comment was somewhat vague about any particular seasonal demands of the work: The general response [to the NPRM questions about the seasonal nature of the work] is that the work is performed on an ``as the need arises'' basis, and there is no single description of a ***worker***'s typical day. The work is defined first and foremost by the needs of the animals in the

herder's care. During lambing, kidding, and calving season, the days are longer and the work is focused on the healthy birthing of new animals. Those duties occur at certain times of the year according to the natural cycles of the seasons and the animals. In parts of the West, employers use fixed structures (known as ``sheds'') to keep livestock and their offspring safe and healthy during the birthing process. Other ranches perform birthing in open-air pastures. The amount of time spent assisting with this phase depends on the natural conditions of the male and female livestock. The associations explain that the work is not only performed on an ```as needed'' basis, but it is also highly dependent on the weather conditions. The ***Worker*** Advocates' Joint Comment included a brief statement supporting separate certifications for the range production of sheep and goats over the 364-day period of need: We applaud DOL for requesting comments on whether more than one H-2A labor certification period should be necessary for ***workers*** who tend sheep and herd goats. The best way to protect the wages and working conditions of U.S. ***workers*** is to have two separate certification periods, one for the birthing period in the spring, which takes place on the ranch, and one for the open range season which lasts from summer through winter. Because the spring birthing period involves no open range tasks, jobs during this season should fall under the normal H-2A regulations, not the proposed special regulations for open range herders. One of the most informative comments on the nature of herder work and its seasonality was from Siddoway Sheep Company. This comment clearly delineated the seasonal aspects of herder work, at least with respect to this particular ranch. In the winter, the work on the ranch is devoted to lambing (some ranches conduct lambing operations later in the spring, sometimes on the open range, and others conduct it in sheds on or by the base ranch). The Siddoway Ranch conducts lambing in sheds. In January, herders bring the flock closer to the base ranch, and as the herders move down from the winter range, they move into the bunkhouse. Lambing begins in mid-February. ***Workers*** are engaged in lambing activities at the base ranch for eight to ten weeks. During the next season--spring grazing--herders move into mobile housing, also called a ``sheep camp.'' During the spring grazing season, herders move the sheep away from the base ranch toward the summer range, and this period lasts for eight to ten weeks. By the first day of summer, the herders begin to move the sheep to the high mountain meadows for summer grazing. During summer grazing, herders move from the ``sheep camps'' into outfitter tents. By mid-September, herders begin to move the sheep down from the mountains for fall grazing, and to separate the market sheep from the rest of the herd. The herders move back into the sheep camps. The sheep are bred in October, during the fall grazing period. Once the [[Page 63000]] sheep are bred, the herders and the flock return to the base camp for the winter. The lambing preparations begin again in January. According to Siddoway's practice, the fall grazing period, which is approximately 20 weeks, is the least labor intensive and is the best time for employees to return to their home abroad or otherwise take an extended vacation. iii. Discussion We have decided to retain the limitations on period of need contained in the TEGLs and proposed in the NPRM. As a result, Sec. 655.215(b)(2) requires that the period of need for the range production of cattle must be no more than ten months, which is consistent generally with the standard H-2A maximum period of need, and the period of need for range production of sheep and goats must be no longer than 364 days. We make this decision after considering several factors. First, Section 101(a)(15)(H)(ii)(a) of the INA permits aliens to obtain H-2A visas to come ``temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a). Section 101 does not define ``temporary'' work for purposes of H-2A visas, nor does it indicate how long a position may last and still qualify as ``temporary'' work. The legislative history of the INA is silent about the expected duration of ``temporary'' work. Under current regulations issued by the U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS), in order to obtain an H-2A visa, an employer must establish that employment is either seasonal or temporary, which, except in extraordinary circumstances, should last no longer than one year. 8 CFR 214.2(h)(5)(iv)(a). DOL's H-2A regulation on this point is consistent with the DHS regulation. 20 CFR 655.103(d). Therefore, neither the statute nor the agencies' regulations proscribe the 364-day period of need applicable to the range production of sheep and goats. Second, we have relied for decades on the unique history and experience of sheep herding in the U.S. to support the 364-day period of need for sheep ranchers. This history was discussed in great detail in both the NPRM, 80 FR at 20301-20302, and the TEGL governing sheep and goat production, and we see no reason to rescind our reliance on this aspect of these jobs to shorten the period of need. Finally, we have reviewed and considered all the comments on this subject, and it is clear that both the ranchers and the herders they employ are well accustomed to the longer period of need for range production of sheep and goats, and that shortening it would be disruptive to the livelihoods of employers and employees alike. c. Comments on Filing Procedures Addressing Issues Outside the Scope of the Rulemaking We received several

comments on post-certification procedures that were beyond the scope of this rulemaking. First, Mountain Plains and Western Range requested clarification about the post-certification ability of an agricultural association filing a master application to transfer ***workers*** between employer-members as needed during the certified period. Similarly, Eph Jensen Livestock, LLC also commented on the value of an association's ability to transfer ***workers*** among employer-members on a master application job order. As the Mountain Plains and Western Range comment pointed out, the INA allows a master application certified under the H-2A program to be used for the job opportunities of any of the employer-members that were disclosed in the master job order, and hired ***workers*** may be transferred among the employer-members to perform the services for which the certification was granted. 8 U.S.C. 1188(d)(2). This statutory authority, which has not changed, applies to all master applications filed under the H-2A program, not only those for range sheep and goat herders. Although the range sheep and goat herding TEGL included discussion of this INA provision, and explained the Department's expectations where an agricultural association engages in ***worker*** transfers, the allowance is not a variance from standard rules. As it is not a variance applicable only to the applications eligible for filing under the herding and range livestock regulations, it is outside the scope of this rulemaking. The Department also received comments from two employers, Maltsberger Ranch and Cherry Ranch, suggesting changes to H-2A visa duration and the Department's general processing timeline for H-2A applications. McPherrin Damboriena Sheep Co. also expressed the difficulty of aligning visas with actual employment dates. The Department considers these comments beyond the scope of the proposed rule, because they raise issues that cannot be resolved through this regulatory process, which addresses only H-2A range applications, and are therefore not within the scope of this rule. 2. Section 655.220--Processing Herding and Range Livestock Applications for Temporary Employment Certification The TEGLs do not provide variances from the processing procedures in the standard H-2A regulations at 20 CFR 655.140-655.145, except as necessary to accommodate the variances provided for master job orders for range sheep and goat herding occupations, which are submitted annually to the NPC and posted with the SWA year-round, unlike other job orders. Because the Department proposed in the NPRM to shift the timing and location of filing the Form ETA-790 for range occupation job orders from a pre-filing submission to the SWA to concurrent filing to the NPC, we also proposed variations to the standard processing procedures to the extent necessary to reflect the NPC's processing of Forms ETA-790 received with Applications for Temporary Employment Certification for these occupations. The Department proposed that, when the Certifying Officer (CO) determines that an application and job order meet all regulatory requirements, the CO would notify the employer and transmit a copy of the Form ETA-790 to any one of the SWAs with jurisdiction over the anticipated worksites so that recruitment can begin. When an agricultural association filed a master application and Form ETA-790 on behalf of its employer-members, the NPRM proposed the CO would transmit a copy of the Form ETA-790 to the SWA with jurisdiction over the association's location. The CO's notification would also direct the SWA receiving the Form ETA-790 copy to place the job order promptly in intrastate and interstate clearance, including forwarding the application to all States where work will be performed. In addition, the NPRM included a proposed provision intended to clarify how the electronic job registry requirement at 20 CFR 655.144(b) (i.e., H-2A job orders must be posted in OFLC's electronic job registry until 50 percent of the work contract period has elapsed) would apply to a job order approved for an agricultural association filing a master application, ***given*** the different dates of need the NPRM proposed be permitted for individual employer-members within a single master job order. Specifically, the Department proposed that we would keep the master job order posted on the electronic job registry until 50 percent of the work contract period had elapsed for all employer-members identified on the job order (i.e., the 50 percent period [[Page 63001]] would be measured based on the employer-member with the last date of need). The Department did not receive comments addressing these proposed provisions, and we are adopting them unchanged in the Final Rule. These provisions establish a clear, consistent processing framework for applications and job orders for eligible range employers. This section of the Final Rule contains the only variances the Department is making from the general H-2A processing procedures for eligible employers seeking ***workers*** in range herding and production of livestock occupations. Unless specifically addressed in these provisions, employers must comply, as they do currently, with the processing procedures in 20 CFR 655.140-655.145. 3. Section 655.225--Post-Acceptance Requirements for Herding and Range Livestock The TEGL for range livestock production occupations provides no variances from the standard rule's post-acceptance procedures in the standard H-2A regulations, at 20 CFR 655.150-655.158. The TEGL for range sheep and goat herding occupations, however, provides a variance from the newspaper advertisement requirement in the standard H-2A regulations, at 20 CFR 655.151, and clarifies the Department's expectations for an agricultural association's

handling of referrals and U.S. applicants responding to master job orders involving multiple employer-members. In the NPRM, the Department proposed to expand almost all of the range sheep and goat herding TEGL's variances to encompass range livestock production occupations as well. The proposed rule waived the requirement for the placement of an advertisement on two separate days in a newspaper of general circulation as provided in the standard H-2A regulations, at 20 CFR 655.151. The NPRM also included a proposed provision intended to clarify that master application job orders for herding and range livestock employers would be handled in the same way OFLC handles other job orders approved for an association of agricultural employers filing a master application as a joint employer on behalf of its employer-members; the CO would direct the SWAs to keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the approved job order. Moreover, the NPRM proposed to expand and codify an association's obligation to accommodate U.S. ***workers***' worksite location preference to all master job orders for range occupations eligible for processing under this rule. Finally, the NPRM included a proposed provision intended to clarify that an association handling the recruitment requirements for its employer-members must maintain a recruitment report containing the information required by 20 CFR 655.156 in a manner that allows the Department to see the recruitment results for each employer-member identified on the H-2A application and approved job order. We received several comments on these issues. Mountain Plains, Western Range and the SBA Office of Advocacy commented that employers engaged in range herding and livestock production cannot find qualified and available U.S. ***workers*** to fill their positions despite employers' efforts. ASI indicated that the labor demographics changed in the 1980s and 1990s, after which time the industry has not been able to find U.S. ***workers*** who were interested or had a background in herding. Western Range stated that in 2012 only 22 U.S. ***workers*** applied for approximately 1,000 sheepherder positions with its employer-members, and of those 22 applicants, only 2 were considered qualified and ultimately hired. However, Western Range reported that neither of the two U.S. ***workers*** hired completed the work contract period. Mountain Plains stated that, in 2014, its employer-members sought to hire ***workers*** for more than 1,000 range sheep and goat herding, range livestock production, sheep shearing, and wool grading positions. Of the two qualified U.S. ***workers*** who applied, one was not interested in the job and the other was hired but didn't complete the work contract. The Department also received a number of comments from other employers, professional associations, and private citizens generally noting the unavailability of U.S. ***workers***. These comments noted that despite recruitment efforts, U.S. ***workers*** are not interested in range herding and production of livestock jobs, and that those who do express initial interest tend to not complete a season. One commenter indicated that U.S. ***workers*** are not willing to work more than 40 hours a week. A different commenter indicated that the shortage of both sheep shearers and shepherds is not just limited to the United States, but is worldwide. Another commenter indicated that the domestic labor force is drawn instead to higher paying job sectors, such as oil and gas, where jobs are prevalent in the West. Another employer noted low unemployment rates in her State, and indicated that her business hires interns through a trade association, the Navajo Nation, and from local colleges, but that these ***workers*** are available only on an ad hoc basis, and do not provide a stable and consistent labor force. In addition, a number of commenters generally urged the Department to maintain the status quo and keep the existing special procedures for these occupations without change, expressing satisfaction with the existing program variances. The Department also received a comment from a SWA employee commenting as a private citizen, stating that employers should be required to engage in maximum recruitment efforts and affirmatively request a referral report from the SWA. The commenter also asked the Department to address the commenter's perceived employer preference for foreign ***workers***, the experience requirements in the job order, and the difficulty U.S. ***workers*** have to predict their availability a month or two in advance of the employer's start date. The commenter thus raised obligations applicable to all H-2A employers (including the prohibition against preferential treatment of foreign ***workers*** and the timing of recruitment in advance of the employer's start date of need). All employers seeking H-2A ***workers*** are required to conduct at least the recruitment activity the Department requires, and to cooperate with the SWA referring U.S. applicants. These obligations are not new or specific to these range employers. The commenter did not suggest specific additional recruitment activity or suggest that newspaper advertisements should be retained as a requirement. We note that we address acceptable experience requirements for these range occupations in Section IV.B.2.a. of this preamble. None of the commenters disagreed with the Department's proposed position that newspaper advertisements are impractical and ineffective recruitment tools for these range occupations. Accordingly, the Final Rule adopts the proposal to expand the current variance to newspaper advertisements to all range occupations eligible for processing under this rule. After considering all the comments received on this

section, we have decided to retain the original Sec. 655.225 as proposed. Because both range herding and livestock production cover multiple areas of intended employment in remote, inaccessible areas within one or more States, and where fewer communities have newspapers, the newspaper advertisement is impractical [[Page 63002]] and ineffective for recruiting domestic ***workers*** for these types of job opportunities. The CO will direct the SWAs to keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the approved job order. The SWA will refer all qualified U.S. ***workers*** to the association, and the association has an obligation to make every effort to accommodate a U.S. ***worker***'s worksite location preference (e.g., the location with an opening nearest to his or her place of residence). In addition, this Final Rule clarifies that an association handling the recruitment requirements for its employer-members must maintain a recruitment report containing the information as required under the standard H-2A regulation, at 20 CFR 655.156, in a manner that allows the Department to see the recruitment results for each employer-member identified on the H-2A application and approved job order. As we have done above, we note again that this section of the Final Rule contains the only variances the Department is making from the general post-acceptance procedures in the standard H-2A regulations for eligible employers seeking ***workers*** in range herding and production of livestock occupations. Unless specifically addressed in these provisions, employers must comply with the post-acceptance procedures in 20 CFR 655.150-655.158. E. Range Housing 1. Section 655.230 Range Housing \55\ ---------- \55\ The title to this section, which was ``Mobile Housing'' in the NPRM, has been changed to ``Range Housing'' in the Final Rule for the reasons discussed in this section of the preamble. ---------- a. Background The TEGLs require employers to provide free housing to H-2A and corresponding U.S. ***workers*** who are not reasonably able to return from their work location to their residence within the same day. Because of the transient nature of the work--going where the herd goes, often in remote areas at some distance from the employer's ranch or farm--the TEGLs recognize that permanent housing is not feasible. Instead, the TEGLs recognize the need for housing that could be moved from one area on the range to another. Under the practice permitted under the TEGLs, most ***workers*** were provided a mobile camper that would be towed from one location to another as housing. Tents and other shelters were also used for this purpose, typically where there was no practical alternative ***given*** limited accessibility by vehicle because of remoteness and terrain. In the NPRM, the Department proposed to include in this section the following basic requirements that were established under the TEGLs: (1) Employers subject to this rule may use mobile housing where more permanent housing is not practicable because of the remote and changing location of the employment or its terrain, or the ***worker*** is engaged in the production of livestock or activities minor, sporadic, and incidental to herding or production of livestock; (2) OSHA standards for range ***workers***, if promulgated, must be followed; (3) the mobile housing must be inspected by state officials at least every three years, and, if certified as meeting established standards, annually by the employer until the next scheduled state inspection; (4) if a ***worker*** is working on or near the employer's ranch, farm, or other central facility (defined as within a reasonable distance for a ***worker*** to travel each night), the employer must provide the ***worker*** access to a toilet, kitchen, and a cleaning facilities for the ***worker*** and his or her clothing, including showers with hot and cold water under pressure; and (5) where a ***worker*** is residing temporarily at the employer's fixed- site housing, rather than using his/her mobile housing for this purpose, the fixed-site housing must meet the requirements of 20 CFR 655.122(d) (the housing standards generally applicable to H-2A employment). The Department explained in the NPRM that since there are no specific OSHA standards for mobile housing on the range, employers were required to follow the requirements established by the TEGLs and that the Department proposed to include these requirements, with some modifications, in this section and section 655.235. The Department invited specific comment on whether an employer should be required to provide a range ***worker*** a sleeping facility in fixed-site housing when the ***worker*** is working at or nearby the employer's ranch, farm, or some other central location. b. Comments and Discussion A few commenters stated that a range ***worker***'s housing should meet the same or similar standards applicable to H-2A ***workers*** or other ***workers*** engaged in agriculture. Most commenters, however, recognized the unique nature of range employment and addressed various aspects of proposed section 655.230, including inspection of mobile housing, and access to kitchen, toilet, washing, and laundry facilities when a ***worker*** is at or nearby an employer's ranch or farm. ***Worker*** advocates, employers, and their associations responded to the Department's invitation for comment on whether an employer should be required to provide sleeping accommodations (other than the ***worker***'s mobile camp) when a ***worker*** is performing work at or near an employer's ranch, farm, or some other central location. Additionally, a few commenters noted that the Department's proposal should be clarified to address

temporary bunkhouse-type structures used in remote areas in Texas and Montana, and possibly other areas, to house ***workers*** when working in these areas. The comments on these particular issues and the Department's resolution are discussed immediately below by issue. i. Inspection Several employers and a State agency stated that the current inspection system is working and that there is no need to change the system. They explained that SWA inspection of mobile housing is occurring as often as once or twice a year in some places. One employer, Eph Jensen Livestock, however, noted the application of the standards by inspectors and investigators sometimes varies drastically, and asked the Department to better ensure clarity and consistency in inspections. In contrast, ***worker*** advocates asserted that the mobile units used by employers often failed to meet the existing standards. They stated that the Department should better monitor and track mobile housing by requiring annual inspections and instituting a system to track the units inspected, and create an ombudsman position to ensure compliance. They recommended the elimination of the self-inspection process, and stated that if the system was continued there should be more detailed requirements for the self-certification system. In their view, some employers require ***workers*** to use uninspected, unsafe units, sometimes in place of those that had been presented for inspection. The ***worker*** advocates stated, as a general rule, that the mobile housing is not adequately maintained, especially ***given*** the rigors of climate and terrain. As stated in the preamble to the NPRM, mobile housing must comply with the established standards in order to provide a ***worker*** with adequate shelter in circumstances where the climate may be harsh and the terrain is often rough. Regular maintenance and inspection of the mobile units are necessary for a ***worker***'s wellbeing. In the Department's view, the proposed inspection system--properly applied-- including the denial of certification [[Page 63003]] where a mobile unit is deficient and the assessment of an appropriate penalty for failing to maintain standards, provides sufficient remedies to protect ***workers***. SWAs are encouraged to review their inspection procedures and to increase the frequency of inspections where they deem appropriate. As noted by some commenters, some states require at least annual inspections, and we encourage other states to do so. SWAs are encouraged to share best practices to improve inspection procedures, develop checklists to assist employers in conducting self-inspections, and take steps to prevent the alleged fraudulent practice in which some employers ignore the inspection process by providing uninspected mobile units to ***workers*** under the guise that they have been inspected. ii. Providing Kitchen, Toilet, Shower, Laundry and Sleeping Facilities for ***Workers*** Performing Work at or Near a Ranch or Farm No commenters directly opposed the Department's proposal regarding provision of kitchen, toilet, shower, and laundry facilities where a ***worker*** is performing work at or near an employer's ranch, farm, or other location where these facilities are already available to other ***workers***. Some commenters stated that they routinely provide these services to the ***workers***. The ***worker*** advocates did not oppose the idea that these services must be provided to ***workers***, but, as discussed below, they favored requiring employers to provide fixed-site housing, meeting the usual standards for H-2A housing, for any range ***worker*** who was at or nearby a ranch or farm for more than one week. In responding to the Department's inquiry whether employers should be required to provide living facilities separate from the mobile housing while the herder is working at or near the ranch, several employers and employer associations, including Mountain Plains and Western Range, Lava Lake Land and Livestock, and the Siddoway Sheep Company, voiced strong opposition to the idea. Many stated that such a requirement would be unreasonable because it would require them to construct a structure that would have to meet all the OSHA requirements for fixed-site housing, even though the structure would be used only a few weeks per year. They instead supported the Department's proposal to allow range ***workers*** to continue to live in their assigned mobile housing unit when located near a fixed-site ranch location. As mentioned above, however, ***worker*** advocates disagreed, asserting that ***workers*** should be provided fixed-site housing that meets all the OSHA standards, whenever a ***worker*** is at or near the ranch or other location for more than a week. In their view, providing access to running water, toilets, and bathing facilities does not replace an employer's requirement to provide housing meeting the normal standards for H-2A ***workers***. The Department is adopting its proposal without change. We recognize that there are times when the mobile housing is located at or near the ranch or a central location for certain operations that are a normal part of the herding cycle, such as birthing, shearing, or branding. In such instances, the practice has been for ***workers*** to use mobile housing, even where access to fixed housing exists. Under the Final Rule, an employer may continue this practice so long as it provides the ***workers*** with access to the other facilities required by this section. However, the Department encourages employers to make appropriate housing available at the ranch, if they have it and if the ***workers*** prefer to stay in that housing. iii. Remote, Stationary Range Housing A few commenters, including Mountain Plains and Western Range, the Texas Sheep and Goat Raisers Association, and an employer, William Ashby Maltsberger, expressed concern about the use by

employers of remote, but not mobile, housing in their range operations. The commenters stated that these operations, located in Montana and the southern plains states, use strategically located wooden bunkhouses in remote areas as they move herds through their grazing routes. The commenters stated that in light of this practice, it would be inaccurate for these employers to include a statement about ``mobile housing'' in the job order, as would be required under the Department's proposal. They expressed concerns, too, that unless the Department modified its proposal, these employers could be denied use of range ***workers*** under the H-2A program. The Department's use of the term ``mobile housing'' in TEGLs and the NPRM was intended to distinguish remote housing provided to ***workers*** engaged in range work from fixed-site housing at a ranch or farm. The term's usage was not designed to preclude employers from using remote, but stationary, housing. Accordingly, the title to this section has been changed to ``Range Housing,'' not ``Mobile Housing,'' and the regulatory text for Sec. Sec. 655.230 and 655.235 has been revised to clarify that such housing may be used to house range ***workers*** under this rule while they work in remote areas so long as such housing meets all the requirements of this section and the minimum standards established under Sec. 655.235. 2. Section 655.235 Range Housing Standards.\56\ ---------- \56\ The title to this section, which was ``Mobile Housing Standards'' in the NPRM, has been changed to ``Range Housing Standards'' in the Final Rule for the reasons discussed in the prior section of the preamble. ---------- a. Background The NPRM, in large measure, proposed to codify the minimum standards historically applied by the Department to mobile housing used by sheep, goat, and cattle herders while working on the range. These proposed standards, which closely track the requirements in both TEGLs, were generally consistent with the housing rules for temporary agricultural ***workers*** published under 20 CFR part 654, subpart E, as adapted to the unique circumstances of range ***workers***. Providing suitable housing for ***workers*** on the range presents unique challenges, ***given*** the continuing movement of the range ***workers*** as they lead their herd to new grazing areas, often in remote locations at considerable distance from the herd's starting or interim locations, and the relatively small number of ***workers*** engaged in this work. In most instances, the housing, which is defined to include tents, moves along with the ***worker*** and the herd to the next grazing location. The housing standards, although providing general requirements regarding their physical structure and inspection (see also Sec. 655.230), also specify requirements relating to the provision of facilities (e.g., for sleeping, heating, and cooking) and services (e.g, water supply and refuse disposal). These standards are often flexible; a particular standard typically allows an employer to select from various options and to make adjustments for particular location, terrain, and other circumstances. The standards necessarily differ, sometimes significantly, from the requirements for less temporary, fixed-site housing used by other ***workers*** engaged in agricultural duties. Thus, while the Department has standard H-2A regulations governing fixed-site housing for other temporary ***workers*** engaged in agriculture, these regulations cannot be readily applied to the range. The term ``mobile housing'' suggests a structure capable of being transported from one location to another. The housing provided to herders most often [[Page 63004]] is a wheeled-structure, varying from recreational type-vehicles seen every day on highways, to other vehicles, more rustic in appearance (``campers''), trailed behind cars or trucks. The proposed rule, like the TEGLs, established requirements for these vehicles, but it also included requirements, as did the TEGLs, applicable to tents, which may be used in limited circumstances to house herders working on the range. These standards were not intended to prohibit the use of other structures used to temporarily house ***workers*** on the range simply because they were not moved or could not be moved. Provided a structure satisfied the ``mobile housing'' standards, the fact that it was not moved would not exclude its use. In the Final Rule, this point is made explicitly, in order to resolve concerns about the use of remote fixed structures in some areas of the country, situated along grazing trails, to temporarily house the herders. The Department proposed to continue the requirement under both TEGLs that each ***worker*** must have his or her own comfortable bed, cot, or bunk, along with a mattress, to sleep. As noted in the NPRM, however, the Department recognizes that where the housing is a one- person unit, occasionally range work requires that two ***workers*** must share or use the same bed, because terrain, remote location, or demands of the herd, prevent the employer from bringing a separate housing unit to the site, and the camper is a one-person unit. These situations are intended to be rare and the Department proposed to continue to restrict an employer from requiring ***workers*** to share a bed for more than three consecutive days. The Department proposed to continue the requirement that the employer must provide each ***worker*** with a separate sleeping bag or other bedding when sharing a bed temporarily. b. Comments and Discussion i. General ***Worker*** advocates asserted that the proposed minimum standards too closely mirror the existing housing requirements, which they criticized as outdated, too general, and inadequate to meet the ***workers***' basic needs for shelter,

sleeping, cooking, cleaning, and personal hygiene. ***Worker*** advocates urged the Department: To forbid the use of kerosene lanterns and other items using combustible fuel; to require newer, safer heating, lighting, cooking and refrigeration facilities, including solar-powered items, LED lights, and battery packs; to require emergency, hand-cranked generators; to require portable camp toilets, and in areas such as corrals, where several individuals may be working, outhouses; and, on at least a monthly basis, to provide each ***worker*** the opportunity to take a hot shower and use a washing machine. The ***worker*** advocates took particular issue with the proposed heating standard. Under the NPMR's standard, an employer was not required to provide heating unless the outside temperature remains below 50 degrees for 24 hours. They stated that this standard ignores the wide temperature fluctuations in some locations on the range and exposes range ***workers*** to altitude- and cold-related medical conditions, such as frostbite, chilblains, and trench foot. They asserted that the Department should establish a requirement that an employer must equip each housing unit with a heater that can maintain at least a minimum prescribed temperature inside the unit, advocating for heaters capable of keeping the temperature at or above 68 degrees. In their comments, the ***worker*** advocates included a thumbnail sketch of their view of the herders' working and living conditions on the range: [Herders part] of the year work and live on the valley floor. During the rest of the year they tend sheep in the mountains and deserts. Living alone, they have no contact with other humans for days or weeks. They live in small, dilapidated, one room trailers, called sheep camps, or tents. Most trailers have no form of heating or air conditioning. They become unbearably hot in the summer and intolerably cold during the winter. There are no bathing facilities. There's no running water. No field toilets are provided. Acknowledging that the ***workers*** traverse many different locations in performing their sometime strenuous herding duties, often in remote and rugged areas that require the use of mobile housing, including tents, the employers paint a different picture than the ***worker*** advocates. From the employer's perspective, the nature of range work, especially in areas where terrain is mountainous or otherwise not easily accessible, limits their ability to provide housing that exceeds the existing standards. Work is often performed on land managed by federal agencies, including the BLM and the Forest Service, which forbid more permanent housing and regulate such things as waste removal and food storage. At the same time, the employers indicated that where the location of the herders' work permits, ***workers*** enjoy conditions better than required by the standards, that the mobile housing meets established certification requirements, and that the herders find their housing suitable and appropriate for their line of work. The employers stated that the ***workers*** are resupplied on a regular basis, prefer their mobile housing to alternative structures, and are treated no less well than other employees whose work is essential to an employer's business success. As stated by the Texas Sheep and Goat Association: ``The ranchers treat the herders . . . in many cases, as family.'' A similar sentiment was expressed by the I & M Sheep Company: ``[The H-2A ***workers***] have worked very hard for our family and have become more than just employees to us,'' adding that ``[w]ithout these individuals, our sheep operation would cease to exist.'' To the extent there are problems with compliance, the employers stated that better enforcement, rather than more stringent standards, is the approach that should be taken. No commenter directly stated that the existing standards, established under the TEGLs, were too stringent; however, as will be discussed, some comments demonstrated that some employers appeared uncertain about some of these requirements. In general, several employers and their associations suggested that the existing standards are just about right, protecting ***workers***' health and safety without imposing excessive or unnecessary costs on employers. As stated by an employer, Theressa Dalling: ``The special procedures . . . have worked for [our industry] over the past 35 years. There is no reason to change what has worked.'' Although the ***worker*** advocates and employer commenters disagree about the degree to which employers comply with the existing requirements, they agree that some employers fail to comply with the requirements and that compliance can and should be improved. The Department agrees. Compliance can be achieved not only through better enforcement but also through outreach efforts to educate employers and ***workers*** about the applicable requirements. In the Department's view, this rulemaking has brought focus to the difficult circumstances under which herders work, the unique features of their employment, and the difficulties confronted by them and their employers, as they perform their work, conduct their business, and attempt to earn a just wage and profit. Although we conclude that the existing standards, overall, adequately protect the health and safety of the herders, some adjustments and clarifications to the standards are appropriate. These adjustments can be [[Page 63005]] made without imposing any unreasonable or unnecessary costs or burdens on employers. In its proposal and the Final Rule, the Department has sought to help employers understand and comply with their housing- related obligations, without sacrificing simplicity and flexibility, and to better inform ***workers*** and their advocates about the ***workers***' housing-related rights. The comments received on housing-

related issues have been informative and have helped the Department to shape the Final Rule, revising the proposed regulatory text, as needed, to address particular concerns raised by commenters. Each change is discussed below with regard to each standard as set forth in the individual paragraphs of Sec. 655.235. ii. Particular Standards (1) Change to Title and Opening Paragraph Both TEGLs and the NPRM stated generally that an employer may satisfy its housing obligations by providing ***workers*** use of a mobile unit, camper, or similar mobile vehicle that meets the prescribed standards. The NPRM proposed ``Mobile Housing'' as this section's title. As discussed in Sec. IV.E.1. of the preamble in connection with Sec. 655.210, the term ``mobile housing'' fails to include remote fixed-site structures that have been used in Texas, Montana, and other areas to temporarily house range ***workers***. These bunkhouse-type structures are not mobile, but are placed at strategic locations on grazing trails to provide housing for ***workers*** as they proceed with a herd along the trail. In the Final Rule, we have revised the title to read ``Standards for Range Housing'' and made plain that any structure used to temporarily house ***workers*** on the range must meet the standards prescribed by Sec. Sec. 655.230 and 655.235. Further, as discussed below, the Department received several comments that suggest confusion about the use of tents to house ***workers*** on the range and how the particular requirements set forth in Sec. Sec. 655.230 and 655.235 apply to tents. For added clarity, we have revised the regulatory text to specify that tents are structures covered by these sections. (2) Paragraph (a)--Housing Site Both TEGLs and the NPRM provide that a housing site must be well drained and without depressions that would allow stagnant water to collect. No comments were received on this point and the Final Rule adopts the proposal without change. (3) Paragraph (b)--Water Supply (a) Background Both TEGLs require employers to provide ***workers*** an adequate and convenient supply of water that meets standards established by the State health authority. The TEGLs require that the employer provide an amount sufficient for the normal drinking, cooking, and bathing needs of each ***worker***. The TEGLs also require an employer to provide an adequate supply of potable water, or water that can be easily rendered potable, and to provide individual drinking cups to each ***worker***. In the NPRM, the Department included these requirements. It clarified that the supply of water must be enough for the ***worker***'s normal cooking, consumption, cleaning, and laundry needs. Under the proposal, the employer was required to provide the ***worker*** with the means to make the water potable. This section overlaps with section 655.210(c), which requires an employer to specify in the job order that it will provide potable water or ``water that can be easily rendered potable and the means to do so.'' The preamble to the NPRM explained: ``Potable water is water that meets the water quality standards for drinking purposes of either the state or local authority having jurisdiction over supplies of drinking water or the U.S. Environmental Protection Agency's National Primary Drinking Water regulations, 40 CFR part 141.'' 80 FR at 20313. The Department explained that this definition mirrors the OSHA field sanitation regulations that define potable water for agricultural establishments, 29 CFR 1928.110. Id. It further explained that the supply of readily available, potable water is necessary to ensure that water is available for cooking and consumption by the ***worker***, and that OSHA requires that drinking water always be available in amounts needed to satisfy thirst, cooling, waste elimination, and metabolism. As proposed by the Department: An adequate and convenient supply of water that meets the standards of the state or local health authority must be provided. Water used for drinking and cooking must be potable or easily rendered potable, and the employer must provide the ***worker*** with the means to make the water potable. The amount of water provided must be enough for normal cooking, consumption, cleaning, laundry and bathing needs of each ***worker***; . . . and [i]ndividual drinking cups must be provided. 80 FR at 20342. The Department specifically invited comment on (1) how much of the water should be potable (or easily rendered potable) for cooking and consumption; (2) how much water is sufficient for cleaning, laundry, and bathing requirements; (3) what alternative water supplies may be used when exigent circumstances preclude the employer from transporting water to the ***worker***; and (4) what means are available to make alternate water sources potable for cooking and consumption. 80 FR at 20313. As discussed further below, we received many comments on whether it was necessary to establish a standard other than to simply require that an employer provide an ``[a]dequate and convenient supply of water that meets the standards of the state health authority . . . [in an] amount . . . enough for normal drinking, cooking, and bathing needs of each ***worker***,'' as required under the TEGLs. In the Final Rule, the Department, as proposed in the NPRM, specifically requires that the water used for drinking and cooking must be potable or easily rendered potable with the means to make it potable, consistent with the TEGL requirement referring to the State health authority standards. The Department only received a few comments, discussed below, on the amount of potable water needed for consumption and cooking. The Final Rule requires that employers on a regular basis must supply, i.e., transport to the ***workers***' housing locations, enough water to ensure that each ***worker*** has at least 4.5 gallons of potable water

available for the ***worker***'s use, per day, until resupplied. The Final Rule provides a limited exception for situations where terrain prevents the delivery of supplies by motorized vehicle. In those circumstances, an employer must identify alternative sources of water, such as springs, streams, or snow, that may be used by ***workers***, and provide the ***workers*** the means to test and, by filtering, chemical purification or other methods, to easily render the water potable. The Department only received a few comments on the amount of non- potable water required to meet the cleaning, laundry, and bathing needs of ***workers***, which are discussed below. The NPRM did not specify an amount of water needed for these purposes, nor preclude an employer in exigent circumstances from requiring that ***workers*** rely on alternate sources of water, where available, for these purposes. The Final Rule adopts the approach taken in the proposal. The Department received several comments on what would constitute an exigent circumstance that would permit [[Page 63006]] an employer to require ***workers*** to rely on alternative sources of water, set out below. ***Worker*** advocates urged the Department to limit the exception to emergencies, such as where a forest fire prevented the delivery of potable water. Employers and their associations urged the Department to provide a broader exception, many asserting that they should not be required to transport any water to any housing locations where alternate sources of water are available. In the Final Rule, the Department takes a middle course, allowing an employer to use the exception where housing is located in areas that are not accessible by motorized vehicle. As discussed below, there will be emergency situations where an employer may encounter some delay in providing supplies. We have decided that it is better to address those situations on a case-by-case basis, rather than by attempting to define their scope. In our view, it is difficult to anticipate the particular situations that might arise. Stating that such an exception is available, without precisely defining its scope, could be used by some employers to circumvent their obligation to supply enough water to meet the range ***workers***' needs. The Department received several comments, which we address below, on the means by which water for drinking and cooking may be rendered potable. The Final Rule does not require that any particular method or device must be used for these purposes. The Final Rule, like the proposal, simply requires that the employer--in those limited circumstances where it is not required to transport potable water for these purposes to a range ***worker*** -must provide the means by which the ***worker*** may easily render the water potable and clarifies that the employer must provide a ***worker*** with the means to test the physical, chemical, and bacteria content of the alternate water sources available so that the ***worker*** is able to determine whether it is necessary to treat the water and the most suitable means of making the water potable. The Department received no comments on its proposal to continue the requirement that an employer must provide individual drinking cups to each ***worker***, and the Department, without further discussion, is including this requirement in the Final Rule. (b) Comments The ***worker*** advocates generally supported the Department's proposal, but suggested that the Department should require employers to provide potable and non-potable water in amounts, prescribed by the Department to meet the ***workers***' minimum daily needs. They stated that employers should be required to deliver this water to the ***worker*** and should not be permitted to require a ***worker*** to rely on alternative sources of water to meet any of the ***worker***'s needs. They asserted that the use of alternate sources of water should be strictly limited to emergency situations such as forest fires or other disasters that temporarily prevent employers from reaching the ***workers***. Although the employers and their associations generally supported the proposed standard, they strongly opposed any limitation on their use of natural sources of water to satisfy this obligation. They acknowledged that ***workers*** should always have enough water for drinking, cooking, bathing, and laundry, but were offended by the suggestion that any legitimate employer would ignore this obligation. They expressed a fear that the Department would ``over-regulate'' and, in doing so, would significantly impair their ability to successfully operate their businesses. Mountain Plains and Western Range stated that employers regularly supply their herders with water for drinking, cooking, and bathing unless the herders are working in remote locations that have natural sources of water. Several employers and two state agencies (New Mexico and Utah) explained that ***workers***' needs and the means of providing water vary depending on the season, location, and particular herding operations. Two employers, Henry Etcheverry and Siddoway Sheep Company, described the particular difficulties involved in transporting heavy materials, including water, to herders working in high mountain areas where access is only by horse. Siddoway Sheep Company estimated that it would need an additional eight pack horses per herd to supply ***workers*** if natural sources of water could not be used for these purposes. Mountain Plains and Western Range and two employers, Cindy Siddoway and Henry Etcheverry, explained that there has been no history of ***workers*** becoming sick from using natural water sources. Another employer, Sharon O'Toole, noted that range ***workers*** are careful with water because it is often not potable in their native countries. The comments included a variety of cost-effective methods and devices that they stated could be

used to make natural sources of water potable, including boiling water, straining melted snow through coffee filters, iodine tablets, ultraviolet purification, bottles, osmosis filters, water purification bottles, and germicidal tablets. One employer, the Siddoway Sheep Company, recommended the use of hand-held bottles designed for water purification, because, its experience has been that ***workers*** will risk drinking water without testing or treatment if the only method available leaves an unpleasant taste in the water. The Department received only a few comments in response to its request for input about the minimum amount of water that should be provided to ***workers*** on a daily or weekly basis. Relying on a statement prepared by an expert on the nutritional requirements of rural populations and immigrant ***workers***, the ***worker*** advocates asserted that at least 32 gallons of potable water was needed weekly for each ***worker***, for consumption and dishwashing, a daily average of a little more than 4.5 gallons. The only employer to comment directly on this point, Sharon O'Toole, estimated that ***workers*** need about 40 gallons per week (5.7 gallons per day) for these purposes. The ***worker*** advocates recommended that the employers be required to provide an additional 50 gallons of water (non-potable) for cleaning, bathing and laundry. The ***worker*** advocates submitted short statements from three herders, one of whom stated that about 35 gallons would be the minimum amount of potable water required for each range ***worker*** per week (5 gallons per day). One herder stated that his employer had only provided him with a total of 40 gallons of per week (suggesting this amount was intended for the all the ***worker***'s drinking, cooking, dishwashing, bathing, and laundry needs). He explained that sometimes he would run out of water before he was resupplied, forcing him to ask other herders, if any were nearby, for water, and that for bathing he had to get water from the sheep's water tank or ponds. Two of the herders said that they were forced to continue wearing dirty clothes if they were not located close to a natural water source. ***Worker*** advocates requested the Department to clarify that separate water supplies should be provided to ***workers***, apart from any supplied for the use of dogs or horses. One commenter, Sims Sheep Co LLC, noted that potable water should be stored in a container appropriate for that purpose. This employer also noted the difficulty of keeping water from freezing, recommending that employers be required to provide containers small enough to be kept inside the ***worker***'s housing to prevent the water from freezing. Mountain States and Western Range requested that the Department not require employers to provide water for [[Page 63007]] clothes washing, if an employer offers laundry services and the ***worker*** expresses no preference to do the laundry on his own. Two employers, Carl and Katy Day and Warren Roberts, stated that they regularly pick up the ***workers***' dirty clothes and return the clothes after washing, often weekly, when they resupply the camp. A Utah state agency stated that requiring employers to provide water for laundering places an unnecessary burden on employers. (c) Discussion After reviewing and considering all the comments on this provision, we first determined that ***workers***' health and safety are unnecessarily put at risk by requiring an employee, on his or her own, to secure water for essential needs. While working on the range, a ***worker*** is always there at the convenience of the employer; thus, it is our view that, at the most fundamental level, it is the responsibility of the employer to ensure the ***worker***'s safety while he or she is serving the employer's business interests. The provision of water, no less so than providing a shelter to sleep in, or food to eat, is properly an employer's responsibility where the ***worker***'s ``residence'' is the range, and all his paid and unpaid time there is spent serving the employer's interests. We acknowledge that most employers are responsible and, as such, try to ensure their ***worker***'s safety, and that most employers regularly, even in difficult circumstances, extend their best efforts to keep their ***workers*** safe. Unfortunately, some employers are not so responsible, and the Department must keep this in mind in setting standards for a workplace, whether it is a factory or the range. Our determination that an employer must provide ***workers*** with necessary potable water--the only alternative to leaving the ***worker*** to obtain it on his or her own--rests on the need to regulate the actions of noncompliant employers, as well as because the alternative leaves the range ***workers*** at too much risk. They work in a place where weather conditions may be severe, temperatures are extreme, drought or near drought conditions may exist, and they are often at considerable distance from their employers and without any ready alternative if their water runs dry. We next determined that setting a recommended minimum amount of water to satisfy an employer's obligation would benefit both ***workers*** and employers. Setting a minimum amount should prompt immediate action by an employer whose practice has been to provide significantly less than this amount, thereby endangering, knowingly or not, the health and safety of its ***workers***. In reviewing the comments, it became clear that many employers, especially in some locations and during certain seasons, have relied on natural sources of water primarily, if not exclusively, to meet or attempt to meet the ***workers***' needs. Thus, having determined that it should be the employer's responsibility to provide the water, not one to be borne by the ***worker***, there was a need, in our view, to establish a ready benchmark to enable these employers to estimate the amount of water they will

now have to provide ***workers***, information that it would need to know in order to establish a plan for transporting this water to their ***workers***. The comments submitted by the ***worker*** advocates helped inform the Department about setting the standard at an appropriate amount. Our consideration was guided by a statement included in the ***worker*** advocates' comment on this point. The statement was prepared by Sarah A. Quandt, Ph.D., a member of Wake Forest University's Department of Epidemiology and Prevention. She is a recognized expert on issues relating to food and nutrition among rural populations. She has conducted research involving immigrant ***workers***, including crop and construction ***workers***.\57\ Based on her experience and considering research published by the U.S. Departments of the Army and Air Force, she estimated that ***workers*** would require about 2.5 to 3 gallons of water per day for consumption to which she added .5 gallon per day for cooking and 1 gallon per day for washing dishes. ---------- \57\ A list of Dr. Quandt's publications may be located at http://www.ncbi.nlm.nih.gov/pubmed?cmd=PureSearch&term=Quandt%20SA%5BAuthor%5D. ---------- The employer's estimate, too, was helpful. Although its recommended weekly amount was about 8 gallons higher (by about one gallon a day) than Dr. Quandt's estimate, the two were close enough to suggest there might be a shared understanding among stakeholders about the amount of water required to meet the essential needs of an in individual engaged in range work. In further considering the issue, the Department consulted two reference guides: The U.S. Army Water Planning Guide, 2008 (Army Water Guide) \58\ and the Water Guide for Emergency Situations, prepared by the U.N. High Commissioner for Refugees (U.N. Water Guide).\59\ The Army Water Guide provides various standards for estimating the per capita water need for troops, depending upon the particular operations in which the troops are engaged. The estimates vary by climate: hot-tropical, hot-arid, temperate, and cold. The Army Water Guide also provides an overall, per capita estimate for sustained operations, again setting standards by climate. We focused on the estimates for hot-arid, temperate, and cold climates. Herding in the United States primarily occurs under those conditions. For drinking and food preparation, the various estimates follow: 5.23 gallons for hot- arid conditions; 3.58 gallons for temperate conditions, and 4.13 gallons for cold conditions. Water Guide, Chart of Standard Planning Factors, at II-A-2. The U.N. Water Guide recommended a daily allocation of 15 liters (nearly 4 gallons). Finally, we considered the water standards prescribed by the State of California for various industries, including agriculture.\60\ ---------- \58\ The Army Water Guide is available at http://www.quartermaster.army.mil/pwd/publications/water/Water_Planning_Guide_rev_103008_dtd_Nov_08_(5-09).pdf. \59\ The U.N. Water Guide is available at http://helid.digicollection.org/en/d/Junr01/5.html. \60\ See State of California, Department of Industrial Relations, Guidance for Employers and Employees on the New Requirements of the Heat Illness Prevention Regulation Amendments, California Code of Regulations, Title 8, Section 3395 (discussing changes, effective May 1, 2015, concerning employer requirements relating to work performed under hot conditions and continuing the State's requirement that covered employers must make available 2 gallons of drinking, per ***worker***, for each 8-hour shift). ---------- Based upon our review of the comments and the authoritative sources noted, we conclude that 4.5 gallons is reasonable as a recommended daily minimum amount of potable water that an employer should provide for each range ***worker*** for drinking and cooking. In setting this amount, we have balanced the need to provide ***workers*** a sufficient amount of potable water to meet their essential needs and the practical ability of employers to supply the appropriate amount of water without undue burden. Setting the minimum recommended standard at 4.5 gallons per day for drinking and cooking, rather than at the employer's higher estimated level, frees space on an employer's trailer or truck to transport supplies and other items to locations that may be distant from the employer's ranch or farm. Further, we conclude that a more conservative estimate is reasonable for setting this standard. It reduces the initial burden on employers, while providing greater protection to ***workers*** than is provided by the existing standard, which does not specify a recommended minimum amount. Some of the employers under this standard [[Page 63008]] will be delivering--for the first time--a large supply of potable water to their ***workers*** who previously relied upon natural sources of water as their sole or primary source of water for drinking and cooking. The employer may take into account the ***worker***'s current supply of potable water when replenishing the water. For example, if an employer resupplies ***workers*** on a weekly basis and the ***worker*** has consumed only 25 gallons of a week's supply of 31.5 gallons, the employer may choose to provide only 25 additional gallons of water until its next resupply. Thus, to meet its obligations, an employer must deliver potable water on a regular basis so that its ***workers*** will have the requisite daily amount available during the supply and resupply cycle (except in exigent circumstances where alternative sources may be used to satisfy this requirement). It deserves emphasis that, even if the employer

provides the daily recommended minimum amount of potable water, it remains its overriding duty to provide an adequate amount for each ***worker***, based on the needs of a particular ***worker***. This need will vary from individual to individual, and the appropriate amount is affected by many factors, including temperature, humidity, wind, the availability of shade, an individual's weight, and the length and intensity of physical activity. In other words, particularly in a dry or hot climate, employers may well be required to provide more than the 4.5 gallon general minimum. We have determined not to set a minimum amount of non-potable water that an employer must supply for bathing, washing clothes, or other uses. We have less confidence in estimating an amount for these additional purposes, ***given*** that bathing, showering, and laundering practices may vary considerably because they involve matters of personal choice that are affected by the availability of particular facilities. These purposes may require significantly more water than needed for consumption and food preparation and cleanup. Based on day- to-day experience, obtained in providing water for their ***workers***, employers should be able to readily estimate the amount of water actually needed by ***workers*** for all their needs, and, where natural water sources are not available, they should be able within a relatively short time to estimate the additional amount of water they will need to provide their ***workers*** for bathing and washing their clothes. This approach addresses the concern that if water for laundry is not needed, the employer need not provide water for this purpose. Moreover, this approach allows employers to rely on the ***worker***'s use of alternate sources of water for cleaning, bathing and laundry, where such sources are readily available. The text of the rule also addresses other concerns raised by the commenters, including a clarification that this standard establishes a supply of water strictly for the ***worker***'s own use, not a source that may be used to provide water for dog, horses, or the herd. We have also retained and clarified the limited exception under which an employer, for exigent circumstances, may require ***workers*** to rely on alternate water sources to provide potable ***workers*** to employees. We have been persuaded that requiring potable water to be carried on pack horse would impose an unreasonable burden on employers. The regulatory text has been clarified so that an employer will qualify for this exception only where terrain would prevent delivery of water by motorized vehicle and the employer satisfies the additional conditions described below. In our view, the ***worker*** advocates' suggestion that exigent circumstances be limited to emergency situations, such as a forest fire, that would prevent the delivery of supplies to ***workers***, is too restrictive and would impose an unreasonable burden on employers. We have concluded that the interests of range ***workers*** and employers are better served by not providing for a broader exception for exigent circumstances. There will be some occasions, such as a fire or a severe storm, which may temporarily prevent an employer from providing supplies. In those instances, an employer will not be held noncompliant so long as it has been prudent in preparing for such a possibility, such as by providing a reserve supply of water for emergencies, having developed a plan for the extrication of their employees in such circumstances, and having available contact information for government and private agencies that are able to provide rescue services. As pointed out by commenters, winter conditions may present particular difficulties because freezing temperatures may prevent the easy and immediate consumption of water. Therefore, we have revised the text of the rule to require that wherever and whenever the temperature can reasonably be expected to drop below freezing, the employer must provide containers, appropriate for potable water, that are small enough to be stored in the range housing to prevent freezing. Regarding the requirement that employers must provide water sufficient for bathing and cleaning, we are clarifying that this water must be clean and free from anything harmful that could be absorbed by the skin or clothing, but the water provided does not need to be potable or easily-rendered potable. For these purposes, an employer may always rely on natural sources of water (springs, streams, fresh snow), when these sources available at the location of the ***worker***'s housing. Where the alternate water source is the same source that will be used to water the herd, the herder's dogs and horses, or may collect runoff from areas in which herd excretes, the employer must undertake special precautions to protect the ***worker***'s health from risk. As discussed above, the Final Rule permits an employer, in limited circumstances, to completely rely on natural sources of water to meet the ***worker***'s needs, including drinking and cooking. The Final Rule establishes the following conditions to rely on natural sources of water for ***worker*** consumption: The terrain or weather conditions of the area in which the

worker's housing is located prevents the delivery of potable water by a

motorized vehicle.

The employer has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located and these sources will remain available during the period the ***worker*** will be at that location.

The employer provides the ***worker*** with the means to test whether the water is potable and, if not potable, the means to filter out contaminants and treat the water to render it potable.

The employer must provide this information when it files its H-2A Application for Temporary Employment Certification.

In the Department's view, these conditions carry special importance ***given*** the presence of drought and near-drought conditions in parts of the United States, particularly in the Southwest, as well as the significant health risks posed if water sources become contaminated with harmful pathogens because of the presence of nearby herds.

Where the employer seeks to use this exception, it must provide the ***worker*** with a device that can test the physical, chemical, and bacteria content of the water and the means to render the water potable. Employers may choose from various approved methods and devices to satisfy this requirement. Potential choices for means to render water potable would include, among others, water purification tablets, portable water purification systems, water

purification bottles, and filtering systems. Whatever method or device is selected to test and make water potable, the employer must ensure that the ***worker*** is adequately trained in the proper use of the method or device, so that when necessary, the method or device is used correctly.

(4) Paragraph (c)--Excreta and Liquid Waste Disposal

Both TEGLs and the NPRM require that facilities must be provided and maintained for effective disposal of excreta and liquid waste in compliance with state or Federal requirements. Where disposal pits are permitted, the TEGLs and the NPRM state that the pits must be ``fly-tight'' and maintained in compliance with State and local sanitation requirements.

A few commenters expressed concern about the facilities employers provide to range ***workers*** for the disposal of excreta and liquid waste. A few commenters, including ***worker*** advocates, stated that employers should be required to provide camp-type portable toilets or outhouses for ***workers*** to use on the range. Another commenter stated that employers do not always provide a shovel with which to bury such waste. We have revised the regulation to address this concern.

The rulemaking record does not reflect what particular toilet facilities, if any, are provided ***workers***. The Department would expect that an employer would choose to provide a portable, camp-like toilet for use by its ***workers***. A strictly functional device, shielded from

view if the herder is working with others, would appear to be relatively inexpensive and compatible with any State or Federal requirements concerning the disposal of excreta and liquid waste. The Department, however, is less convinced about the suggestion that employers should be required to provide an outhouse, which the Department interprets to mean a permanent or semi-permanent structure constructed of wood or similar material. Obviously, it would be

impractical unless ***workers*** routinely used the same location to establish a ``camp,'' and even in these situations, it would entail construction and maintenance costs and would increase, perhaps substantially, an employer's disposal costs. The Department assumes that similar costs would be entailed in the rental, purchase, use, and transportation of a construction-type ``porta-john.'' Further, the construction of an outhouse would likely be subject to land use restrictions on many parcels of land used for grazing, including

Federal lands. ***Given*** the absence of information about current employer practices in this area and uncertainty about legal and cost considerations, the Department declines the suggestion to revise the standard to require camp toilets or more substantial structures of this

nature, notwithstanding the benefit they would provide for ***workers***.

(5) Paragraph (d)--Housing Structure

Both TEGLs and the NPRM required that employers provide structures that are structurally sound, in sanitary condition, and in good repair

to protect ***workers*** from the elements. Beyond this general duty, the TEGLs also specified a few particular requirements regarding the structure of the housing. The general and particular requirements were included in the NPRM.

Earlier, in the Sec. IV.E.1. of the preamble related to Sec. 655.230, and throughout this section, we discussed various general comments and comments specific to particular requirements. Many of these bear on the structural suitability of a housing unit, but the Department received no comments specifically directed to this subsection and therefore the Final Rule adopts the proposal on this point without change, except to clarify that the requirements relating to housing, including the standard for structure, also apply to tents, except as discussed below.

Some employer comments suggested that there may be some confusion about the application of standards to tents. The proposal did not modify an employer's obligations under the TEGLs to generally apply the same requirements to tents as apply to other range housing. The TEGLs and the NPRM require that an employer may use a tent to house ***workers*** only if the terrain or land use regulations prevent the use of more substantial housing and the tent is appropriate for the weather conditions. Further, where tents are used, they are subject to the same requirements that apply to campers or other structures, unless the standards provide otherwise. If it is feasible to provide electricity and mechanical refrigeration at a location, an employer must do so, even if the ***worker*** is housed in a tent. While such opportunities will

be limited, the obligation remains. If the use of the tent is required by land use restrictions prohibiting more permanent structures, but electric service is available, the employer must provide it. See Sec. 655.235(f). The TEGLs and the NPRM, however, specifically exempted tents from the requirements applicable to other structures--that they have rigid flooring and a second means of egress for escape (unless the tent is large and has rigid walls), see Sec. 655.235(e)(5). Further, the TEGLs and the NPRM prohibited the use of heaters in tents unless the heater was approved for such use and the tent is fireproof. The Final Rule contains these same requirements and exceptions.

(6) Paragraph (e)--Heating

Both TEGLs and the NPRM required that stoves or heaters using combustible fuels be safely vented and be shielded by fireproof material. They required that if a heater has automatic controls, it must be of the type that interrupts the fuel supply when the flame fails or a predetermined safe temperature is exceeded.

Neither the TEGLs nor the NPRM, however, required that each housing unit be equipped with a heater or a heating system, nor did either require the employer to ensure that the temperature inside the housing could be maintained at or above a certain level. The NPRM continued the existing standard under which employers could choose not to provide heated units. Under that standard, no heating is required for housing located in mild-climate areas unless the temperature is reasonably expected to drop below 50 degrees and remain continuously below that temperature for 24 hours. To maintain ***worker*** safety, however, employers

that choose not to provide heating were required to provide the ***workers*** with proper protective clothing and bedding.

The ***worker*** advocates contended that the Department's proposal ignored the wide temperature fluctuations in some locations where range ***workers*** are employed, and that the proposal would continue to expose range ***workers*** to altitude- and cold-related conditions that could lead to injury and illness. They asserted that the Department should instead require an employer to provide heating whenever the temperature inside the housing facility falls below a prescribed temperature, advocating in favor of setting this temperature at 68 degrees. The ***worker*** advocates also requested the Department to require that any devices that use combustible fuels (which would include those for lighting, heating, and cooking) should have fuel sources stored outside the housing structure. They further requested that the Department require that heating devices should be inspected annually by fire departments or heating specialists. No comments were submitted by employers or their associations on this point. However, as noted throughout this section of the preamble, employers and their associations generally opposed

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any requirements that would go beyond those required by the TEGLs.

The ***worker*** advocates have presented a persuasive argument that the Department's proposed heating standard does not adequately protect the health and safety of the ***workers***. It is widely known that the hourly temperatures in the mountainous and desert areas in which herding is common can dramatically fluctuate over the course of a day. Even in areas where temperature changes over the course of a day generally fluctuate within a narrower range--areas that could be fairly described as mild and whose usual daily temperature reaches 50 degrees or higher--it is not for uncommon for the temperature to drop below freezing or to feel as if it has when the weather is windy, rainy, or both. In these circumstances, a range ***worker*** should be able to obtain a heated shelter from the elements. Accordingly, the Final Rule revises the threshold at which heating must be provided. As revised, an employer must provide heating for a housing unit if the low temperature for any day in the work contract period is reasonably expected to drop below 50 degrees. If the low temperature for any day in which the housing unit is being used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the ***workers***.

The Department recognizes that this may require some employers--for the first time--to equip their range housing with heaters. The existing standard is simply inadequate to protect the health and safety of the

range ***workers***. The extra clothing and bedding is a poor substitute for a heater on a day when the temperature may remain below 50 degrees.

The Department is unpersuaded by the argument that it should require employers to provide housing units that will maintain a specified inside temperature. The Department has no present information that would allow it to set such a standard, particularly ***given*** the wide variety in the design of the housing units used by range ***workers*** and the uncertainty that a particular temperature could be achieved without undue expense to employers.

The Department is not convinced that it is necessary to add either a requirement that heating or heating system be inspected annually by a fire department or heating specialist, or a requirement that an employer can only provide a device in which the fuel source is stored outside the housing unit, particularly because the type of device and fuel storage must fit the variety of current and future housing structures. The Final Rule retains the existing requirement under the TEGLs that the units in which ***workers*** sleep must be constructed and maintained according to applicable state and local fire and safety laws. Moreover, the housing unit, including any heating equipment, would have to meet whatever inspection requirements are established by the SWA. In our view, this standard adequately ensures the safety of the ***workers***. Accordingly, except for revising the proposed standard to limit the ability of an employer to provide an unheated housing unit, the Final Rule adopts the standard as proposed. Finally, as discussed

above in Section IV.B.2.c., heating equipment and, where permitted, protective clothing and bedding, must be listed in the job order along with other required tools, supplies and equipment that will be provided free of charge or deposit charge.

(7) Paragraph (f)--Lighting

Both TEGLs and the NPRM require that electrical service must be provided if feasible. Both TEGLs and the NPRM required that where electric service is not provided, the employer must provide at least one lantern for each ***worker***. Kerosene lamps were permitted.

The ***worker*** advocates, as previously noted, have broadly criticized the Department for not incorporating modern technology in its range housing standards. They have objected to the permitted use of kerosene lamps in the range housing, asserting instead that the Department should require battery or solar-powered devices. Although some employers mentioned that they provided solar power sources for some purposes, none indicated whether they were used to supply power for lighting. As noted throughout this section of the preamble, employers and their associations generally opposed any requirements that would go beyond those required by the TEGLs.

In the Department's view, it is unnecessary and inappropriate to mandate, or categorically forbid, the use of any particular device. Kerosene lanterns have long been used by campers and other outdoors enthusiasts to provide lighting in temporary structures similar to range housing. On the present record, there is nothing that would

justify the Department from banning their use. As discussed previously, employers are required to construct and maintain units that comply with applicable state and local fire and safety laws. Where such laws forbid the use of particular kinds of lanterns or impose conditions on their use, an employer would be obliged to follow those laws. Moreover, it is in employers' interest to provide safe lighting options.

There were no comments received on the requirement that an employer must provide at least one lantern for each ***worker***. The Final Rule adopts the proposed lighting standard without change.

(8) Paragraph (g)--Bathing, Laundry, and Hand Washing

Both TEGLs and the NPRM require employers, if feasible, to provide hot and cold water under pressure in range housing. Where not feasible, employers were required to provide movable facilities for bathing, laundry, and hand washing. Only a few concerns were raised in comments on this provision.

Worker advocates requested the Department to provide ***workers*** with sun-shower devices when work is being performed in warm climates. They also asserted that employers should be required to provide ***workers*** with at least monthly access to facilities where they can have a hot shower and use of a washing machine. A few employers asserted, as discussed in connection with the minimum standard for water, Sec. 655.235(b), that laundry facilities are unnecessary where an employer picks up and launders a ***worker***'s dirty clothes and exchanges the laundered clothes for dirty ones when it resupplies the ***worker***. The Department is not

persuaded that these suggested changes are necessary.

While the suggested use of a camp-type ``sun shower'' may be an economical means of allowing a ***worker*** to bathe, it is only one of several potential options that may be available to meet the employer's obligation to provide movable facilities for bathing, and there is no basis in the record for the Department to conclude that this device is superior to other methods. Allowing a range ***worker*** to obtain a hot shower and access to a washing machine each month could prove costly to an employer. We assume that the employer would have to pay for the services of a substitute ***worker*** to watch the herd in the first herder's absence, and the time and distance between the herder's work location and the available facilities might be considerable. ***Given*** that under the Final Rule's standard, the ***workers*** are provided movable washing and bathing facilities, imposing such a requirement seems unnecessary and, depending upon the time and expenses involved, could impose an unreasonable economic expense on the employer.

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With regard to the suggestion that the standard should be revised in recognition that some employers launder their ***workers***' clothes, the Department has determined that the standard should remain unchanged. It

is important, in the Department's view, that ***workers*** be provided the means--tub, scrub bush, soap, and a line for clothing to dry, and a sufficient amount of water with which to launder all or some of their clothing on an as needed basis. Of course, if an employer chooses to provide laundered clothing regularly, the ***worker***'s needs are likely to be minimal.

(9) Paragraph (h)--Food Storage

Both the TEGLs and the NPRM required that employers must provide housing with mechanical refrigeration where feasible. Where mechanical refrigeration is not feasible, the standard provided the employer the choice to either provide a propane or butane-powered refrigerator or provide an alternate means by which food can be used or stored to prevent or avoid spoilage. The TEGLs mentioned salting as method to avoid spoilage. In the NPRM, the Department proposed ``dehydration'' as another example of an acceptable alternative. The Department invited comment on food preservation options in keeping with food safety and nutrition concerns. These concerns have been addressed in Sec. IV.B.2.d. of this preamble, in connection with Sec. 655.210.

As discussed with regard to the meal requirements established by Sec. 655.210(e), commenters agreed that employers should be required to provide range ***workers*** with ``adequate'' meals or ``sufficient'' food to prepare healthy, nutritious meals and appropriate means for food storage. Insofar as food storage methods are concerned, commenters disagreed as to whether mechanical refrigeration should be required.

The ***worker*** advocates suggested that the Department adopt a hierarchy of food storage methods, so that alternatives to refrigeration (e.g., salting and dehydration) could only be used where such refrigeration is not possible. The ***worker*** advocates stated that advances in power options (propane located outside the unit, battery packs, and solar equipment) make refrigeration available in most instances and that their use to maintain a temperature at or below 45 degrees would allow the storage of fresh produce, thereby improving the variety and nutritional value of the ***workers***' diets.

Employer and employer association commenters stated that while refrigeration is provided by some employers in some locations, it cannot be provided in some remote locations (e.g., in the ``summer high range'') where ***workers*** must live in tents and all supplies must be transported by pack horses. Further, several commenters indicated that they must comply with Forest Service and BLM regulations, noting that in some locations the Forest Service requires food be stored in trees to minimize encounters with potentially dangerous animals. In those locations, employers stated that they provide food appropriate to the available food storage options.

Mountain Plains, Western Range and some employers, including Siddoway Sheep Company and Henry Etcheverry, read the proposal to require refrigeration units when tents are being used, an undue and likely impossible burden, because an employer's use of tents, in their view, means that the herd is located in an area where the terrain is

rugged and supplies and equipment must be transported by pack horses. The Siddoway Sheep Company proposed that the purpose served by refrigeration--to ensure that ***workers*** receive nutritious meals--could be achieved by providing the ***workers*** with fresh meat and fresh produce for consumption in the short term, supplemented by a variety of canned meats, fruits, and vegetables.

The Department recognizes that range work is performed throughout the year in a wide variety of locations, including some that are remote and not accessible by motorized vehicle. Yet it remains appropriate to establish a minimum standard that is flexible enough to apply to the variety of situations on the range. The historical approach, embodied in the TEGLs and the NPPRM, achieves this purpose. It allows flexibility, while at the same time ensuring that employers provide adequate and sufficient meals to ***workers***, which cannot be met without ensuring that appropriate methods of storage are also provided.

Under the proposal and as adopted in the Final Rule, where mechanical refrigeration is not feasible, an employer may choose among alternative means to eliminate or reduce spoilage of food and thereby meet its obligations under the standard, established in Sec. 655.210, to provide ***workers*** with sufficient and adequate meals. While the provision of a butane or propane refrigerator, obviously, would best replicate mechanical refrigeration, we conclude that requiring such use would be impractical in many instances. The Department also recognizes that in some instances, regulations by other government agencies,

including those designed to protect people from potentially dangerous encounters with wild animals, will determine appropriate storage methods. Further, as noted below in connection with Sec. 655.235(k), employers are required to provide sealed containers for storing food where there is a risk of contamination of the food by insects, rodents, or other vermin.

(10) Paragraph (i)--Cooking and Eating Facilities

Both TEGLs and the NPRM required that if ***workers*** were permitted or required to cook in their housing, the employer must provide a space with adequate lighting and ventilation for this purpose. The TEGLs and the NPRM required that the wall surfaces next to the areas for food preparation and cooking must be non-absorbent and easy to clean. They further required that the wall surface next to cooking areas must be made of fire-resistant material. No substantive comments were received on these particular points and the Final Rule adopts the proposal without change.

(11) Paragraph (j)--Garbage and Other Refuse

Both TEGLs and the NPRM required employers to provide clean, durable, and fly-tight containers for each housing unit. If refuse and garbage cannot be buried, the employer was required to collect the garbage twice weekly or more often if necessary. The Department received only a single comment on this standard. The Siddoway Sheep Company stated that the garbage disposal requirements should be clarified because a twice-weekly schedule for removal is impractical in mountain areas, where resupply occurs only once every 8-10 days.

In the discussion above related to Sec. 655.235(b), the Department recognized the impracticality of moving supplies in areas that are not accessible by vehicle. Similar problems are involved with the disposal of refuse and garbage by packhorse or other means. Accordingly, the Final Rule has been revised to provide a limited exception to the general requirement where garbage and other refuse cannot be buried. In those situations, the employer must collect and remove the garbage and other refuse on the return leg of its supply run. The Department reminds employers that other agencies may regulate the storage and disposal of garbage and refuse, and employers are required to comply where such regulations are applicable.

Accordingly, the text has been revised as discussed. Apart from this revision,

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the Final Rule adopts the proposal without change.

(12) Paragraph (k)--Insect and Rodent Control

Both TEGLs and the NPRM required the employer to provide appropriate materials, including sprays, to combat insects, rodents, and other vermin. The Department received no comment directly on this point and the Final Rule adopts the proposal without change. A private individual, ***worker*** advocates, and employers submitted comments on protecting food from insects, rodents, and other wildlife. A private

citizen, noting the difficulty of keeping insects away even in private residential areas of the country, recommended that the Department require employers to provide sealed containers to prevent insect contamination. While the Department construes its food storage and insect and rodent control standards to require this practice, the Department has determined that ***worker*** health would be better protected by making this requirement explicit. Accordingly, in the Final Rule, the Department has revised the proposal to provide: ``Appropriate materials, including sealed containers for food storage, must be provided to aid housing occupants in combating insects, rodents, and other vermin'' (adding underscored text).

(13) Paragraph (l)--Sleeping Facilities

The NPRM retained, with minor clarifying edits, the requirement under the TEGLs that each ***worker*** have his or her own comfortable bed, cot, or bunk with mattress. The NPRM also continued the existing variance from this requirement for temporary situations of up to three days, in which two ***workers*** could share a mobile housing unit with a single bed, provided each ***worker*** was provided his or her own sleeping bag or bedding.

Even though the Department's intent was only to maintain the existing standard, many commenters, including Mountain Plains, Western Range, Wyoming Wool Growers, and the Texas Sheep & Goat Raisers Association, perceived the proposal as a new requirement. For example, the Colorado Wool Growers Association stated that this standard would

require employers to transport a second mobile unit whenever they have two ***workers*** herding the same flock. An employer, Kay and David O. Neves, expressed the concern that the proposed standard would prevent a new herder from living in a two-bed unit with an experienced herder, denying the ***worker*** and the employer the benefit of the seasoned ***worker***'s experience. Other commenters, including the Texas Sheep & Goat Raisers Association also expressed concern about how the standard should be applied, i.e., whether employers must provide a physically separate area for a second herder to sleep in the housing, only separate cots or beds, or only separate bedding (blanket, other linen, or sleeping bag). Mountain Plains, Western Range, and Wyoming Wool Growers requested that we remove the three-consecutive day limit on two ***workers*** sharing a unit with a single bed, stating that winter conditions and safety considerations often require two ***workers*** to care for the herd, and practical considerations prevent moving a second camper every few days. They argued in favor of revising the rule to allow two ***workers*** to share a single camper as long as there is space for two sleeping bags.

The associations and several other commenters stated that the phrase ``sleeping facility'' was confusing, leaving them guessing whether it refers only to a bed or the entire camp structure. The confusion caused alarm among several commenters who read the proposal to require that they must have two separate mobile housing units

whenever two herders would be staying overnight at the same location. Several mentioned that this requirement would force them to purchase new units at a cost of $20,000 per vehicle.

To remedy the concerns noted, Mountain Plains and Western Range suggested that a ``sleeping unit'' should be defined as ``a comfortable bed, cot, or bunk with a clean mattress.'' On a separate point, the ***worker*** advocates recommended that the Department revise the standard to require that mattresses and pads not sit on the floor of a housing structure and to require that if foam pads are provided, they must be thicker than two inches and covered completely with a washable material. On a related point, the Siddoway Sheep Company requested modification of the sleeping facilities standard to relieve employers of the requirement to provide mattresses or cots when ***workers*** are living in tents. It stated that its experience has been that range ***workers*** do not use the cots it has provided, preferring instead to use pine boughs.

The Department has determined that its use of the term ``sleeping facility'' rather than a term such as ``sleeping arrangement'' or even more simply ``a separate bed,'' to describe this standard has contributed to unnecessary confusion. ``Sleeping facility,'' even as defined in the TEGLs and the proposal, carries with it the idea of a physical structure, such as a camper or bunk. As such, the standard can be read to require that whenever an employer assigns a second range

worker for longer than three days to work with a another herder, it must provide a separate structure, a separate area within a single structure, or separate bed or cot, or some combination of such requirements, for each ***worker***.

We have revised the requirement to make plain that an employer is not permitted to require ***workers*** to use or share a single bed for more than three consecutive days. It should be emphasized that the sleeping standard establishes the general requirement that each ***worker***, on a nightly basis, must be provided his or her own separate bed. The shared sleeping exception is limited to infrequent and temporary (no longer than 3 days) situations where it is impractical to provide a ***worker*** with a separate bed, mattress, or cot. The exception cannot be used in other situations to circumvent the requirement of one ***worker***, one bed. Of course, if the camper is designed and certified for occupancy by two people, and has two beds, two ***workers*** may occupy it.

In the Final Rule, we have revised the proposed standard to better distinguish the general requirement from the limited three-day exception.

Each ***worker*** must be provided housing (including a camper or tent, when permitted or required) that contains, except in a family arrangement, his or her own comfortable bed, cot, or bunk with a clean mattress. An employer may be permitted to require ***workers*** to use or

share a single bed only where:

The employer makes the request when filing an application for certification;

demonstrates to the satisfaction of the CO that it would be impossible or impractical to provide each ***worker*** with a separate bed; and

the employer provides the second ***worker*** a sleeping bag or bed roll free of charge or deposit charge.

With regard to the comment that the Department should revise the standard to relieve employers from providing a cot and mattress when ***workers*** are staying in tents, the Department disagrees. In doing so, the Department would be removing a basic measure of sleeping comfort. At the same time, it should be clear that the standard does not require a ***worker*** to use a mattress and cot if he or she prefers to sleep on pine boughs or some alternative foundation. An employer meets its obligations under the standards by making available the mattress and cot to the ***worker*** and allowing him or her to

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freely choose whether or not to use these items.

As a final matter, the Department is not persuaded that it should mandate a specific thickness or covering for a sleeping pad or require

an employer to modify its housing to ensure that no ***worker*** may be required to sleep on mattresses and pads that sit on the floor of the housing structure. The standard requires that the employer provide a comfortable bed, a standard that admittedly allows room for

interpretation, but ensures that a ***worker*** must be provided a mattress or its equivalent, which must be clean and which provides some comfort from the alternative of sleeping directly on a hard surface. The rulemaking record does not provide sufficient information that would allow the Department to establish a particular thickness for pads, their covering, or similar particulars for bedding.

(14) Paragraph (m)--Fire, Safety, and First Aid

The NPRM continued the requirements established under the TEGLs that:

An employer must provide housing that must be constructed and maintained in compliance with applicable state or local fire and safety laws;

the storage of flammable or volatile liquids or other materials in living areas is prohibited, except for those needed for current household use;

the housing provide two safe means by which a ***worker*** may escape the unit without difficulty, excepting tents from the requirement of a second means of escape unless they are large and their walls are constructed of rigid material; and

the employers must provide a first aid kit and provide adequate fire extinguishers in good working condition.

The ***worker*** advocates commented on three aspects of the proposal, requesting the Department to require employers: To install smoke detectors in housing and to provide easily accessible fire extinguishers; to require that there be an emergency exit, with egress at rear, of each housing structure; and to include particular items, as identified by the Department, in first aid kits. The ***worker*** advocates did not suggest the inclusion of any particular items, but asked the Department to consider the need for items to treat illnesses related to exposure to cold temperatures.

In the Department's view, the proposed standard adequately meets these concerns. The ***worker*** advocates have provided no evidence that the standards are inadequate or that ***workers*** have been put at risk by the application of the standards. The proposed standard requires compliance with applicable fire and safety laws, including a second means of escape, and requires the unit to have a fire extinguisher in good working condition. The proposed language does not explicitly state that the fire extinguisher must be accessible. We have added this requirement to the standard.

Where state and local authorities have determined that smoke or fire detectors are required for the type of housing provided ***workers***, employers must comply with those requirements. Where such laws do not apply to such housing, without any demonstration that the lack of such devices has caused injury to ***workers*** the Department is ill-equipped to

mandate their use. Similarly, local and state fire departments, nongovernmental organizations, such as the Red Cross or organizations comprised of camping, hiking, or wilderness exploring enthusiasts, or their ***worker***'s compensation insurers, are better suited than the Department, at present, to recommend the items to be included in first aid kits, especially for treating injuries caused by exposure to the elements. However, we would expect that employers in stocking the required first aid kit will take into account the conditions under which range work is performed, including the risks posed by insects, wildlife, and the ***worker***'s exposure to extremes of heat, cold, storms, and rugged terrain.

We decline the ***worker*** advocates' suggestion that the Department should require employers to provide a hand-cranked generator for emergencies. They have not provided any evidence that would allow the Department to properly consider this request. With regard to their comment on first aid kits, they again have not provided sufficient evidence that would allow the Department to properly consider this request.

The Final Rule adopts the proposal on fire, safety, and first aid without substantive change. The Final Rule makes three minor changes. We have clarified that an employer must comply with both state and local fire and safety laws and that the standards apply to all housing covered by Sec. 655.235, a change, as discussed earlier in connection with Sec. 655.230, to make plain that stationary housing used by some

employers on grazing trails must comply with the standards, which were previously referred to ``mobile housing.'' Finally, we have clarified that employers must ensure the accessibility of fire extinguishers.

V. Administrative Information

A. Executive Order 13563 and Executive Order 12866

Executive Order (E.O.) 13563 directs agencies to: Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under E.O. 12866, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a ``significant regulatory action'' as any regulatory action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely affects in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as ``economically significant''); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

OIRA has designated the Final Rule a significant regulatory action under sec. 3(f) of E.O. 12866 but not an economically significant rule. The economic effects of the costs and transfers that would result from the changes in this Final Rule, above and beyond the impacts of the program as it is currently implemented, are not economically significant. The largest impact on employers will result from implementation of the wage setting methodology. The Final Rule will result in average annual transfers from employers to employees ***due*** to increased wages of $17.46 million between 2016 and 2025, which includes

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a two-year transition period during 2016 and 2017, with full implementation in 2018.61 62 For those employers engaged in

the range production of livestock other than sheepherding and goat herding, the Final Rule requires employers to provide food or meals, free of charge, to ***workers*** at an average annual cost of $1.78 million (employers engaged in sheepherding and goat herding must already provide free food under the TEGL, so it is part of the baseline; although employers engaged in the range production of livestock currently must provide free food based on the SWA wage survey, that could change, so we accounted for the cost). The special procedures guidance currently in place for the range production of livestock and sheepherding and goat herding require the provision of an adequate and convenient supply of water that meets the standards of the state health authority in sufficient amount to provide for drinking, cooking, and bathing. The Final Rule clarifies the required water supply by generally requiring the supply of at least 4.5 gallons of potable water per day for drinking and cooking, and modifies it by including water for laundry (with certain exceptions). The additional costs incurred by employers resulting from these requirements in the Final Rule average $2.36 million annually and include the cost of the potable water, utility trailers, vehicle mileage, and labor to deliver the water and food to ***workers***.\63\ The Final Rule also includes a requirement that employers provide access to cooking and cleaning facilities when ***workers*** are located at or near a fixed-site ranch or farm. As the Department anticipates existing cooking facilities will accommodate that requirement, the estimated average annual cost to employers for

costs related to the provision of cleaning facilities is $0.75 million. The additional cost incurred by employers for recordkeeping is $0.19 million per year and $0.10 million for the heating equipment per year, respectively. Finally, the cost for the time required to read and review the Final Rule is $0.01 million per year. The Final Rule involves some cost reductions for employers, primarily for those who will no longer be required to place newspaper advertisements, which amount to $0.06 million per year. Therefore, the average annual cost of the Final Rule is $5.13 million.

\61\ Some part of these increased wages will be paid to foreign ***workers***. Following Circular A-4, these payments may potentially be considered costs from the perspective of the U,S. economy, but should be considered transfers if these ***workers*** can be considered ``residents'' of the U.S. or if the global effects of the regulatory change are analyzed.

\62\ To determine the new required monthly wage rate for 2016, the Department first multiplies $7.25 per hour times 48 hours per week times 4.333 weeks per month. For years after 2016, the Department calculates the average change in the quarterly wages and salaries Employment Cost Index (ECI) for each year from 2012 through 2014. We then take the average year-over-year ECI growth rate and in 2017 apply the resulting value to the 2016 monthly wage, and we apply the ECI growth rate to the prior year's result again for each

subsequent year. There is a transition period during 2016 and 2017, when the resulting monthly wage is multiplied times .8 and .9, respectively. This methodology is described in detail in Section 4: Subject-by-Subject Analysis. The $17.46 million in increased wages likely is an overestimate of the impact as several employer commenters stated that they already pay wages in excess of the currently required wages (as well as for other reasons addressed in Section 4).

\63\ The estimate of $2.36 million is likely an overestimate based on the fact employers are already required to provide water for drinking, cooking, and bathing that meets state health standards, and it presumes delivery 50 weeks of the year when ***workers*** are only required to be on the range for a majority of the job order period.

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1. The Mendoza Litigation and Need for Rulemaking

In Mendoza, et al. v. Solis et al., U.S. ***workers*** filed a lawsuit in the U.S. District Court for the District of Columbia challenging the special procedures for sheepherding, goat herding, and occupations involved in the production of livestock on the range, asserting that the Department violated the Administrative Procedure Act (APA) by adopting ``special procedures'' without first providing notice and an opportunity for public comment. The district court granted a motion to

dismiss for lack of standing, but the Court of Appeals for the DC Circuit reversed the district court's dismissal and held that the Department's Training and Employment Guidance Letters (TEGLs) containing special procedures for herding and production of livestock occupations on the range constituted legislative rules subject to the APA's procedural notice and comment requirements.

Through this rulemaking, the Department is complying with an order issued by the district court on remand to remedy the APA violation found by the DC Circuit. The lawsuit, however, is only one of the reasons for the promulgation of this Final Rule. The unique on-call nature (up to 24 hours a day, 7 days a week) of the work activity in isolated areas associated with these occupations, coupled with the sustained scarcity of U.S. ***workers*** employed in herding, has made determining an appropriate prevailing wage increasingly difficult under the current methodology for determining wages for these occupations. In these occupations, the prevailing wage serves as the Adverse Effect Wage Rate (AEWR). Few employers provide U.S. ***worker*** wage information in response to prevailing wage survey requests for these occupations, making it difficult for State Workforce Agencies (SWAs) to submit statistically valid prevailing wage findings to the OFLC Administrator. For example, based on a review of employer surveys conducted over the last four years by approximately 10 states located in the mountain plains/western regions of the United States, all of the SWAs with reportable wage results under ETA's guidelines reported a combined total of only 30 (2012), 26 (2013), 18 (2014), and 52 (2015) domestic

workers performing sheepherding; these numbers are insufficient to report statistically reliable wage results by state. Therefore, through this rulemaking, the Department plans to establish a more effective methodology for determining and adjusting a monthly wage rate for these unique occupations that adequately protects U.S. and H-2A ***workers*** in these occupations. In addition, the Department has received complaints concerning housing conditions and has found violations of the housing standards in both complaint and directed (non-complaint) investigations. In addition, several cases have been litigated in which ***workers***' health and safety were at question. See Ruiz v. Fernandez, 949 F. Supp. 2d 1055, 1060 (E.D. Wash. 2013) (denying defendants' motion for summary judgment where plaintiff-sheepherders alleged mistreatment, including denied breaks, threats of deportation, inadequate food, and housing that did not meet the minimum health and safety standards); Camayo v. John Peroulis & Sons Sheep, Inc., No. 10-CV-00772-MSK-MJW, 2012 WL 4359086, at *1 (D. Colo. Sept. 24, 2012) (denying defendant's motion to dismiss where plaintiff-sheepherders alleged severe mistreatment, including lack of food); In the Matter of: John Peroulis & Sons Sheep, Inc., ALJ Case No. 2012-TAE-00004 (appeal pending before ARB) (ALJ upheld the Department's charges against employer for multiple violations, including lack of adequate housing).

2. Regulatory Alternatives

In the Notice of Proposed Rulemaking (NPRM), the Department proposed to set the monthly AEWR for these occupations based on

forecasted AEWR values from the Farm Labor Survey conducted by U.S. Department of Agriculture USDA (FLS-based AEWR) multiplied by an estimate of 44 hours per week, with a four-year transition and full implementation in year five (referred to in the NPRM as a five-year

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phase-in). In addition, DOL considered the following two alternatives:
(1) Base the monthly AEWR on the FLS-based AEWR multiplied by 44 hours with a two-year transition and full implementation in year three; or
(2) base the monthly AEWR on the FLS-based AEWR multiplied by 44 hours with no transition.

The Department received numerous comments related to the alternatives considered in the NPRM's EO 12866 analysis. Many commenters, including Mountain Plains Agricultural Services and Western Range Association (Mountain Plains and Western Range) and the Texas Sheep & Goat Raisers Association, as well as Brent Espil, Cunningham Sheep Co., and Siddoway Sheep Company, Inc. (individual employers) asserted that the alternatives were not ``true'' alternatives in that the Department did not consider other ways to determine the AEWR for occupations involving the herding or production of livestock on the range. For this reason, some commenters stated that the Department failed to meet the requirements set forth in the Regulatory Flexibility Act (RFA). They characterized the three alternatives presented by the Department as one alternative with three transition periods methods,

and stated that in their view the alternatives therefore do not satisfy the requirements of Section 603(c) of the RFA to describe ``any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.'' The U.S. Small Business Administration (SBA) Office of Advocacy similarly asserted that the Department did not analyze any regulatory alternatives that may minimize the economic impact of the proposed rule on small businesses, and suggested that the Department publish a Supplemental Initial Regulatory Flexibility Analysis (IRFA). The Wyoming Farm Bureau Federation--a trade association--questioned why the Department did not consider longer phase-in alternatives. In the Final Rule, the Department analyzes a different set of alternatives that utilize different wage rate sources, including the Fair Labor Standards Act (FLSA) current minimum wage of $7.25/hour, the 1994 TEGL monthly wage rates indexed by the Employment Cost Index (ECI) for wages and salaries as published by the Bureau of Labor Statistics (BLS), and the FLS-based AEWR.

The Department carefully reviewed the comments related to the proposed wage setting methodology and to the alternatives laid out in the E.O. 12866 analysis and the IRFA. After considering the comments, the Department has decided to set wage the monthly AEWR for range herders of sheep, goats, and other livestock using a formula based on the current FLSA minimum wage of $7.25/hour as a starting point, multiplied by a revised weekly estimate of 48 hours per week, with

annual adjustment based on inflation from the ECI for wages and salaries beginning in year two. This base wage source is generally consistent with the second of two alternative proposals set forth by Mountain Plains and Western Range, which was endorsed by the ASI and many individual employers. DOL adopts a weekly hour estimate of 48, which is greater than that proposed by these commenters, and a transition period (two years with full implementation in year three) shorter than that favored by these commenters. As under the proposal, the employer is required to pay an applicable Federal or State minimum wage if higher than the monthly AEWR. As discussed in detail in the preamble, the Department concludes that this wage rate is both necessary to provide a meaningful test of the labor market for

available U.S. ***workers*** and to protect against adverse effect on ***workers*** in the United States similarly employed.

As discussed in the Final Regulatory Flexibility Analysis (FRFA) that follows, in addition to the wage methodology adopted in this Final Rule, the Department considered three alternative methods to set the monthly AEWR: (1) To set the monthly AEWR based on the 1994 TEGL wage adjusted for inflation using the capped ECI,\64\ and a three-year transition period with full implementation in year four; (2) to set the monthly AEWR based on an hourly rate of $7.25 multiplied by an estimate of 44 hours per week and adjusted using the capped ECI beginning in year five, implemented with a three-year transition period with full implementation in year four; and (3) to set the monthly AEWR using the FLS-based AEWR multiplied by an estimate of 65 hours per week without a

transition and permitting food deductions based on the methodology used in the rest of the H-2A program.

\64\ Mountain Plains and Western Range recommended indexing past wages based on the ECI with a 1.5 percent adjustment if the percentage increase in the ECI during the previous calendar year was less than 1.5 percent; by the percentage increase in the ECI if such percentage was between 1.5 percent and 2.5 percent, inclusive; or by 2.5 percent if the percentage increase in the ECI exceeded that amount. We refer to this methodology throughout as the ``capped ECI''.

The selected methodology will most effectively enable the Department to meet its statutory obligations to determine that there are not sufficient ***workers*** available to perform the labor or services requested and that the employment of foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** in the United States similarly employed before the admission of foreign ***workers*** is permitted. The new wage methodology will begin to address immediately and substantially the wage stagnation concerns discussed earlier in the preamble. The transition period recognizes that the full wage increase

in a single year could lead to disruptions that could be avoided by the more gradual implementation period. In determining where to set the monthly AEWR so that it will not result in adverse effect, it was appropriate for the Department to consider whether a significantly higher wage could be immediately absorbed by employers or might have the unintended consequence of reducing the availability of jobs for U.S. ***workers*** because the wage would result in some employers going out of business or scaling back their operations, as a substantial number of comments demonstrated.

3. Economic Analysis

The economic analysis presented below covers employers engaged in the herding or production of livestock on the range. The Department's economic analysis under this Part (III.A) is strictly limited to meeting the requirements under Executive Orders 12866 and 13563. The Department did not use the economic analysis under this Part as a factor or basis for determining the scope or extent of the Department's obligations or responsibilities under the Immigration and Nationality Act, as amended. Nor did the Department use the economic analysis in this Part as a relevant factor relating to any requirement under the Administrative Procedure Act (APA), or any case interpreting the requirements under the APA.

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2010 Final Rule and TEGLs 32-10 (Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the

H-2A Program) and 15-06, Change 1, (Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H-2A Program), against the benefits and costs associated with the

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implementation of provisions contained in the Final Rule. This analysis assumes that entities subject to the Final Rule are already in compliance with the 2010 Final Rule and relevant TEGLs. We explain how the required actions of employers engaged in herding or the production of livestock on the range are linked to the expected impacts of the Final Rule.

The Department has quantified and monetized the impacts of the Final Rule where feasible. Where we were unable to quantify benefits and costs--for example, ***due*** to data limitations--we describe them qualitatively and identify which data were not available to quantify the costs. The analysis covers 10 years (2016 through 2025) to ensure it captures all major impacts.\65\ When summarizing the benefits, costs, or transfers resulting from specific provisions of the Final Rule, we present the 10-year averages to estimate the typical annual effect or 10-year discounted totals to estimate the present value of the overall effects.

\65\ For the purposes of the cost-benefit analysis, the 10-year period starts on January 1, 2016.

In the remaining sections, the Department first presents an overview of general comments received from the public. We then present a subject-by-subject analysis of the impacts of the Final Rule and a summary of the costs and transfers, including total impacts over the 10-year analysis period.

a. General Comments Received on the Economic Analysis

i. Employer Growth Rate

The NPRM's EO 12866 analysis used an annual growth rate of 2 percent to forecast participation in the H-2A program. Several commenters stated that this growth rate was inaccurate. Carol Martinez, Alex (Buster) Dufurrena, and John and Carolyn Espil, individual employers, stated that the assumed 2-percent annual growth rate of U.S. sheep producers was inaccurate because the proposed rule would put additional financial burdens on producers that would force them to reduce the number of H-2A ***workers*** hired or to close. John and Carolyn Espil referenced the BLS Occupational Outlook Handbook (2014-15 Edition), which predicted that farmers, ranchers, and other agricultural managers would experience a loss of 179,000 jobs over the period of 2012-2022, which amounts to a 19 percent reduction. Similarly, the Texas Sheep & Goat Raisers Association and ASI and

Public Lands Council stated that after the National Wool Act was phased out by the Federal government in 1993-1995, tens of thousands of sheep ranches went out of business and subsequently, in the late 1990's, linked allied industries also went out of business ***due*** to the lack of lamb and wool. Mountain Plains and Western Range stated that the assumed 2-percent employer growth rate ``demonstrates how fundamentally wrong DOL's assumptions are.''

The Department had estimated the 2-percent annual growth rate based on historical H-2A program data on labor certifications for sheepherding, goat herding, and range cattle production employers. For the Final Rule, the Department updated its analysis by evaluating the annual change in the number of unique herding employers between FY 2012 and 2014 and found inconsistent results. Between FY 2012 and 2013, we found a decrease in participation of 114 percent, while the FY 2013 and 2014 program data indicate an increase in participation of 11 percent. In light of the comments and this data, in the Final Rule the Department revises the growth rate to be 0 percent, that is, the Department assumes the employer participant population in this H-2A program will neither rise nor fall over the analysis time period.

ii. Comments Received on Impacts on Profitability

Several commenters stated that the increased costs associated with the proposed rule, particularly the proposed wage increases, would destroy the industry. Other commenters questioned the accuracy of the economic analysis and opposed some of the conclusions presented in the analysis. For example, Representative Allen Jaggi, an elected official,

and Skye Krebs, an individual employer, warned that the proposed rule would force employers out of business because they operate on thin profit margins. The American Farm Bureau Federation used an industry standard range sheep farm budget developed by the University of Utah to analyze the impact of the proposed 2020-2025 forecasted FLS-based AEWR wage, which resulted in $41,325 per year in additional wages. According to the American Farm Bureau, if prices fall to year 2002 conditions--the lowest prices over the period of 2000-2014 ($0.80 per pound for lambs and $0.53 per pound for wool)--employers in each of the 19 states analyzed would be operating at a loss (Alabama, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Missouri, Montana, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming). They also presented the average prices over the last five years as well as over the preceding 10 years to demonstrate the trend in prices. They noted that the average price received for lamb over the past five years ($1.70 per pound) is 63 percent higher than the price received over the preceding 10 years ($1.04 per pound), while the average price received for wool over the last five years ($1.45 per pound) is 113 percent higher than the prices they received on average over the preceding 10 years ($0.68 per pound). The State of Utah also submitted data pertaining to the average price of lamb over time. The State noted that the average price of lamb increased from $67.94 in 1994 to $157.15 in 2014, which amounts to an increase of $48.61 over a 20-year period after adjusting for inflation.

Without acknowledging that ***worker*** wages have not similarly been

adjusted for inflation, the commenter stated that this small increase in the value of lamb cannot support the proposed tripling in the wage increase and will force producers out of business.

The Utah Farm Bureau Federation, the Texas Sheep & Goat Raisers Association, and Mountain Plains and Western Range analyzed an enterprise budget for an Idaho sheep operation with ewes on the range and selling feeder lambs (Painter, K., Idaho, University of Idaho, 2014), which earned $60 per head in total returns. Using data for the State of Utah, the Utah Farm Bureau estimated that after tripling the wage rate, total returns would decrease 111 percent to negative $6.00 per head, while income above operating costs would decrease 80 percent from $83,000 to less than $17,000. They stated that tripling the hired labor rate reduces total returns from a profit of nearly $90,000 to a loss of approximately $10,200.

The Wyoming Wool Growers Association stated that the Department underestimated the cost associated with the proposed wage increase. They referenced an analysis from the University of Wyoming estimating that the proposed wage increases would increase the annual operating costs by more than 40 percent ($39,600) for a Wyoming range sheep operation with two foreign herders. The analysis also indicated that income above operating costs would fall by 78 percent (to $11,313) under current price conditions. The Texas Sheep & Goat Raisers Association commented that the Department underestimated the cost of the proposed rule, which included the cost of additional wages over the period from 2016 to 2020 ($45 million) and non-wage costs ($5 million

per year).

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John and Carolyn Espil stated that the Department misrepresented the make-up of the industry as it was presented in the NPRM's Exhibit 2 (The Number and Percentage of H-2A Employers by Occupation and State). They stated that none of the values in the Exhibit reflected the Western Range Association's membership numbers. For example, the Department presented information indicating that Nevada had one employer, while the Western Range Association had 17 members from Nevada as of January 2015. Because of what they perceived as an inaccuracy, they questioned the overall accuracy of the economic analysis. They also disagreed that the proposed rule was not a major rule that required review by Congress under the Small Business Regulatory Enforcement Fairness Act (SBREFA), asserting that it would have an economic impact of at least $100 million and would result in increased costs to consumers, levels of government, and regions ***due*** to failed businesses, the loss of stewardship of the land by livestock ***workers***, as well as a loss of 40 percent of the sheep industry. They stated that this would affect competition, employment, investment, productivity, innovation, and the competitiveness of U.S.-based businesses.

Mountain Plains and Western Range, and Vermillion Ranch and Midland Ranch stated that the economic analysis did not take into account the

cost of forcing ranches to close or to downsize. The commenters contended that employers would be forced to sell their herds, equipment, and land into a buyer's market. Many other commenters similarly stated that the economic analysis did not estimate the losses associated with the massive sale of livestock. Since 40 percent of the nation's sheep graze on ranges, the commenters asserted that the proposed rule could lead to the sale of breeding ewes for slaughter at undervalued prices because the market would not be able to absorb them. Mountain Plains and Western Range, for example, estimated that the total loss would be $212 million based on the total value of the U.S. sheep supply. They also emphasized that the ranchers could not simply raise prices to cover the increased costs because U.S. producers account for less than seven tenths of one percent of the world's wool production and less than nine tenths of one percent of the world's lamb production.

The commenters focused primarily on the proposed wage increase because labor is such a significant percentage of their operating costs, although the statistics they cited were not uniform. The Utah Farm Bureau Federation referenced an economic analysis conducted by Dr. Julie Shiflett of Juniper Consulting, which stated that hired labor accounts for 40 percent of total operating costs for an average western range sheep operation with two bands of sheep. The Rural Development Office cited the Utah Woolgrowers Association, which also stated that labor costs make up 40 percent of total operating costs in Utah sheep operations.

On the other hand, the Wyoming Livestock Board, the Texas Sheep & Goat Raisers Association, Mountain Plains and Western Range, and ASI and Public Lands Council summarized that current statistics from ASI show that, on average, hired labor costs make up 24 percent of a sheep rancher's total operating costs. The Diamond Sheep Company stated that wage costs represent approximately 20 percent of its operation's annual costs. The commenter noted that, in total, nearly 30 percent of its annual operating costs are labor-related when groceries--which make up approximately five percent--and travel and labor document fees--which make up 2 percent--are included.

Several commenters described the effect the proposed rule's wage increases would have on their operations, with some indicating that the proposal would result in annual operating losses:

FIM Corp. stated that over the period of 2006-2013, its gross annual income from sales of wool, lambs, sheep, and hay averaged $1.1 million and that after operating expenses are taken out, its net income averaged approximately three percent of gross income. FIM Corp. further stated that the proposed tripling of sheepherder wages would result in approximately $250,000 per year in additional wage payments. The commenter also noted that it employs 11 H-2A sheepherders and seven ***workers*** for other ranch work, and stated that it treats them equally; hence, it would apply any wage increase imposed by the Department to all ***workers***, which would cost the commenter's operation between $320,000 and $450,000 per year.

David and Bonnie Little stated that they typically employ 10 sheepherders and that the proposed wage increase would add an additional $180,000 per year in payroll expenses, which exceeds their average adjusted gross income of $79,000.

Steve Raftapoulos, an individual employer, stated that the proposed wage increase alone would result in a loss of approximately $120,000 in 2017 and $320,000 by 2020.

The Siddoway Sheep Company stated that the proposed wage increase would result in increased costs of $98,354 over the first five years of implementation, excluding employer liability for payroll taxes, while using the FLS-based AEWR with no transition would result in increased costs of $138,539 over the first five years of implementation. Siddoway stated that the wage increases should be consistent with average wage growth, and stated (without noting that there has been almost no wage growth for H-2A herders since 1994) that the average wage for U.S. ***workers*** increased 3.13 percent in 2011, 3.12 percent in 2012, and 1.28 percent in 2013.

Eph Jensen Livestock, LLC stated that, in 2014, wages paid to sheepherders accounted for nine percent of the gross revenue and would have accounted for as high as 30 percent if the proposed rule had been fully implemented.

In contrast to the comments from employers, the ***Worker*** Advocates' Joint Comment emphasized that the proposed monthly wage was inappropriately low. They criticized the weekly number of hours used to set the proposed monthly wage, presenting data from a survey of 90 H-2A

herders indicating that only 7 percent worked less than 60 hours per week, while 62 percent worked more than 81 hours per week, and 35 percent worked more than 91 hours per week. In their view, this study demonstrates that the 44-hour assumption used in the proposal is a significant underestimate of the actual number of hours worked. In support of the view that the FLS-based AEWR should be immediately

effective, the ***Worker*** Advocates' Joint Comment pointed to several examples of jobs that, in the their view, demonstrated that the

ranching industry already supports ***workers*** earning the full FLS-based AEWR who perform similar work, particularly citing ``Sheep, Farmworker General'' in Wyoming, ``Closed Range Herders'' in Texas, and ranch hands performing livestock as well as other tasks. They further cited wage rates paid by employers ``in states without large herder

populations,'' such as for Maine sheep farmers and sheep farm ***workers*** in North Dakota (both paid on an hourly basis). Further, they noted that California, where employers are significant participants in the H-2A program, has a wage rate for herders that is significantly higher than the current TEGL wages in other States.

In response to the comments on potential economic losses to H-2A employers attributable to the proposed

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rule, the Department considered enterprise budgets pertaining to range

sheep production submitted by commenters and the economic analysis provided by the American Farm Bureau on the range sheep production industry, in assessing the industry's ability to absorb the increased wages that would have been required based on the FLS-based wage methodology in the proposed rule.\66\ The Department also considered the comments from individual employers who provided the data on wage increases as a percentage of their revenues and profits. We also reviewed the historic pricing data for lamb and wool, which show significant fluctuations over the years. The Department also carefully reviewed the comments from ***worker*** advocates regarding the wages paid in occupations that they view as comparable to range herding jobs and the hours worked.

\66\ As discussed below, the enterprise budgets are from various years when labor, lamb, wool and all other factors were priced at different levels, making them of somewhat limited utility; however, they provided a useful starting point for the analysis.

After carefully evaluating all of the available information, we found that the data did not warrant setting wages for these occupations based on the FLS-based AEWR for the reasons discussed in detail in the preamble and summarized below. If the rule would result in a

substantial number of range herding employers closing their operations or significantly reducing the number of ***workers*** hired, that would result in fewer jobs being available to U.S. ***workers*** and would thus be inconsistent with the Department's obligation to protect against adverse effect to U.S. ***workers***.

First, the Department received many comments from employers who have been in the business for many generations asserting that the proposed wage rate would cause many employers to either go out of business entirely or to downsize and greatly reduce the number of ***workers*** employed. Commenters provided enterprise budgets for the range sheep production firms in Wyoming, Idaho, and Utah.\67\ The enterprise budgets for range sheep production show that applying the full FLS-based proposed AEWR to H-2A ***workers*** will lead to a wage increase of about 290 percent, which under the conditions presented will entirely eliminate profits in Wyoming and Idaho and substantially diminish them in Utah. For example, the Wyoming Wool Growers Association estimated that the proposed wage increase would reduce annual returns to a negative $16,237. The commenter asserted that based on the past 20 years of total receipts per ewe, the sheep operation would have been able to pay total operating and ownership costs only eight percent of the time over the 20-year period if labor costs were as high as proposed by the Department.

\67\ Wyoming Wool Growers Association, ``Economic Importance of

Sheep Production in Wyoming,'' http://wyowool.com/NewsandInfo/2015/Supplemental%20Info_UWYO%20Analysis_EconImpactSheep%20in%20WY.pdf;

University of Idaho Extension, ``2014 Idaho Livestock Costs and

Return Estimate--Sheep Range,'' http://web.cals.uidaho.edu/idahoagbiz/files/2015/04/EBB-SR1-14.pdf; Utah State University,

Extension Economics, E. Bruce Godfrey and Gary Anderson, http://extension.usu.edu/agribusiness/files/uploads/livestock/pdf/1997%20range%20sheep.pdf.

The American Farm Bureau, using the average prices for 2000-2014,\68\ showed that the profit for range sheep firms will be reduced by approximately 35 percent to 40 percent in Utah, Colorado, Nevada, Wyoming, and Idaho. The reduced profits are approximately $75,000 on average per firm in those states. When the 2002 prices are used, which were the lowest over the 15-year period, profits for range sheep production firms in all five states will be entirely eliminated. The American Farm Bureau stated that the historic prices for feeder lamb and shorn wool have fluctuated greatly over the last 25 years and that it is probable they will return to prices lower than the current prices, which in the past few years have been at historic highs.

\68\ $1.26/lb 60-90 pound feeder lambs, $0.90/lb shorn wool.

Nevertheless, after considering variations from year to year, the data reflect that the increases in the prices of wool and lamb have outpaced the minimal increases in wages, and that based upon the 15-year average prices a substantial increase is wages could be absorbed. Thus, even the three primary employer associations have proposed setting the monthly AEWR based on a methodology that will result in wages significantly above the current TEGL rates, which we view as compelling evidence that the industry will remain viable even where employers pay a significantly higher wage rate to employees in these occupations. This is consistent with the fact that employers in Oregon and California are currently paying substantially higher wages (for example, in California the higher state minimum wage for sheepherders produces a monthly salary for sheepherders of $1,600.34, and effective January 1, 2016 it will increase to $1,777.98). Not only does the industry remain viable at those rates in those States, but California has the second highest number of employers participating in the H-2A sheep and goat herder program.

This evidence is supported by the few comments we received in support of the proposed wage methodology in the NPRM. These commenters stated that wage rates based on the full FLS-based AEWR, as in the proposed rule, are appropriate and necessary to protect against adverse effect on ***workers*** in the U.S. similarly employed. The ***Worker*** Advocates' Joint Comment provided prevailing wage data for various states based on

wage surveys that show that some H-2A ***workers*** performing similar duties are paid at wage rates that are comparable to the full AEWR.

However, as discussed in the preamble, DOL found that data did not warrant setting wages for these occupations based on the FLS-based AEWR. The record indicates that the proposed approximate tripling in the wage rates, which would have resulted in higher wage rates than those in California in several states, could not be absorbed without a significant risk of job losses. Based on the comments from ranchers, the Department concludes that at least some sheepherding or goat herding employers would decide to leave the industry if, ***due*** to the extra costs, they would be able to earn income outside farming that is significantly higher than their reduced profits or no profit, especially ***due*** to the risky and unpredictable nature of agriculture and the fluctuations in prices that they receive with an ever-decreasing share of the world market. Therefore, we conclude that some ranchers would not be able to continue to do business if they had to pay H-2A ***workers*** at the FLS-based AEWR, thereby resulting in job losses in the range sheep production industry and related industries.

As noted above, the Department relied on the enterprise budget data submitted by commenters only in conjunction with all the other information in the record in coming to this conclusion, because there are several limitations on that data. First, the enterprise budget data is not available for all range sheep production firms in terms of

various operational sizes and geographical areas, which are factors that may significantly affect costs and profitability. Second, budgets are generally constructed to reflect future actions, and it is difficult to accurately predict future commodity prices and yields. High degrees of variability in price and production adversely affect the reliability of the estimates used in the enterprise budgets. Third,

it likely that some of the ***workers*** included in the enterprise budgets are paid wages above those required by the TEGLs; therefore,

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the wage increase costs measured in this analysis may overestimate the true cost increase for H-2A employers. \69\ In addition, errors in developing an enterprise budget from various data sources can compound themselves to the point where budgets can have limited value in assessing profitability and break-even values, particularly for range sheep production. Finally, a rancher could have multiple enterprise operations that include both range sheep production and range cattle production. This would negate the accuracy and reliability of the profitability analysis of the rancher that is solely based on the enterprise-budget data pertaining to range sheep production.

\69\ This is particularly true as the budgets are not limited to H-2A ***workers***, and some employers stated in their public comments

that they pay even their H-2A herding ***workers*** above the minimum TEGL-required wage.

In that regard, the Department did not receive any economic analysis pertaining to range cattle production, which is a much smaller part of the program than the range production of sheep; the limited data received for cattle herding is generally consistent with that received on sheep production. For example, Vermillion Ranch and Midland Ranch, individual employers, provided a link to a study \70\ showing that the average net income (i.e., profit) for range cow/calf production is 55 cents per acre in New Mexico and also indicated that a cow/calf operation running 300 head in New Mexico would need about 31,000 acres. Using 31,000 acres for a viable range cattle production firm in New Mexico, it would have an annual profit of $17,050. This profit would be reduced by almost 90 percent to around $1,700 if wages were increased by 250 percent based on the monthly FLS-based AEWR for one H-2A ***worker*** hired by the firm.

\70\ New Mexico State University, Cooperative Extension Service Agricultural Experiment Station, ``Legacy of Agricultural Property Tax in New Mexico (2011),'' http://aces.nmsu.edu/pubs/_ritf/RITF81.pdf.

The Department understands that prices for wool and lamb have varied widely over the past 15 years, and that they are currently at historic highs, so that in determining the appropriate wage rate we cannot consider only what employers presently can pay without resulting in the loss of jobs. Based on the record in the comments as a whole, the Department concludes that some ranchers would not be able to continue to do business if they had to pay H-2A ***workers*** at the full FLS-based AEWR, as proposed; thus, there would be a potential for significant job losses in the range sheep, goat and cattle industries and related industries. Therefore, the Department modified the required monthly AEWR in the Final Rule in a manner generally consistent with a suggestion offered by Mountain Plains and Western Range and many other commenters, although modified in a manner suggested in the ***Worker*** Advocates' Joint Comment. Thus, the Department has decided to set wage rates for range sheep, goat and other livestock herders based on a formula that uses the current FLSA minimum wage as a starting point and updates it annually for inflation. These rates are in line with those set forth in the second of two alternative proposals by Mountain Plains and Western Range, a proposal that was endorsed by ASI and many individual employers. However, we modify their suggestion by increasing the number of hours in setting the monthly rate to 48 hours per week, and by shortening the transition period before the full monthly AEWR goes into effect. The record, including the comments from the three

primary employer associations, demonstrate that such higher wage rates can be absorbed and will not result in significant job losses. In addition, the viability of these higher wage rates is supported by the fact that California has continued to have a vibrant herding industry (it is the second largest user of the H-2A herder program) even in light of the increased wage rates in that state. The Department concludes that the increase in operating costs under the new wage rate initially based on the FLSA should be manageable for ranchers and is the minimum necessary to overcome the decades of wage stagnation and

require that the job opportunities are made available to U.S. ***workers*** at appropriate wage rates that will not result in adverse effect.

iii. Economic Impacts of Herding on Other Industries

The Department received numerous comments related to the economic impacts of herding on other industries. Many commenters asserted that up- and down-stream businesses in related industries, consumers, as well as local, state, and national economies would be negatively affected by the implementation of the rule.

Several commenters, including ASI and Public Lands Council, the Texas Sheep & Goat Raisers Association, and individual employers, stated that since 38 percent of U.S. sheep are cared for by H-2A

workers, if the proposed rule forced ranchers out of business, it could result in up- and down-stream losses. The Texas Sheep & Goat Raisers Association, ASI and Public Lands Council, and the Utah Farm Bureau Federation estimated that, in 2014 dollars, $1.00 of revenue produced by a sheep producer generates $1.71 in backward-linked industries and

$0.80 in forward-linked good and services industries, for a total of $3.47 in additional economic impacts generated in the local, rural economy (Shiflett, ASI, Sheep and Lamb Industry Economic Impact Analysis, April 2008, Revised March 2011). They stated that the U.S. sheep industry annually generates approximately $500 million in backward-linked industries through the sale of items such as lambs, wool, and cull breeding stock. The direct and value-added multiplier effects were calculated to be an estimated $486.5 million, which supports an additional $1.2 billion in economic activity for a total of $1.7 billion. The sheep industry also supports forward-linked industries, such as local businesses, through expenditures of sheep-industry generated income on goods and services. Estimates of sales from retail lamb and wool-related products indicate that $785.6 million in production generates an additional $1.9 billion in multiplier effects. The commenters stated that the total economic impact is $2.7 billion. Mountain Plains and Western Range stated that the estimated value of the direct production of sheep cared for by H-2A ***workers*** is $275 million, and that revenue created in indirect up- and down-stream businesses is valued at more than $665 million.

The Texas Sheep & Goat Raisers Association and ASI and Public Lands Council further remarked that an estimated loss of $66,167 per rancher would generate approximately $229,320 in backward- and forward-linked businesses, and ***given*** that they estimate 598 operations employ herders, rural communities across the West would experience a loss of

approximately $137.1 million. The commenters stated that a loss of over $66,000 per sheep rancher would result in 1.67 jobs being lost at the ranch, which would subsequently result in a total loss of 2.62 jobs in the local economy. They estimated that if 598 sheep operations employing herders suffered this loss, the total rural-employment loss would be 1,568 jobs.

Many commenters, including the Texas Sheep & Goat Raisers Association, the Wyoming Livestock Board, the Wyoming Wool Growers Association, the National Lamb Feeders Association, the Garfield County Farm Bureau, and TVB Management Company, discussed the broader impact of the rule. Some

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cited industry estimates that suggested that each H-2A open-herder position creates many full-time U.S. jobs up- and down-stream, most of which are associated with small, rural communities. Mountain Plains and Western Range stated that significant losses would occur up-stream and down-stream, because each production of livestock job creates at least eight full-time U.S. jobs. Commenters cited related industries and jobs such as feed suppliers, lamb processors, slaughterhouses, meat packing plants, truck drivers, shearers, textile mills, fencing companies, veterinarians, supermarket clerks, and butchers who would be affected. Other commenters focused on the types of supplies and equipment that sheep businesses typically buy from local businesses (e.g., groceries,

propane, campers, animal feed, crop seeds, cloth, insurance, medicine, parts from agriculture dealers and auto part stores, as well as vehicles and machinery such as ATVs and John Deere and Bobcat products). The commenters warned that the effects would not be limited to western sheep operations--the loss of the supporting industry in the West would force eastern sheep operations out of business as well. They noted that losing 2,000 H-2A ***workers*** could result in the loss of tens of thousands of U.S. jobs.

Some commenters from supporting businesses expressed how the proposed rule would affect them. Below are three comments that were typical of the comments provided:

Oregon Shepherd LLC, which manufactures all-natural wool building insulation, stated that it is a small business with three employees that depends on the U.S. sheep industry for raw materials. It is located in a rural Oregon county with a higher than average unemployment rate.

Center of the Nation Wool, Inc. is a primary wool supplier to the U.S. textile industry and acts as a wool marketing agent for a large percentage of sheep enterprises, which are mostly small family operations that would be directly affected by the proposed rule. The commenter asserted that the implementation of the proposed rule could lead to a loss of textile jobs and destroy the entire lamb and wool marketing chain.

Mountain State Rosen, LLC is an integrated lamb packer and processor. It employs over 300 people and has national distribution

with annualized sales of $192 million. It is a producer-owned company affiliated with Mountain States Lamb Cooperative, which is comprised of 170 lamb producers located in 17 western states, and 65 percent of the lambs they market through their cooperative come from ranches with H-2A herders. The commenter stated that volume is critical to its business, and the proposed rule would force mass liquidation of western sheep operations, thereby doing significant harm to its business.

The New Mexico Department of Agriculture, the Wyoming Department of Workforce Services, the Wyoming Department of Agriculture, Governor Matthew H. Mead of the State of Wyoming, and John and Carolyn Espil suggested that the Department should perform a full economic analysis on the impacts that the proposed rule would have on local, State, and national economies. ASI and Public Lands Council stated that for some western states (e.g., Idaho, Colorado, Oregon and New Mexico), the loss of sheep-related economic activity would affect three to five percent of the total agriculture, forestry, fishing, and hunting gross domestic product (GDP). For other western states, the loss would be more significant--for example, sheep-related economic activity accounts for 14 percent of the GDP in Utah and Wyoming. The Lassen County Board of Supervisors stated that the value of sheep and lamb livestock production ($1,332,634) made up approximately 25 percent of Lassen County's 2012 agricultural economic output. Vermillion Ranch and Midland Ranch stated that Vermillion Ranch holds grazing permits in Daggett County, Utah, and pays property taxes; hence, it is a critical part of the local economy (as are other ranches throughout western

States). John and Carolyn Espil stated that Bureau of Land Management (BLM) and Forest Service sheep permits would be rendered valueless.

Other commenters expressed concern that the proposed rule would result in shortages of lamb and wool, because U.S. citizens could not afford or would not be willing to pay higher prices for lamb and wool. A consultant to ASI for military procurement stated that the proposed rule would disrupt the wool industry's ability and requirement (by the Berry Amendment) to support the U.S. Department of Defense (DOD) with wool for garments and blankets. The commenter stated that over 80 percent of the wool required by DOD is grown in the West on lands requiring shepherds. If domestic wool production is reduced by 38 percent, it may be impossible for the national industry to supply DOD. The commenter cited FY 2015 DOD-published accession, retention, and clothing issue rates, which indicate that DOD would spend over $300 million on wool-based garments and blankets in FY 2015. The commenter asserted that this expenditure could support as many as 5,000 manufacturing jobs in the U.S. economy, which may be lost if the proposed rule were implemented.

The Department is unable to accurately quantify the potential indirect economic impacts to related industries in the local and national economies, ***due*** to the lack of data and economic models necessary to conduct an appropriate analysis. Therefore, the Department estimated the costs only to the sheep, goat and range cattle production industries that are directed affected by this regulation, both in the NPRM's EO 12866 analysis and IRFA and in the Final Rule's analyses. In

the absence of an economic input-output model or comparative general equilibrium model of the economy specifically developed for sheep, goat and range livestock production industries, it is not possible to measure the aggregate indirect economic impact of the Final Rule on other related industries in the economy with any degree of accuracy.

Numerous changes made in the Final Rule make these commenters' concerns about the impact on the broader economy unlikely. These include for example, the adoption of a definition of ``range'' that deletes the reference to fencing that so many commenters opposed, the adoption of a wage setting methodology that is similar to a suggestion offered by the three primary employer representatives, and the other flexibilities such as the deletion of the proposed 20 percent cap on

the days that ***workers*** could perform duties at the ranch that are closely and directly relating to herding and/or the production of livestock. The Department concludes that the Final Rule will not likely result in the commenter predictions regarding the impact on the broader economy.

The Department also is responding to a few other specific comments that we received. John and Carolyn Espil stated that the Department misrepresented the make-up of the industry as presented in Exhibit 2 of the NPRM, which showed the number and percentage of H-2A employers by occupation and state derived from H-2A employer applications filed with the Department during FY 2011 and 2012. The Exhibit was not intended to reflect the total number of employers in the industry in Nevada as of January 2015 or the number of members of the Western Range Association.

In the Final Rule, the Department has updated the number of H-2A employers by state using H-2A employer applications filed during FY

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2013-14. The Exhibits below present the number of unique herder and range livestock production employers by state for FY2013 and 2014.

However, ***due*** to the fact that these occupations involve performing work on itineraries covering multiple states, some employers applied for certification covering areas of employment in multiple states; thus, the total number of unique employers is overstated.

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The Department disagrees with the comment that the proposed rule (or the Final Rule) should be considered a major rule requiring Congressional review under SBREFA. As detailed in the FRFA, the Department does not expect that the impact of the Final Rule will be over $100 million annually, which is the monetary benchmark of significance for a rule to be classified as major under SBREFA. The

Department also does not believe that the Final Rule, which was significantly modified from the NPRM in response to the comments, will result in a ``major increase in costs or prices'' for industries, governments, or consumers, or that it will have a ``significant adverse effects'' on the economy, such as on competition, employment, productivity or the ability to compete.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the following provisions of the Final Rule against the baseline (i.e., the 2010 Final Rule; TEGL 32-10; and TEGL 15-06, Change 1): (a) Proportion/type of work permitted at the ranch (i.e., not on the range); (b) the new methodology for determining the minimum monthly AEWR to be paid to ***workers***; (c) H-2A application filing requirements; (d) job order submissions; (e) job order duration; (f) newspaper advertisements; (g) placement of ***workers*** on master applications; (h) employer-provided items; (i) meals; (j) potable water; (k) expanded cooking/cleaning facilities; (l) heating equipment; (m) recordkeeping; and (n) time to read and review the rule.

For each of these provisions, the Department discusses the relevant costs, benefits, and transfers. In addition, we provide a qualitative assessment of transfer payments associated with the increased wages and protections of U.S. ***workers***. Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated

with a distributional effect but do not result in additional costs or benefits to society.

a. Proportion/Type of Work Permitted at the Ranch

The Final Rule codifies certain procedures for employers who apply to the Department to obtain temporary agricultural labor certifications to hire foreign ***workers*** to perform herding or the range production of livestock. The Final Rule also clarifies the proportion/type of work that is permitted to be performed by ***workers*** at the fixed-site ranch. Any job duties performed at a place other than the range (e.g., a fixed site farm or ranch) must be performed on no more than 50 percent of the workdays in a work contract period, and duties at the ranch must involve the production of livestock, which includes duties that are closely and directly related to herding and/or the production of livestock. The Final Rule thus clarifies and makes more specific the provision in current TEGL 32-10, which similarly provides that it applies in the unique situation of sheepherding, which requires ``spending extended periods of time with grazing herds of sheep in isolated mountainous terrain,'' and states that ***workers*** may perform ``other farm or ranch chores related to the production and husbandry of sheep and/or goats on an incidental basis.'' As in current TEGL 32-10, the Final Rule states that the work activities must also generally require the ***workers*** to be on call 24 hours per day, 7 days per week.

i. Costs

This change represents a cost to employers engaged in herding and range livestock production that have had or will have ***workers*** at the ranch for more than 50 percent of the contracted workdays or have had ***workers*** perform incidental duties at the ranch that are not closely and directly related to herding and/or the production of livestock. These employers will be excluded from applying for ***workers*** pursuant to the special procedures unless they commit to complying with the limitations for such ***workers*** in the future. The Department is not able to estimate this cost, however, because we do not know how many ***workers*** currently spend more than 50 percent of their days working at the farm or ranch, although we believe the number is very small ***given*** the commenters' descriptions of the typical herding cycles, which generally involve months spent on the range. Particularly ***given*** the Final Rule's revised definition of the term ``range,'' which no longer includes the word ``open'' and which deleted the NPRM's proposed limitation to areas that were not fenced, we anticipate employers will be able to satisfy the requirement that at least 50 percent of the job order period be spent on the range. Further, the Final Rule deletes the NPRM's proposed 20 percent cap on the percentage of ranch days that a ***worker*** could spend performing closely and directly related work. Therefore, the Department anticipates that it is likely that affected employers will make any necessary adjustments to their practices so that the duties performed

by herding and range livestock ***workers*** at the employer's fixed-site ranch will be closely and directly related to herding and/or the production of livestock.

b. New Methodology for Determining the Wages of ***Workers***

As discussed above, the Department received numerous comments related to the proposed methodology for determining ***worker*** wages. In particular, employers and their representatives commented on (1) perceived flaws with the Farm Labor Survey (FLS) data, (2) wages not accounting for herder benefits, (3) the effect the proposed wage increases would have on the profitability of operations, and (4) flaws in the reasoning behind the methodology. ***Worker*** advocates commented that the proposed wage methodology incorporated a weekly number of hours worked that was too low and that the transition period was inappropriate.

i. Use of FLS Data

Several commenters stated that it was inappropriate for the Department to determine proposed wages based on semi-annual FLS data produced by USDA's National Agricultural Statistic Service (NASS). For the reasons set forth in the preamble, the Department is not using FLS data in the Final Rule, but rather is relying on the current FLSA minimum wage of $7.25 as the starting point in the wage formula for 2016.

ii. Employee Benefits

Numerous employer commenters, including Mountain Plains and Western

Range and Calvin Roberts, an individual employer, stated that the Department's wage methodology was flawed because it did not account for the other ``benefits'' employees receive (e.g., food, rent, clothes, and transportation). Mountain Plains and Western Range remarked that most H-2A herders are able to send all of their salary to their home country. Some commenters provided estimates pertaining to the amount of the benefits provided. Calvin Roberts estimated that the cost of housing, food, and owning and operating a car could range between $1,200 and $1,500 per month in western Colorado. Mountain Plains and Western Range estimated that the proposed wage increases would yield ``actual wages'' over $2,000 per month using the methodology from the Colorado Wool Growers' 2010 report. Andre Talbott-Soares, an individual employer, stated that California's H-2A monthly wage of $1,600 increases to at least $2,100 once the costs of necessities (e.g., food, housing, supplies, propane, travel, and I-94 visas) are included.

Roswell Wool,

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an individual employer, compared the net income of an H-2A ***worker*** making $800 in net pay per month to a U.S. ***worker*** making $16.50 per hour while working 40 hours per week. Once costs for rent, taxes, food, vehicle expenses, and clothing are taken into account, the commenter concluded that the H-2A ***worker*** would make more than such a U.S. ***worker***

in monthly net pay. Vermillion Ranch and Midland Livestock stated that meal credits should be included in the wage methodology in order to offset the substantial wage increase proposed by the Department.

The provision of these items does not suggest a different wage is appropriate. As discussed in the preamble, all H-2A employers are required to provide housing free of charge. Furthermore, all H-2A employers are required to provide the tools, supplies, and equipment necessary to perform the job free of charge as well as any job-related transportation. Moreover, sheep and goat herder employers are required under the existing TEGL to provide food free of charge, and livestock herder employers have been required to do so in recent years based on the SWA wage survey. Nonetheless, this economic impact analysis accounts for the cost associated with this requirement for livestock employers below in a separate section.

iii. Reasoning Behind Wage Methodology--U.S. ***Workers***

The Utah Farm Bureau Federation and John and Carolyn Espil stated that the reasoning behind the wage methodology was flawed because the Department's attempt to protect U.S. ***workers*** by increasing wages is inappropriate. The commenters remarked that U.S. ***workers*** do not want to work in this occupation and are not suited for it. Mountain Plains and Western Range expressed the view that low wages are not the prime deterrent for ***workers*** and stated that, in their experience, despite higher wages in California they receive fewer U.S. applicants in sheep herding occupations in that state than in other states.

As discussed above, the Department has decided to set the monthly AEWR for these occupations based on a calculation of $7.25 per hour multiplied by 48 hours per week and adjusted annually for inflation. Because this Final Rule does not use the FLS-based AEWR to set the wage rates, the Department disagrees that meal credits should be included in the new wage formula to offset the wage increase because permitting food deductions under the wage methodology adopted in this Final Rule would erode much of the wage increase; therefore, it would not be sufficient address wage stagnation in these occupations.

As discussed in the preamble, we have elected not to use the FLS-based AEWR to set the monthly AEWR for these occupations because use of this wage source is likely to cause, rather than prevent, adverse effect on U.S. ***workers***. For the reasons discussed above, this decision is not based upon flaws with the FLS as a data source or on commenters' views of the effects of the state law wage rate in California. As explained in the preamble, commenters' observations about California are inconsistent with DOL's experience that California is consistently among the states with the largest number of U.S. sheepherders identified in SWA surveys.

The Department also received many comments in response to the NPRM stating that costs related to the proposed wage increases were underestimated in the economic analysis. Mountain Plans and Western Range Association commented that the proposed wage requirements should be classified as costs rather than transfers. They reasoned that since

most of the money earned by H-2A ***workers*** is spent in countries like Peru or Mexico, the proposed requirement results in a net loss for the U.S. economy. The Texas Sheep & Goat Raisers Association and Vermillion Ranch and Midland Ranch stated that the Department underestimated the costs of the proposed wage increases, especially for operations with more than three H-2A ***workers***. The commenters estimated their annual costs using an estimate of $13,860 per year for one ***worker*** based on the 5-year phase in. Vermillion Ranch, which has 18 ***workers***, would expect to pay $249,480 in additional wages, while Midland Ranch, which has 13 ***workers***, would expect to pay $180,180.

In contrast to the employer comments, the ***Workers*** Advocates' Joint Comment stated that the phase-in methodology to the new wage is not justified. They noted that the current wage rates already reflect stagnated wages and asked DOL to consider this history of stagnation in requiring the full FLS-based AEWR to be paid immediately. In the Final Rule the Department does decrease the transition period to two years, and we also increase the number of hours per week on which the monthly AEWR is based.

In the NPRM's EO 12866 analysis assessing the total costs and transfers to society, the proposed wage increases were classified as a transfer. Transfer payments are defined as monetary payments from one group to another that do not affect total resources available to society. However, contrary to the commenters' statements, the proposed wage increases also were classified as additional costs to small H-2A

employers in IRFA assessing the impact to H-2A employers (as they are in the analysis in the Final Rule). Wage increases are both transfer payments (to society) and costs (to employers); however, we recognize that foreign employees send at least some of their wages to their families abroad.

The Final Rule changes the methodology for determining the required monthly AEWR for ***workers*** engaged in the herding or production of livestock on the range. The Final Rule sets the monthly AEWR for these occupations by multiplying a $7.25 hourly wage rate by 48 hours per week, indexed annually beginning in the second year based on the ECI. The Final Rule uses a two-year transition period (at 80% and 90% of the full rate in 2016 and 2017, respectively) with full implementation in year three (2018).\71\ The Department analyzes the impact of this provision relative to the baseline--the 2015 herder monthly wage rates--which is the most recent AEWR data available and which reflects what employers currently are paying. To convert the monthly wage rate to an hourly wage rate, the Department divides the monthly wage rate by 48 hours and 4.333 weeks (which is derived from 52 weeks/12 months). Exhibit 3 presents the monthly baseline wages by state.

\71\ As explained in the FRFA, the Department considered three other alternatives to set the monthly wage rate: Using (1) the 1994 TEGL wage adjusted using the capped ECI approach and a three-year

transition period with full implementation in year four; (2) $7.25 multiplied by a 44-hour estimated calculation of weekly hours and adjusted using the ECI beginning with the wages for year five, using a three-year transition period with full implementation in year four; and (3) the FLS-based AEWR multiplied by a 65-hour estimate of weekly hours, implemented immediately and permitting a food deduction of the scope allowed under the regular H-2A program.

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\72\ California's state-required sheep herder wage will increase to $1777.98 on January 1, 2016, and employers in that state will be required to pay that increased wage on that date.

\73\ Hawaii's monthly wage of $1,422.52 is based on a 2012 prevailing wage survey conducted by California.

\74\ This wage rate is annually adjusted by the CPI-U. The average percentage increase of the CPI-U in the past 3 years (2012-2014) was 1.54 percent. With the 1.54 percent increase per year, the

forecasted monthly wage in Oregon in 2016 is $1,628; $1,653 in 2017; $1,679 in 2018; $1,705 in 2019; $1,731 in 2020; and $1,758 in 2021; $1,785 in 2022 and $1,812 in 2023. The forecasted monthly wage with ECI-adjusted $7.25 hourly wage is $1,797 in 2025. Therefore, the monthly wage in Oregon is always expected to be higher than the forecasted monthly wage with ECI-adjusted $7.25 hourly wage over the 10-year period, and, thus, no wage impact is expected for Oregon.

Exhibit 4 presents the number and percentage of employers engaged in the herding or production of livestock on the range participating in the H-2A program and the state for which they applied for certified H-2A ***workers***. The number of employers is based on the H-2A certification dataset over FY 2013-2014. Note that each employer is counted once for each state for which the employer applied for ***workers***, although ***due*** to the itinerant nature of the work, some employers applied for certification covering areas of employment for ***workers*** in multiple states. Hence, Exhibit 4 overstates the number of employers participating in the H-2A herder and range livestock program. As Exhibit 4 illustrates, sheepherders and goat herders are most heavily concentrated in Arizona, California, Utah, and Colorado, while range livestock (i.e., cattle) production ***workers*** are most heavily concentrated in Utah, Colorado, Wyoming, and Montana.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.011

To estimate the new monthly AEWR, the Department first calculates the average quarterly wages and salaries ECI for each year from 2012 through 2014. We then take the average year-over-year growth rate and apply the resulting value (2.0 percent) to the initial $7.25 hourly base wage rate used in 2016 and do so each successive year to forecast the hourly base wage rates from 2017 to 2025. The new wage setting methodology will base the calculation on 48 hours per week and includes a two-year transition period. The Department estimates the hourly base wage rate for each year of the analysis period as follows:

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[GRAPHIC] [TIFF OMITTED] TR16OC15.012

Exhibit 6 presents the forecasted ECI-adjusted $7.25 hourly wage rates with the two-year transition period and full implementation in 2018.

[GRAPHIC] [TIFF OMITTED] TR16OC15.013

To convert this to a monthly wage rate, the Department multiplies the above rates times the estimated 48 hours per week and by 4.333

weeks per month. Exhibit 7 presents the monthly wage rates.

[GRAPHIC] [TIFF OMITTED] TR16OC15.014

Exhibits 8 and 9 present the wage differential between the monthly AEWR required under this Final Rule and the baseline by state for sheep and goat herders and range livestock production ***workers***, respectively. In the case of California, the monthly AEWR wage is lower than the baseline wage for the first nine years, because state law requires a higher wage. In those years, the ***workers*** will continue to receive the baseline wage; therefore, no wage differential results. Similarly, Oregon's state required wage is higher than the rate required under the AEWR calculation of this Final Rule, and it is adjusted annually for inflation using the CPI-U. Accordingly, ***workers*** in that state will continue to be paid the state-required rate and employers in Oregon will not be impacted by the wage increase in this Final Rule. Hawaii's current monthly wage of $1,422.52 is based on a 2012 prevailing wage survey conducted by California, and the Final Rule's monthly AEWR is lower than Hawaii's current baseline wage in the first two years. The Department assumes that the ***workers*** in Hawaii will continue to receive the baseline wage in those years; therefore, no wage differential results. Additionally, the hourly wage differentials for states that did not have a baseline wage because there were no H-2A ***workers*** employed as herders or range livestock ***workers*** are denoted as ``N/A.''

Note that these values are for informational purposes only and were not used in the analysis.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.015

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[GRAPHIC] [TIFF OMITTED] TR16OC15.016

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The Department multiplies the average increase in hourly wages per H-2A ***worker*** under this wage determination option in 2016 ($1.53) by the estimate of weekly hours (48) and the average duration of need (50 weeks) to obtain the total increase per H-2A ***worker*** in 2016 ($3,672). We then multiply the total increase per ***worker*** by the number of H-2A certified ***workers*** (2,481) to obtain total transfer ***due*** to increased wages of $9.11 million in 2016.\75\ We repeat this calculation for each year of the analysis period, using the average increases in hourly

wages.

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This results in an average annual transfer payment of $17.46 million.

\75\ This methodology may result in an overestimate. Using the number of H-2A ***workers*** certified may overestimate the number of affected ***workers*** because employers do not bring into the country all the ***workers*** for whom they are certified each year, and some ***workers*** are double counted because employers file multiple applications for certification to cover additional states and send the same ***workers*** to those states. In addition, some certifications are not for a full year, as some commenters indicate that they hire additional H-2A ***workers*** during peak seasons, such as the lambing season. Moreover, all ***workers*** do not stay for the entire period of the certification. Finally, as noted in the preamble, some employer commenters stated that they already pay more than the TEGL-required wages, that they pay bonuses, or that they provide paid vacation. Nevertheless, there likely are some corresponding ***workers*** who would also receive the increased wages. The number of annual H-2A ***workers*** needed by

employers may also be higher in future years. Therefore, the Department concludes that using the total number of ***workers*** certified and a 50-week average duration provides a reasonable estimate of the impact based on the available data.

The increase in the wage rates for some ***workers*** represents an important transfer from agricultural employers to corresponding U.S. ***workers***, not just H-2A ***workers***. As noted previously, the higher wages for ***workers*** associated with the Final Rule's methodology for determining the monthly AEWR will result in an improved ability on the part of ***workers*** and corresponding U.S. ***workers*** and their families to meet their costs of living and spend money in their local communities. On the other hand, higher wages represent an increase in costs of production from the perspective of employers that affects economic profit and creates a disincentive to hire H-2A and corresponding U.S. ***workers***. The Department does not have sufficient information to measure the net effect of these countervailing impacts.

There also may be a transfer of costs from government entities to employers as a result of lower expenditures on unemployment insurance benefits claims. Unemployment insurance benefits replace a maximum of half of prior earnings in most states. However, to the extent that ***workers*** who had been laid off and were eligible for unemployment

insurance benefits were not willing to accept a job at the current lower wage, and may now be willing to accept the job at the new higher wage, they would not need to seek new or continued unemployment insurance benefits. The Department, however, is not able to quantify these transfer payments.

c. Filing Requirements

The Final Rule permits an association of agricultural employers filing as a joint employer to submit a single job order and master Application for Temporary Employment Certification on behalf of its employer-members located in more than two contiguous states with different start dates of need.

This provision does not represent a change for an association filing a master application as a joint employer with its employer-members for sheepherding or goat herding positions. However, to ensure consistency in the handling of all employers eligible to use these procedures, the Final Rule extends this existing practice to employers in the range herding or production of other livestock.

i. Cost Reductions

This change represents a minor cost reduction to employers of H-2A ***workers*** in range livestock production occupations that file master applications as joint employers with their employer-members. ***Due*** to data limitations regarding the time savings realized by filing a master application relative to separate applications and the extent to which range livestock production employers would file master applications as

joint employers with their employer-members, however, the Department is not able to quantify this impact.

d. Job Order Submissions

The Final Rule extends the waiver of job order filing requirements in 20 CFR 655.121(a) through (d) to employers of H-2A ***workers*** in range livestock production occupations. A covered employer will submit its job order, Agricultural and Food Processing Clearance Order, Form ETA 790, directly to the National Processing Center (NPC), not to the State Workforce Agency (SWA). The employer will submit the job order to the NPC at the same time it submits its Application for Temporary Employment Certification, Form ETA 9142A, as outlined in 20 CFR 655.130.

This provision does not represent a change for an association filing a master application as joint employer with its employer-members for sheepherding or goat herding positions. However, to ensure consistency in the handling of all employers eligible to use these procedures, the Final Rule extends this existing practice to all employers involved in the range herding or production of other livestock.

i. Cost Reductions

This change represents a minor cost reduction to employers of H-2A ***workers*** in range livestock production occupations who will no longer be required to prepare and send a separate ETA Form 790 submission to the SWA and then communicate directly with the SWA about any concerns the

SWA raises with the ETA Form 790. ***Due*** to data limitations, however, the Department is not able to quantify the staff time and resource costs saved relative to the baseline in which submission of the form and communication with the SWA is required.

e. Job Order Duration

The Final Rule requires that, where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, each of the SWAs to which the job order was transmitted by the Contracting Officer (CO) or the SWA having jurisdiction over the location of the association must keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order, and must refer each qualified U.S. ***worker*** who applies (or on whose behalf an application is made) for the job opportunity. The Final Rule also requires that the Department keep the job order posted on the OFLC electronic job registry for the same period.

i. Cost Reductions

This change represents a possible cost reduction for an H-2A employer association that files a master application as a joint employer with its employer-members for ***workers*** in sheepherding and goat herding occupations. These employers were previously required to accept referrals throughout the work contract period. Under the Final Rule, these employers will only have to accept referrals for 50 percent of the work contract period, resulting in avoided costs of accepting

referrals during the second half of the work contract period. ***Due*** to data limitations regarding the number of referrals during the second half of the work contract period, however, the Department is not able to quantify this impact.

f. Newspaper Advertisements

The Final Rule continues for sheepherding and goat herding occupations and expands to other range livestock production occupations the TEGL practice of granting a waiver of the requirement to place an advertisement on two separate days in a newspaper of general circulation serving the area of intended employment. Because both herding and the range production of livestock cover multiple areas of intended employment in remote, inaccessible areas within one or more states, the newspaper advertisement is impractical and ineffective for recruiting domestic ***workers*** for these types of job opportunities.

i. Cost Reductions

This change represents a cost reduction to employers of ***workers*** in range livestock production occupations. The Department estimates this cost reduction by multiplying the estimated number of applications filed by range livestock production employers each year (107, as determined from a review of 2013 and 2014 applications for labor certification in the herding program) by the average cost of placing a newspaper advertisement ($258.64) and the number

of advertisements per employer (2).\76\ We repeat this calculation for each remaining year of the analysis period. This results in an average annual cost reduction of $55,349.

\76\ This newspaper advertisement cost estimate is based on an advertisement of 158 words placed in The Salt Lake Tribune for one day (Source: The Salt Lake Tribune. Available at *http://placead.yourutahclassifieds.com/webbase/en/std/jsp/WebBaseMain.do*. Accessed Nov. 13, 2014).

Because these activities require time on the part of a human resources manager on the ranch, we add to the result the incremental cost of preparing the advertisement, which we calculate by multiplying the estimated number of applications filed by range livestock production employers each year (107) by the time required to prepare a newspaper advertisement (0.5 hours), the hourly labor compensation rate of a human resources manager at an agricultural business ($78.48), and the number of advertisements per employer (2).\77\ This amounts to an average annual cost reduction of $8,397.

\77\ The Department estimates that this work would be performed

by a human resources manager at an agricultural employer at an hourly rate of $54.88 (as published by the Department's OES Survey, O*Net Online), which we multiply by 1.43 to account for employee benefits to obtain a total hourly labor cost of $78.48.

In total, the cost reduction from not having to place the advertisement and saved labor yield an average annual cost reduction of $0.06 million.

The Department received one comment pertaining to the cost reductions by waiving newspaper advertisements for ***workers*** in range livestock production occupations. The Department estimated a labor cost of a human resources (HR) manager to prepare the advertisement. Patrick O'Toole, a private citizen, stated that family members typically serve as the HR managers; hence, they do not receive benefits along with their wages, and they do not spend all of their time acting as the HR manager.

Even if family members serve as the HR managers and are not explicitly compensated for their time and work, it is still considered a cost reduction under the opportunity-cost approach used in the economic analysis for costing purposes. This is similar to the expenditure for family labor in the enterprise budget when family members are not actually paid for their labor. Thus, the Department believes that the inclusion of the labor cost of an HR manager is still

reasonable.

g. Placement of ***Workers*** on Master Applications

The Final Rule requires that eligible U.S. ***workers*** who apply for the job opportunities and are hired be placed at the locations nearest to them, absent a request for a different location by the U.S. ***workers***. The Final Rule also requires that associations that fulfill the recruitment requirements for their members maintain a written recruitment report for each individual employer-member identified in the application or job order, including any approved modifications.

i. Cost Reductions and Costs

The U.S. ***worker*** placement requirement represents a minor cost reduction. Because U.S. ***workers*** will be placed at locations nearest to them, the Final Rule will yield a decrease in travel costs to arrive at and return from the work site. ***Due*** to data limitations regarding travel costs to arrive at and return from the work site for participating U.S. ***workers***, however, the Department is not able to quantify this impact with any certainty.

The recruitment report requirement represents a cost to an association of employers of ***workers*** in range livestock occupations. Associations will be required to maintain a written recruitment report for each individual employer-member; however, associations are currently required to document all applications and their disposition,

making this a change in the form of the recordkeeping rather than its substance. This will likely lead to a marginal increase in costs for the association to prepare and maintain a more disaggregated recruitment report for each employer-member named on a master application. The Department is not able to quantify this impact with any certainty, however, ***due*** to data limitations regarding the time required for associations to prepared and maintain a more disaggregated recruitment report.

h. Employer-Provided Items

In the NPRM, the Department proposed to require that the job offer specify that the employer will provide, without charge or deposit charge, those tools, supplies, and equipment required by law, by the employer, or by the nature of the work to do the job safely and effectively. Because of the isolated nature of these occupations, an effective means of communication between ***worker*** and employer--to enable the employer to check the ***worker***'s status and the ***worker*** to communicate an emergency to persons capable of responding--is required because it is necessary to perform the job safely and effectively. The ***workers***' location may be so remote that electronic communication devices may not work at all times. Therefore, the NPRM proposed to continue the TEGLs' current requirement for the employer to provide an effective means of communicating in an emergency. The Final Rule similarly provides that where the employer will not otherwise make regular contact with the ***worker*** (e.g., when delivering food or checking on the ***worker*** and herd

in-person), the employer must make arrangements so that the ***workers*** will be geographically located in a place where the electronic communication device will function on a regular basis (e.g., mobile phone in an area with adequate reception) so that the ***workers***' safety and needs can be monitored. The employer must include in the job order a simple statement identifying the type of electronic communication device that it will provide and the frequency with which it will make contact with the ***workers*** when the devices may not operate effectively.

The Department received several comments on the cost of employer-provided items--including the cost of maintaining regular contact. Sharon O'Toole, an individual employer, stated that it is not necessary to quantify the cost of regular contact between employers and herders, as it has been a common practice for decades to ensure the conditions of herders, sheep, horses, and dogs, which is in an employer's business interest. Contact usually occurs when someone delivers items such as food and water. In contrast, the Wyoming Farm Bureau Federation stated that it is not possible to get a cellular signal in some areas. The commenter noted that a satellite phone plan that allows 10 minutes of usage per month costs at least $300 per year, not including the price of the phone, and that plans can cost as much as $2,000 per year.

The Department understands that there is a range of different ways to establish effective communication between employers and their ***workers*** to address the ***workers***' basic needs and to enable contact in an

emergency. Employers are not required to provide satellite phones, as they do not always provide reliable service, when other effective means of communication are available. The Department expects that very few employers will have to purchase satellite phone to communicate with their ***workers***.

The Department also received several comments pertaining to the quantification and data sources for other items they stated should be monetized in the economic analysis. For example, Governor Matthew H. Mead of the State of Wyoming remarked that the

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economic analysis did not reflect an analysis of the complete compensation structure. Several commenters similarly commented on the cost of providing items to H-2A ***workers*** that, in the commenters' view, supplement the ***workers***' wages. For example, FIM Corp. stated that the cost of ``benefits'' (listing for example housing, utilities, food, satellite TV, cell phone service, laundry, ***workers***' compensation insurance, supplies, travel to and from the home country, administrative costs for Western Range Service, and banking services) for each sheepherder is at least $1,220 per month beyond the wages paid, bringing the total compensation to over $2,000 per month. Donald Watson expressed that the cost of ***workers***' compensation insurance,

housing, provisions, and incidental herding costs nearly double the annual cost per herder from $10,000 to $20,000. Raymond Talbott, an individual employer, stated that although H-2A wage is $1,600 per month in California, when the cost of items such as commissary, housing, supplies, propane, travel, and I-94 visas are included, the wage increases to at least $2,100.

Many of these costs, such as the cost of housing and related provisions (utilities/propane), are required by the H-2A program generally; thus those costs are not new or unique under this Final Rule. Other employer business expenses, such as a ***worker***'s travel to and from the home country, visa fees, or employer association fees, also are the responsibility of the employer under the standard H-2A regulations. Anything that is newly required by this Final Rule, such as free meals for range livestock ***workers***, is acknowledged and discussed separately.

Finally, many commenters, including Mountain Plains and Western Range, the Washington State Sheep Producers, and John and Carolyn Espil, stated that the Department should monetize the impact caused by the change in the definition of ``open range,'' which they asserted would exclude approximately 40 percent of employers that currently use the H-2A program. As explained in detail in the preamble, commenters explained that livestock grazing varies substantially, depending on the particular ranch owner and/or the geographic location, and they emphasized that modern grazing contains fencing. Commenters almost unanimously opposed using fencing as a defining factor for ``open

range." In response to the comments related to definition of ``open range," the Department decided to use a modified version of the FLSA definition of ``range" to provide flexibility and account for the changes in herding practices over time. The Department believes this revised definition of ``range" will not impose any additional costs on employers, as most comments indicate that employers assign their H-2A ***workers*** to the range for at least the majority of the year.

In the final rule, employers are also required to provide:

Containers appropriate for storing and using potable water and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing;

facilities, including shovels, for effective disposal of excreta and liquid waste in accordance with the requirements of the state health authority or involved Federal agency; and

appropriate materials, including sprays, and sealed containers for food storage, to aid housing occupants in combating insects, rodents and other vermin.

i. Costs

The requirement that employers arrange for the ***workers*** to be located in a place where the electronic communication device will operate effectively on a regular basis when they are stationed in areas where the devices may not work, or to provide regular in-person contact, represents a possible minor cost to herding or range livestock production employers. This may impose restrictions on land use or

require the purchase of particular types of communication devices. The Department cannot, however, predict this impact or quantify it as a cost to employers, but we anticipate that it will be minimal as the current TEGLs contain a similar communication requirement and many employer commenters stated that they are in routine contact with their ***workers*** to monitor their health and well-being and that of the herd.

The Department believes that most existing employers already provide to H-2A ***workers*** on the range containers for storing and using potable water, shovels for effective disposal of excreta and liquid waste, and insect and rodent control materials such as sprays and sealed containers for food storage in order to satisfy their current requirements under the TEGLs. Even for the small fraction of employers who currently do not provide any such items to H-2A ***workers*** on the range, the additional costs would be trivial, at most $50 in 2016.

i. Meals

All H-2A employers must provide either three meals a day or free and convenient kitchen facilities. Currently, as required under the sheepherding and goat herding TEGL and pursuant to practice in the industry for range production of livestock occupations, employers with these range herding occupations must provide food, free of charge, to their ***workers***. The Final Rule adopts this common practice as a requirement for employers engaged in the range production of livestock (who now must provide free food pursuant to the prevailing industry practice) and continues it for employers engaged in sheep or goat

herding. The Final Rule also requires employers to disclose it in the job offer. The Final Rule clarifies that the food must be ``sufficient'' and ``adequate'' and that it must include a daily source of protein, vitamins and minerals. The employer commenters agreed that the physical demands of the job require a protein-rich diet, and that the ***workers*** need and deserve good, nourishing food; they stated that they currently provide such food to their ***workers***, typically in response to the ***workers***' expressed preferences for particular food.

i. Costs

Because this is a current requirement of the sheepherding and goat herding TEGL, this provision does not represent a cost to sheepherding and goat herding employers (the Department concludes that the clarifications requiring that the food be sufficient and adequate, and include a daily source of protein, vitamins and minerals, impose no additional quantifiable cost, particularly ***given*** the employers' assertions that they are providing such food now). This provision does, however, represent a cost to other range livestock production employers.\78\ The Department estimates this cost by multiplying the number of days ***workers*** receive meals on a weekly basis (7), the average cost of three meals per day ($11.86), and the average duration of need (50 weeks) to obtain the total cost of meals per ***worker*** ($4,151).\79\ We then multiply the total cost of meals per ***worker*** by the estimated

number of range livestock

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production employers in 2016 (102) and the average number of H-2A

workers per employer needing meals on a weekly basis (4.2) to obtain an

average annual cost of $ 1.78 million.\80\

\78\ Since 2013 livestock employers have been required to provide food free of charge because payment of food is included in the wage rate identified in the SWA surveys. Therefore, the cost estimate for this provision is an overestimate.

\79\ The daily meal cost estimate of $11.86 is from Allowable Meal Charges and Reimbursements for Daily Subsistence published by the U.S. Department of Labor, Employment & Training Administration (Source: http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm. Accessed July 30, 2015).

\80\ The FY 2013 and FY 2014 certification data show an annual average of 954 applications certified for an average of 2,482

workers in the herding and range production of livestock program, or

2.6 ***workers*** per application. The Department concluded that this could be an underestimate because some employers file multiple applications per year. Therefore, we also attempted to identify the number of unique employers filing applications. We estimate that an

annual average of 485 unique employers filed applications, which would indicate more than five ***workers*** per employer. However, the Department concluded that this could be an overestimate because employers do not bring into the country all the ***workers*** for which they are certified each year. Furthermore, some employers file multiple applications because their itinerary changes and they need to reapply to receive authorization to send ***workers*** to another state, even though they will be the same ***workers***. Therefore, we assumed an average of 4.2 ***workers*** per employer, which is consistent with the estimate from the Mountain Plains 2015 telephone survey of its members discussed by the SBA Office of Advocacy.

In addition to the cost incurred to purchase food, these range livestock production employers would incur costs to transport the food to the ***workers***. The Department assumes that food would be transported to the ***workers*** on a weekly basis along with the potable water. The costs related to transporting food and potable water are accounted for below in the section on costs related to potable water.

The Department received only a handful of comments directly pertaining to the economic analysis of providing meals without charge to ***workers***. However, as discussed in the preamble, some commenters

opposed the proposed provision to provide daily meals to ***workers*** for free and wanted to be permitted to take a wage credit for the cost of meals, while others thought that providing free food was appropriate. For example, Sharon O'Toole stated that if an employer is not already providing adequate food to employees, then they are in violation of other laws and should not be covered by this rule. She also commented that providing access to expanded cooking facilities is unnecessary because the ***workers*** are already provided with hot meals at the ranch.

Vermillion Ranch and Midland Ranch stated that the cost of providing meals increases operating costs substantially when the number of ***workers*** hired increases. They said that for Vermillion Ranch, the cost of the meal provision requirement would be $72,954 for 18 ***workers*** as opposed to the $12,159 estimated by the Department. The Siddoway Sheep Company stated that during the winter lambing season it employs a cook who prepares the ***workers*** three meals each day, and that when ***workers*** are on the range, it purchases food every eight to 10 days. The commenter expressed that actual food expenditures, including meat grown on the ranch, average $476 per ***worker*** per month. Siddoway provided three alternatives that it supported: (1) Allowing employers to deduct the cost of purchasing the food products on the employee's grocery list; (2) a ranch-specific deduction based on annualized expenditures over a three-year period; and (3) an industry-wide deduction equal to

128 percent of the liberal USDA Food Plan Cost, which is what it estimated it spends on meals. ASI and Public Lands Council, and Mountain Plains and Western Range, also pointed to the USDA liberal meal plan and stated that such a meal plan is more expensive than the subsistence meal charges that the Department uses for ***workers***. For the reasons discussed in the preamble, including the current free food requirements and that the Final Rule uses the FLSA minimum wage rate of $7.25 as the starting point for the wage requirement, we did not permit employers to offset the cost of meals to avoid continued wage stagnation; rather, we have identified it as a cost for range livestock production employers.

j. Potable Water

The Department received several comments related to the costs of transporting meals and potable water to ***workers***. As summarized below, the commenters (1) stated that the economic analysis did not fully capture the cost, (2) described the amount of water provided and the types of containers typically used at their locations, (3) listed alternative sources of water not specified by the Department, and (4) were generally opposed to employers being required to provide water for laundry.

Several commenters remarked that the Department's economic analysis underestimated the cost to transport meals and potable water; several commenters also provided cost estimates. Eph Jensen Livestock, LLC and Mountain Plains and Western Range stated that the Department did not account for the actual distances traveled between the ranch and camp or

how the time needed to travel can vary depending on the type of terrain. Eph Jensen Livestock, LLC, stated that the Department did not account for areas in which vehicle travel is prohibited or impossible. The Wyoming Farm Bureau Federation also commented on the difficulties associated with using a trailer for water. The trailers must often be driven on roads that are two tracks or not maintained. These conditions make it difficult to drive in reverse and drivers occasionally get stuck. In addition, ***workers***' mobile housing units already have a trailer attached. Attaching another trailer would make traveling unsafe, increase traveling time, and result in additional costs. The commenter also noted that some states prohibit the use of triple trailers.

Mountain Plains and Western Range and Sharon O-Toole stated that the estimated costs for providing meals and water did not include the cost of purchasing additional trucks or water trailers. Several commenters stated that in addition to the costs for the truck and trailer, the Department should include the cost to hire a driver with a commercial driver's license. They noted that it recently cost them $45,000 for a cab with 500,000 miles and $8,000 for a used trailer. Sims Sheep Co. LLC stated that trailers and tanks would be more expensive than estimated because they would need to be tailor-made to withstand the weight of the water and poor road/terrain conditions.

Paul Nelson stated that it costs $15 for gas each trip, $30 per ***worker*** to transport water and other necessities. Cindy Siddoway stated that

transportation to mountain camps would require them to purchase eight pack horses, which would cost $9,600 in addition to food and pack saddles. Vermillion Ranch and Midland Ranch stated that the costs of providing sufficient potable water for drinking, cleaning, and laundry using the Department's estimate of $4,910.96 per ***worker*** would be $88,397.28 per year and $63,842.28 per year for Vermillion Ranch and Midland Ranch, respectively, ***given*** their large number of employees.

Paul Nelson and Cindy Siddoway stated they provide water in five-gallon containers. Donald Watson stated that he provides water in either five-gallon containers, 50-gallon barrels, 400-gallons tanks, or from containers filled by hose, depending on the location. A handful of individual employers warned that large water tanks could restrict ***workers***' access to water during winter months if the water freezes, and that a preferable alternative would be smaller potable water containers that could fit inside the ***workers***' housing units and would thus not be subject to freezing.

Several commenters listed alternative sources of water. The Wyoming Farm Bureau Federation and Sharon O'Toole listed melted snow as an alternative water source, and Cindy Siddoway listed mountain springs and streams as alternative sources. Commenters stated that ***workers*** have tools to boil water to

make it potable, and some commented that their ***workers*** have not gotten sick drinking from these alternative sources and that ***workers*** rarely use purification methods such as water filters or purification tablets that have been made available by the employer.

The Department understands that these alternative sources of water would be almost costless relative to the estimated costs of potable water in the economic analysis. However, such alternative sources are not always available, and for health reasons the Department must require that ***workers*** have available potable water (or in exigent circumstances the means to make water potable) for consumption, cooking, and dishwashing.

Several commenters opposed the proposed requirement for employers to provide enough water for laundry, stating either that non-potable water sources are often available that are adequate for washing laundry or, more often, that they wash laundry for the ***workers*** and deliver it when they bring food to the ***workers***. They stated that this is more cost-effective than transporting water for ***workers*** to wash laundry themselves.

A few commenters stated how much water was typically needed in their operations. Sharon O'Toole stated that 40 gallons of potable water per week is enough for a ***worker*** to drink and wash. Eph Jensen Livestock, LLC commented that the amount of water needed varies

depending on climate.

The ***Workers*** Advocates' Joint Comment outlined several suggestions regarding what constitutes an adequate supply of potable water. They stated that the supply of water should be defined as 4 to 4.5 gallons of potable water per day in clean and sealed containers, which amounts to 28 to 31.5 gallons per week. They also noted that the water supply should include an additional 50 gallons per week for cleaning, bathing, and laundry, which is based on comments from range ***workers***. The commenters stated that range ***workers*** should be supplied with a means for water purification only in exigent circumstances (e.g., forest fires), and that the Department should clarify that the supply of water is ``for ***workers*** only'' and not for the sheep dogs or horses. In the NPRM the Department assumed that each ***worker*** required 28 gallons of potable water per week. Several commenters stated that this was not a sufficient amount and suggested the Department use an estimate based on 4 to 4.5 gallons of potable water per day in clean and sealed containers.

For the reasons discussed in the preamble, in the Final Rule the Department requires employers to provide at least 4.5 gallons of potable water per day, which amounts to at least 31.5 gallons of potable water per ***worker*** per week (4.5 x 7). The Department does not specifically define the minimum quantity of water that must be provided for bathing and laundry. The Final Rule also allows the use of

alternate sources of water for bathing and laundry where such sources are readily available. Moreover, we note that if employers provide laundry services for ***workers*** that likely will substantially minimize their need for water for that purpose. Finally, the Final Rule allows the employer to request a variance from the requirement to provide 4.5 gallons of potable water when ***workers*** are located in areas that are not accessible by motorized vehicle; the employer must identify an alternative water supply and disseminate both the means and methods for testing and making potable the water obtained for drinking and cooking from such alternative supplies.

i. Costs

In the NPRM's EO 12866 analysis, the Department estimated that range sheep, goat, and other livestock production employers already must incur the cost under the TEGLs of transporting both food and water for cooking, consumption and bathing to their ***workers*** on the range, which must meet state health authority standards. The NPRM proposed to add a requirement for additional water for cleaning and laundry. The Department assumed that the additional water would be transported to the ***workers*** on a weekly basis along with the previously required food and potable water. The cost of providing a water supply to ***workers*** was estimated as the sum of the cost of the water itself, the cost of purchasing utility trailers to transport the additional water and meals, the cost of mileage for those vehicles, and the wages for the

drivers to transport the additional water and meals. The Department noted that because employers are currently required to provide food and water to ***workers***, our cost estimate in the analysis likely was an overestimate.

The Final Rule continues the same general approach, with the modifications discussed above. The Department concludes, ***given*** the changes made in the Final Rule, particularly the employers' ability to identify alternative sources of water for bathing and laundry, that the NPRM's general approach remains valid. In addition, because the Final Rule requires only that ***workers*** spend the majority of their time on the range, we continue to believe that the estimate likely produces an overestimate because the analysis assumes that the water and food is transported 50 weeks of the year.

The Department estimates the cost of purchasing the water by multiplying the estimated number of employers in each year (485) by the average number of H-2A ***workers*** per employer needing potable water on a weekly basis (4.2), the number of gallons of potable water needed per ***worker*** on a weekly basis (31.5), the average cost of a gallon of potable water ($0.005), and the average duration of need (50 weeks).\81\ This results in an average annual cost of $16,041.

\81\ This potable water cost estimate is from the 2014 Water and Wastewater Survey produced by the Texas Municipal League (Source:

http://www.tml.org/surveys. Accessed Nov. 13, 2014). It is estimated based on the average cost of potable water for commercial entities in Texas cities with a population below 2,000 and based on the fee for 50,000 gallons.

Because the employers must have the means to transport the potable water and food to the ***workers***, the Department estimates the cost of purchasing utility trailers. We assume that 10 percent of agricultural employers do not currently have a trailer sufficient to transport the additional water and food to ***workers***. In the first year of the rule, we include the cost incurred by existing and new H-2A employers to purchase trailers; in future years, we include the cost incurred only by new participants. To calculate the cost for the first year of the Final Rule, we multiply the total number of participants in the program (485) by the assumed percentage of employers that would need to purchase a trailer (10 percent). We then multiply the number of employers needing to purchase a trailer (49) by the average cost of a trailer ($839.34) to estimate the total cost of purchasing utility trailer each year ($40,708).\82\ To calculate the cost for each of the remaining years, we estimate the average number of employers joining the program that would need to purchase a trailer each year, which we calculate by multiplying the number of participants joining the H-2A program (49) by the assumed percentage of employers that would need to

purchase a trailer (10%).\83\ We

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then multiply the number of employers joining the H-2A program needing to purchase a trailer (5) by the average cost of a trailer ($839.34) to estimate the total cost of purchasing utility trailers in each remaining year ($4,071).

\82\ This trailer cost estimate is based on the average costs for a 5 x 8 ft. utility trailer from Tractor Supply Co. (Source: http://www.tractorsupply.com/en/store/search/utility-trailers. Accessed Nov. 13, 2014), Lowes, and Home Depot. ***Given*** the changes in the Final Rule, particularly the employers' ability to identify alternative sources of water for bathing and laundry, we conclude it is not necessary to assume a cost for a water truck as a few commenters suggested.

\83\ Based upon H-2A program data, the Department assumes that, ***due*** to turnover, 10% of the average number of employers that participate in the H-2A program each year (485) join the H-2A program each year, which results in 49 new employers per year.

The Department also estimates the cost of mileage on the employers' vehicles. The mileage reimbursement rate is intended to cover the costs of operating a vehicle for business purposes. The costs encompassed by the standard mileage rate are standard maintenance, repairs, taxes, gas, insurance, and registration fees. Essentially, the standard mileage rate is intended to cover the expenses that an individual would report if using the actual car expenses deduction. While the standard mileage reimbursement rate is simply an estimate and may end up being more or less than actual car expenses, it reflects the full cost of operating a truck for transporting the water and meals. However, the Department assumed that employers already would have a truck for delivering food and water as it is currently required by TEGL and therefore, did not include the cost of purchasing a new truck in this analysis. We estimate this cost by multiplying the estimated number of employers in each year (485) by the average cost per mile of owning and operating an automobile ($0.58), the number of miles driven (roundtrip) to deliver the water and meals (100), and the number of roundtrips expected per year (50).\84\ This calculation results in an average annual cost of $1.4 million.

\84\ This cost per mile of owning and operating an automobile is based on the average costs in the DOT Bureau of Transportation

Statistics. (source: http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_03_17.html Accessed

July 30, 2015), which cites the costs presented by American

Automobile Association Exchange (Source: http://exchange.aaa.com/automobiles-travel/automobiles/driving-costs/ Accessed July 30,

2015). The Department assumes the ***workers*** are all located within the

100-mile roundtrip distance so only one roundtrip per employer per

week would be needed to transport water and meals to ***workers***.

Although the Department received a handful of general comments

stating that we had underestimated the distances involved and the

time required, they did not provide data or alternative estimates of

their actual distances or time spent. Therefore, the Department has

not modified its assumptions.

Because these activities require time on the part of an

agricultural ***worker*** on the ranch, the Department estimates the cost of

transporting the potable water and food to the ***workers***, which we

calculate by multiplying the estimated number of employers in each year

(485) by the assumed time required to transport the potable water and

food (2.86 hours), the hourly labor compensation rate of an

agricultural ***worker*** ($13.40), and the number of roundtrips per year

(50).\85\ This calculation results in an average annual cost of $0.9

million. As mentioned above, this may be an overestimate as the Final

Rule only requires that ***workers*** be on the range for the majority of workdays in the job order period.

\85\ The Department assumes that the water delivery will be performed by an agricultural ***worker*** at an hourly rate of $9.37 (as published by the Department's OES Survey, O*Net Online), which we multiply by 1.43 to account for employee benefits to obtain a total hourly labor cost of $13.40. The time required to transport the potable water and meals roundtrip was estimated using the assumptions that a roundtrip is 100 miles and that the agricultural ***worker*** would drive at 35 mph. The Department assumes the ***workers*** are all located within the 100-mile roundtrip distance, so only one roundtrip per employer per week would be needed to transport water and meals to ***workers***.

This calculation yields an average annual cost of $2.4 million for the cost of the water, utility trailers, vehicle mileage, and labor to deliver the additional water and food.

k. Expanded Cooking/Cleaning Facilities

The Department recognizes that there are times when ***workers*** are located at or near the ranch or farm (or a similar central location)

for certain operations that are a normal part of the herding cycle, such as birthing (in some cases), shearing, or branding. In such instances, the Final Rule allows ***workers*** to continue to use their mobile housing, which may be preferred by ***workers***, even where access to fixed housing exists. However, the Final Rule requires (as the NPRM proposed) in such a situation that ***workers*** be granted access to facilities, including toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities that satisfy the standard housing requirements if the employer does not provide meals.

The Department received a couple of comments in response to the NPRM pertaining to the cost to provide expanded cooking facilities at a ranch or farm. Sharon O'Toole commented that providing access to expanded cooking facilities is unnecessary because the ***workers*** are already provided with hot meals at the ranch. Vermillion Ranch and Midland Ranch objected to the term ``ranch'' in conjunction with the proposed locations of the expanded cooking facilities.

i. Costs

As the Department stated in its NPRM economic analysis, we do not expect any additional costs for construction or expansion of cooking facilities because existing farm kitchens will be able to increase production to a sufficient extent to provide for the additional ***workers***. As several commenters stated, some employers already provide hot meals to H-2A ***workers*** at the ranch. Alternatively, employers need

not incur any additional cost to construct or expand cooking facilities as they could simply provide the ***workers*** with access to the existing farm kitchen to prepare their own meals.

The requirement to provide access to facilities such as toilets and showers with hot and cold water under pressure, however, will likely impose a cost on herding and range livestock production employers that do not have such facilities for ***worker*** use. To estimate the cost of constructing or expanding the cleaning facilities for the first year of the Final Rule, the Department estimates the number of existing H-2A participants that would need to construct/expand cleaning facilities, which we calculate by multiplying the number of existing H-2A participants (485) by the assumed percentage of employers that would need to construct or expand their facilities (20%). We then multiply the number of existing employers that would need to construct/expand facilities (97) by the average cost per square foot to construct or expand cleaning facilities ($270.00) and the assumed size of the cleaning facility (150 sq. ft.).\86\ This calculation results in a cost of $3.93 million in 2016.

\86\ This cost per square foot estimate is based on the average cost to add a bathroom to a building from The Nest (Source: http://budgeting.thenest.com/average-cost-per-square-foot-add-addition-house-23356.html. Accessed Nov. 13, 2014).

To calculate the cost for each of the remaining years of the Final Rule, we estimate the average number of employers joining the program that would need to construct such facilities, which we calculate by multiplying the number of participants joining the H-2A program (49) by the assumed percentage of employers that would need to construct or expand their facilities (20%). We then multiply the number of employers joining the H-2A program needing to construct or expand their facilities (10) by the average cost per square foot to construct or expand cleaning facilities ($270.00) and the assumed size of the cleaning facility (150 sq. ft.) to estimate the total cost of constructing or expanding facilities in each remaining year ($0.4 million). Over the 10-year period, this calculation yields an average annual cost of $.75 million to existing and new employers.

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l. Heating Equipment

In the Final Rule, as specified in Sec. 655.235, the mobile housing unit provided to ***workers*** must include operable heating equipment that supplies adequate heat for ***workers*** in locations where required for the health and safety of the ***workers*** by the climate. Where the climate in which the housing will be used is mild and the low temperature for any day in the work contract period is not reasonably

expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the ***workers***.

i. Costs

The Department acknowledges that this may impose a cost on some employers, but we do not have sufficiently accurate location and temperature available to identify how many ***workers*** may require such additional heating units or how many of the mobile housing units already contain built-in heating equipment. The Department evaluated possible portable heating equipment units that are suitable for a housing unit of approximately 150 square feet to determine the range of costs required to purchase heating units. We found 12 different types of portable heating equipment suitable for heating at least 150 square feet, including propane units, kerosene units, and electric units. The propane units range in cost from approximately $69 to $280; \87\ the kerosene units range in cost from approximately $119 to $188; \88\ and the electric units range from approximately $147 to $218.\89\

\87\ http://www.grainger.com/product/DAYTON-Portable-Gas-Heater-12H991; http://www.homedepot.com/p/Dyna-Glo-15k-25k-BTU-Propane-Convection-Heater-RMC-LPC25DG/202223055; http://www.grainger.com/product/DAYTON-Tank-Top-Portable-Gas-Heater-WP105137; http://www.grainger.com/product/DAYTON-Convection-Portable-Gas-Heater-WP105135 (Accessed 07/27/15).

\88\ http://www.homedepot.com/p/DuraHeat-23-000-BTU-Kerosene-Portable-Heater-DH2304/100045793; http://www.homedepot.com/p/Unbranded-Duraheat-Compact-Convection-Heater-DH1051/202221099;

http://www.grainger.com/product/SENGOKU-Omni-Radiant-4NHH2; http://www.grainger.com/product/SENGOKU-Radiant-Convection-Heater-5UDU3(Accessed 07/27/15).

\89\ http://www.grainger.com/product/PRO-TEMP-Portable-Heater-32MY65; http://www.grainger.com/category/hvac-and-refrigeration/ecatalog/N-k00; http://www.grainger.com/product/DAYTON-Electric-Space-Htr-3VU34; http://www.grainger.com/product/PRO-TEMP-Portable-Heater-32MY66(Accessed 07/27/15).

The Department estimates the number of existing H-2A participants that would need to purchase portable heating equipment, which we calculate by multiplying the number of existing H-2A participants (485) by the assumed percentage of employers that would need to purchase portable heating equipment (20%). We then multiply the number of existing employers that would need to purchase portable heating equipment (97) by the average cost of a portable propane heating unit ($150.00). This calculation results in a cost of $14,550 in 2016. The Department added gas costs to employers by assuming that the average price of propane is $3 per gallon and that it would require approximately 323 gallons \90\ of propane to adequately supply heat for

workers in locations where the temperature is expected to drop below 50 degrees Fahrenheit. This calculation results in a cost of $93,993 per year.\91\ The total cost of providing portable heating equipment and propane is $108,543 in 2016.\92\

\90\ 323 = 4 months x 4.333 weeks x 7 days x 8 hours / 3 hours (average heating time per gallon of propane for a portable gas

heater with 3,000 BTU).

\91\ $93,993 = $3 x 97 x 323.

\92\ $108,403 = $14,550 + $93,993.

To calculate the cost for each of the remaining years of the Final Rule, we estimate the average number of employers joining the program that would need to purchase such equipment, which we calculate by multiplying the number of participants joining the H-2A program (49) by the assumed percentage of employers that would need to purchase portable heating equipment (20%). We then multiply the number of employers joining the H-2A program needing to purchase such equipment (10) by the average purchase cost ($150.00) to estimate the total cost of purchasing portable heating equipment in each remaining year ($1,455). The total cost of providing portable heating equipment and propane is $95,448 in 2017 and thereafter.\93\ Over the 10-year period, this calculation yields an average annual cost of $96,758 to existing and new employers for purchasing the equipment and propane.

\93\ $95,448 = $93,993 + $1,455.

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m. Recordkeeping

The NPRM required that employers generate a daily record of the

site of the employee's work, whether it was on the range or on the ranch or farm, and for periods when the ***worker*** was on the ranch a record of the hours worked and duties performed. The Department received several comments on the costs of generating daily records of a ***worker***'s hours and duties in response to this requirement. Several commenters stated that the Department underestimated the costs associated with the proposed requirement, while one commenter stated that the Department overestimated the costs.

For example, the Wyoming Farm Bureau Federation and Sims Sheep Co. LLC commented that the Department underestimated the costs. The Wyoming Farm Bureau stated that the Department used flawed assumptions in its estimation and remarked, along with John and Carolyn Espil, that most employers do not have an HR manager--often family members are used to perform these tasks. Secondly, the commenter stated that ranch operations do not occur in locations such as offices or manufacturing facilities that are convenient for record keeping. Without access to a clock, it is difficult to track the amount of time spent on activities, which may change unexpectedly (e.g., if an animal gets sick and its care must be immediately prioritized). Thirdly, the commenter stated the proposed requirement would require a clerk as herders do not have the necessary skills. Finally, additional costs would be required for an employer to transfer the employees' records onto a time sheet for the Department's records. The Wyoming Farm Bureau concluded that the benefits do not outweigh the costs.

The ***Worker*** Advocates' Joint Comment stated that the Department's methodology for estimating the cost of complying with the proposed record keeping requirement was reasonable; however, they stated the cost may have been overestimated. The commenter noted that operations that employ ***workers*** who are not covered by the current herder exemptions are already required to have payroll systems that meet Fair Labor Standards Act (FLSA) requirements, and that it would not require much time to incorporate herder information into those systems. The commenter stated that the benefit of having these records available for monitoring and enforcement outweigh the minor cost of compliance, as the employees generally would bear the responsibility for recording their own time.

The Final Rule modifies the NPRM's proposed recordkeeping requirements by eliminating the requirement to record hours worked when ***workers*** are not on the range and by eliminating the requirement to record the duties performed each day when ***workers*** are not on the range. The Final Rule retains only the requirement to record daily whether work was performed on the range or at the farm or ranch.

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i. Costs

This change represents a minor cost to herding or range livestock production employers who are not already creating and retaining

records. ***Given*** that the Department received contradictory comments that it had either overestimated or underestimated the costs of the proposed recordkeeping requirement, the Department maintains its average estimate of the time required. The Department estimates the cost by multiplying the time required to prepare and store the records by the average compensation of a human resources manager at an agricultural business. In the first year of the rule, the Department estimates that the average employer will spend approximately 6 minutes each week or approximately 5 hours a year (based on a 50 week average period of need) to prepare and store the records, which amounts to approximately $392.40 ($78.48 x 5) in labor costs per year.\94\ For the 485 employers, the total is 2,425 minutes (485 employers x 5 minutes) per week, or 40 hours per week for recording, with an annualized reporting burden of 2,000 hours per year (40 hours per week x 50 weeks). The total recordkeeping burden for 485 employers is 485 minutes (485 employers x 1 minute) per week, or 8 hours per week, with an annualized recordkeeping burden of 400 hours per year (8 hours per week x 50 weeks). When these two sums are added together, the total employer reporting and recordkeeping burden is 2,400 hours per year. Therefore, the total annual respondent hourly cost for this new reporting and recordkeeping burden placed on the employers in herding and the range production of livestock is estimated at 2,400 hours x $78.48 = $0.19 million per year.

\94\ The Department estimates that herding and range livestock production employers will spend 5 minutes each week to record and 1 minute to store these records. The average period of need for an H-2A ***worker*** is 50 weeks a year. The median hourly wage for a human resources manager is $54.88 (as published by the Department's OES survey, O*Net Online), which we multiply by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). This calculation yields an hourly labor cost of $78.48.

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n. Time To Read and Review the Rule

During the first year that this rule would be in effect, herding and range livestock production employers would need to learn about the new requirements. The Department received a couple of comments related to the cost to read and review the proposed rule, which expressed the view that the Department's estimate was too low. For example, Sheep! Magazine commented that it would take longer than two hours to read and review the proposed rule. The commenter stated that the average American cannot read 400 words per minute, especially when reading regulatory language. Vermillion Ranch and Midland Ranch stated that the Department's estimate of the average annual cost ($15.18) to review the NPRM was an underestimate because employers or associations would have to hire counsel and experts to review the NPRM and prepare feedback and guidance. The commenters suggested that it would cost $15,000 per employer.

In response to comments, the Department revised its estimate of time to read and review the Final Rule upward to four hours. While the Department understands that different employers may take more or less time to read and review the rule, it believes that four hours on average is a reasonable estimate of the time needed to learn about the new requirements. The text of the regulation is quite limited in length and scope as it addresses only the subset of requirements for herding and the range production of livestock that are exceptions from the standard H-2A regulations. Further, the Final Rule does not require employers to retain counsel or other advisors to assist them, and the Department will make available compliance assistance materials, including a specific small business compliance guide, that many employers may choose to read in lieu of reading the regulation itself.

i. Costs

This requirement represents a cost to herding and range livestock production employers in the first year of the rule. The Department notes that the cost of reading and reviewing the rule ($313.92) is incurred only in the first year; amortized over the rule's 10-year lifespan, the average annual cost is only $31.39. The Department estimates this cost by multiplying the time required to read and review the new rule (4 hours) by the average compensation of a human resources manager at an agricultural business ($78.48).\95\ The Department estimates the cost of reading and reviewing the rule by multiplying $31.39 times the number of employers (485). This calculation results in a cost of $152,251 in 2016 and an average annual cost of $15,225.

\95\ The median hourly wage for a human resources manager is $54.88 (as published by the Department's OES survey, O*Net Online), which we multiply by 1.43 to account for private-sector employee benefits (source: Bureau of Labor Statistics). This calculation yields an hourly labor cost of $78.48.

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5. Summary of Impacts

i. Costs and Transfers

Exhibit 10 presents a summary of first-year and average annual costs and transfers by affected entity.\96\ The Department estimates the total first-year costs and transfers of the Final Rule to be $8.49 million and $9.11 million, respectively. The transfer from all herding and range livestock production employers to ***workers*** ***due*** to the revised wage determination methodology, which bases the monthly AEWR on the forecasted ECI-adjusted $7.25 base wage, times 48 hours per week with a 2-year transition period, amounts to $9.11 million. The largest first-year cost is the cost to expand cooking/cleaning facilities at $3.93 million, followed by the cost of providing water to ***workers***, the cost of providing food to ***workers***, recordkeeping, heating equipment, and the time required to read and review the Final Rule. These costs and transfers are incurred by all sheep and goat herding and range

livestock production employers with the exception of the cost of providing food to ***workers***, which is incurred only by range livestock production employers. Range livestock production employers experience a cost reduction of approximately $0.06 million in the first year of the rule ***due*** to the elimination of the newspaper advertising requirement.

\96\ Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional costs or benefits to society. In this case, the Department classifies the wage increases as both transfer payments (to society) and costs (to employers).

In general, average annual transfers are larger than those in the first year because of the transition period for the monthly wage increases and because the Department adjusted the base wage based upon the wages and salaries ECI over the 10-year analysis period. The average annual transfer from employers to employees ***due*** to the revised wage determination methodology for the AEWR amounts to $17.46 million per year. The largest average cost is providing water to ***workers*** at

$2.36 million per year, followed by the cost of providing meals to

workers at $1.78 million per year, the cost of expanding cooking/ cleaning facilities at $0.75 million per year, the cost of recordkeeping at $0.19 million per year, the cost of the heating equipment and propane at $0.10 million, and the time required to read and review the Final Rule at $0.02 million per year. Range livestock production employers experience an average annual cost

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reduction of approximately $0.06 million. The Department estimates the average annual cost of the Final Rule to be $5.13 million.

[GRAPHIC] [TIFF OMITTED] TR16OC15.017

Exhibit 11 presents a summary of the economic impact analysis of the Final Rule. The monetized net costs and transfers displayed are the yearly summations of the calculations described above. In some cases, the totals for one year are less than the totals of the annual averages described above. The total (undiscounted) costs and transfers of the rule sum to $51.26 million and $174.64 million over the 10-year analysis period, respectively. This amounts to an average annual cost and transfer of $5.13 million and $17.46 million per year, respectively. In total, the 10-year discounted costs of the Final Rule range from $36.87 million to $44.16 million (with 7 and 3 percent discounting, respectively). In total, the 10-year discounted transfers

of the Final Rule range from $117.99 million to $146.52 million (with 7 and 3 percent discounting, respectively).

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[GRAPHIC] [TIFF OMITTED] TR16OC15.018

ii. Benefits

The Department was able to identify cost reductions of the Final Rule ***due*** to the elimination of the newspaper advertising requirement, which amount to $0.06 million per year over the 10-year analysis period. The Department also expects there to be cost reductions ***due*** to the revised job order submission requirements and the revised master application filing requirements. However, the Department was not able to quantify those cost reductions resulting from the Final Rule.

Due to data limitations, the Department also did not quantify several of the important benefits to society provided by the revised policies. Through this rulemaking the Department is establishing a new methodology for determining a monthly AEWR and clarifying employer obligations for these unique occupations with the aim of protecting the wages and working conditions of U.S. ***workers*** and better assessing their availability for these jobs based on appropriate terms and conditions of employment. The higher wages for ***workers*** will result in an improved

ability on the part of ***workers*** and their families to meet their costs of living and spend money in their local communities. Higher wages may also decrease turnover among U.S. ***workers*** and thereby decrease the costs of recruitment and retention to employers. Reduced ***worker*** turnover is associated with lower costs to employers arising from recruiting and training replacement ***workers***. Because seeking and training new ***workers*** is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005).\97\

\97\ Reich, Michael, Peter Hall, and Ken Jacobs, ``Living Wages and Economic Performance: The San Francisco Airport Model'' Institute of Industrial Relations, University of California, Berkeley, March 2003. Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, ``Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on ***Workers*** and Businesses'' LAANE, 2005. See Arindrajit Dube, T. William Lester and Michael Reich (2012), ``Minimum Wage Shocks, Employment Flows and Labor Market Frictions,'' Institute for Research on Labor and Employment, http://www.irle.berkeley.edu/workingpapers/122-12.pdf.

This potential retention of U.S. ***workers*** may reduce the need to recruit and hire temporary foreign ***workers*** to fill these jobs. Furthermore, higher wages may have positive impacts on productivity. Higher wages can boost employee morale, thereby leading to increased effort and greater productivity. For example, Holzer (1990) \98\ finds that high-wage firms can sometimes offset more than half of their higher wage costs through improved productivity and lower hiring and turnover costs.

\98\ Holzer, Harry, ``Wages, Employer Costs, and Employee Performance in the Firm.'' Industrial and Labor Relations Review, Vol. 43, No. 3, pp 147-164, 1990.

In addition, clarifications for such requirements as providing sufficient housing; supplying all tools, supplies, and equipment required, free of charge; establishing effective means of communication in case of emergencies; and providing meals and potable water will better foster the safety and health of both U.S. and H-2A ***workers*** as they perform these jobs. ***Due*** to data limitations, the Department was not able to quantify or monetize the impact of these protective

measures.

B. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of

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preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. This rule will have a significant economic impact on a substantial number of small entities.

1. Need for, and Objectives of, the Rule

Among the reasons for the current rulemaking was the decision of the Court of Appeals for the District of Columbia in the Mendoza case, which required the Department to engage in notice and comment rulemaking to set standards governing the employment of foreign herders because those standards were legislative rules governed by the

Administrative Procedure Act, 5 U.S.C. 553. Mendoza, 754 F.3d at 1024-1025. In addition to the Mendoza decision, ETA's traditional method of determining the monthly AEWR for these occupations--the use of SWA surveys--has become increasingly difficult with few states reporting wage results because their surveys included so few U.S. ***workers*** that they could not report statistically valid results. Wage stagnation has resulted from this methodology with herders in most states earning only slightly higher nominal wages today than they were 20 years ago, and therefore they are making significantly less in real terms. 80 FR 20307. Accordingly, we needed to engage in notice and comment rulemaking as a result of both the Mendoza decision and to address the faulty wage methodology that over years contributed to herder wage stagnation.

2. Significant Issues Raised by the Public Comments and the Department's Response

This section presents an analysis of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis (IRFA) and a summary of the Department's response to those issues. We discuss many of these issues in detail in the preamble and the EO 12866 analysis and, therefore, we incorporate those discussions by reference.

a. Comments on the Number of H-2A ***Workers*** per Small Business

The SBA Office of Advocacy, the Mountain Plains Agricultural Services and Western Range Association (Mountain Plains and Western

Range), the Wyoming Wool Growers Association, Vermillion Ranch and Midland Ranch, and others stated that the Department underestimated the cost of the proposed rule for small herding operations because these operations may hire more than three H-2A ***workers***, which is the value the Department used to estimate costs. They emphasized that, for small businesses that hire more than three H-2A ***workers***, the cost of the proposed rule could be higher than the 19 to 24 percent of revenues the Department identified in the IRFA. The commenters referenced a survey by the Colorado Wool Growers Association, The Real Wage Benefits Provided to H-2A Sheep Herders and the Economic Cost to Colorado Ranchers, which showed that its members hired an average of five H-2A ***workers*** per employer. The commenters also cited a recent phone survey by Mountain Plains, which showed that its members hired an average of 4.2 H-2A ***workers*** per employer. Vermillion Ranch and Midland Ranch stated that although their ranches' gross revenues are generally higher than the average annual revenue of $252,050 estimated by the Department, they would incur significantly greater costs because they hire 18 and 13 ***workers***, respectively, each year.

Some commenters provided the number of ***workers*** hired on their ranches per year:

Etchart Livestock, Inc. stated that it employs five to seven foreign ***workers***.

David and Bonnie Little stated that they employ 10

sheepherders.

FIM Corp. stated that it employs 11 H-2A sheepherders.

Julian Land & Livestock stated that it employs 12 to 22 men.

In the Notice of Proposed Rulemaking (NPRM) economic analysis, the Department estimated the average number of H-2A ***workers*** per employer as three based on actual H-2A certifications issued during FY 2011 and FY 2012. Based on a review of more recent H-2A certifications issued during FY 2013 and FY 2014, the Department revised the average number H-2A ***workers*** per employer to 4.2 in the final regulatory flexibility analysis (FRFA).\99\ The Department notes that this is the average number of H-2A ***workers*** per employer, meaning that some employers may choose to employ more than 4.2 H-2A ***workers*** while others employ fewer. The Department agrees that ranchers involved in sheep and goat herding operations who employ more than 4.2 H-2A ***workers***, and who earn no more than an average revenue of $252,050, will incur a revenue loss of more than the estimated percentage of annual revenues. Based on the revised average number of H-2A ***workers*** per employer, the Department believes that the Final Rule will have a significant economic impact on a substantial number of affected small entities. DOL has a statutory obligation to set wages and working conditions in the H-2A program at a level that protects against adverse effect on U.S. ***workers*** ***due*** to the

employment of foreign ***workers***. For the reasons discussed in the preamble, DOL has determined that the requirements in this rule are needed to protect against adverse effect on U.S. ***workers***; therefore, DOL could not lower requirements for small businesses.

\99\ The FY 2013 and FY 2014 certification data show an annual average of 953 applications certified for an average of 2,481 ***workers*** in the herding and range production of livestock program, or 2.6 ***workers*** per application. The Department concluded that this could be an underestimate because some employers file multiple applications per year. Therefore, we also attempted to identify the number of unique employers filing applications. We estimate that an annual average of 485 unique employers filed applications, which would indicate 5.1 ***workers*** per employer. However, the Department concluded that this could be an overestimate because employers do not bring into the country all the ***workers*** for which they are certified each year. Furthermore, some employers file multiple applications because their itinerary changes and they need to reapply to receive authorization to send ***workers*** to another state, even though they will be the same ***workers***. Therefore, we assumed an average of 4.2 ***workers*** per employer, consistent with the estimate

from the Mountain Plains 2015 telephone survey of its members discussed by the SBA Office of Advocacy.

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b. Comments on the Calculation of the Number of Affected Small Entities

The Department received comments on the calculation of the number of affected small entities. The commenters asserted that most or all of the businesses affected by the proposed rule are small entities.

John and Carolyn Espil stated that most or all of the ranches affected by the proposed rule would be small entities. They cited (1) the Nevada Department of Agriculture (NDA), which stated that 82.78 percent of agricultural operations in Nevada are engaged in livestock production and (2) the NDA's Economic Contribution of Agriculture Report, which stated that 82.2 percent of farms and ranches are owned by families or individuals. The commenters also disagreed with the Department's estimate in the IRFA that the average small farm makes $252,050 in annual revenue. The commenters remarked that farms cannot make this much without off-farm income and stated that any other estimates using this annual revenue figure should be considered inaccurate as well. Sharon O'Toole stated that since nearly all of the

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businesses affected by the proposed rule are small entities, the proposed rule is a violation of existing law.

Mountain Plains and Western Range and Texas Sheep & Goat Raisers Association cited the ASI, which stated that 99.98 percent of sheep operations in the United States are small businesses. In addition, the commenter noted that nearly all of the members of Mountain Plains and Western Range would meet the statutory definition of a ``small business'' for an agricultural enterprise. The SBA Office of Advocacy confirmed that approximately 99 percent of U.S. farms in the relevant industries are considered small businesses under the SBA definition. The Siddoway Sheep Company referenced the U.S. Department of Agriculture's most recent census, which stated that 92 percent of sheep and goat operations are family businesses. ASI and Public Lands Council and Patrick O'Toole stated that changes to the H-2A sheepherder program would have a significant negative impact on the 79,500 family farms and ranches that raise sheep in the United States. The Wyoming Livestock Board, the Texas Sheep & Goat Raisers Association, ASI, and the Pilster Ranch stated that 38 percent of sheep production in the United States is under the care of H-2A sheepherders and that the proposed rule would negatively impact the 79,500 family farms in the U.S. sheep industry.

The Department agrees with the commenters that almost all of the H-2A employers affected by the rule are small entities that meet the SBA's small business size standards, which was reflected in the IRFA and is repeated in the FRFA. However, the Department maintains that its estimate of the average revenue of a small entity ($252,050 in 2013 dollars) is consistent with the average revenue from the Idaho farm enterprise budget for range sheep herding submitted by Mountain Plains

and Western Range. Please note that in the FRFA, the Department has updated its analysis to 2014 dollars; thus, the revised estimate of the average revenue of a small entity is $256,138 in 2014 dollars.\100\ In addition, some ranchers have multiple enterprise operations that include both range sheep production and range cattle production.

\100\ According to the 2012 Census of Agriculture, the average revenue (i.e., the average market value of agricultural products sold and government payments) per farm in the relevant industries is $248,411. After adjusting for inflation using the CPI-U, the Department estimates that the average revenue per farm in the relevant industries is approximately $252,050 in 2013 dollars and $256,138 in 2014 dollars. Thus, the Department estimated that a small farm in the relevant industries would have average annual revenues of approximately $252,050 and $256,138 in the NPRM and Final Rule, respectively.

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c. Comments on the Calculation of the Significant Economic Impact on a Substantial Number of Small Entities

The Department received several comments stating that the proposed rule would have a significant economic impact on a substantial number of small entities. The Department also received a couple of comments suggesting that the Department publish a Supplemental IRFA for public

comment.

The SBA Office of Advocacy, Mountain Plains and Western Range, the Wyoming Wool Growers Association, the Montana Wool Growers Association, John and Carolyn Espil, and Sheep! Magazine concluded that the proposed rule would have a significant economic impact on a substantial number of small entities. The SBA Office of Advocacy stated that the Department's IRFA may have underestimated costs for small businesses and did not analyze any alternatives that may minimize the economic impact on small businesses. The commenter suggested that the Department publish for public comment a Supplemental IRFA analyzing the cost of the proposed rule and alternatives for small businesses that minimize the economic impact.

The Department concluded that the proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, the Department published the IRFA and invited comments on the impact to such small entities. If the small-entity impact estimates in the IRFA underestimated the true costs to the small entities, such

as because we were not able to quantify the costs of some of items ***due*** to data limitations, we specifically identified those items and invited comments. Very few, if any, responses were received that provided specific information on such costs. Moreover, the IRFA identified two alternatives; we did not identify any less costly alternatives because we concluded, at that time, that such alternatives would not allow the Department to fulfill our dual statutory mandate of determining that no

U.S. ***workers*** are available for the job and that the employment of

foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** similarly employed in the United States.

With respect to the ``downstream'' economic impacts on related industries in the U.S. economy, the Department was unable to quantify such impacts ***due*** to a lack of data and statistical input-output models necessary to conduct an accurate analysis. Therefore, such impacts are beyond the scope of this economic analysis.

Based upon the comments received on the NPRM, the Final Rule makes a number of changes to the NPRM, all of which are analyzed below. The Department decided to set the monthly wage rates for range herders of sheep, goats, and other livestock using the current Fair Labor Standards Act (FLSA) minimum wage rate of $7.25 per hour as a starting point, with annual adjustments to account for inflation, and an assumed 48-hour workweek; we also considered and address below alternative wage setting proposals submitted by commenters, including two less costly alternatives.

d. Alternatives Considered in the Analysis

As discussed in detail in the EO 12866 analysis, the Department received comments related to the alternatives considered in the IRFA. Many commenters asserted that the alternatives were not ``true'' alternatives in that the Department did not consider other ways to determine the monthly Adverse Effect Wage Rate (AEWR). They commented that the Department only considered alternatives related to the timing of the monthly wage rate increases, and thus they characterized it as

one alternative with three transition periods. For this reason, some commenters stated that the Department failed to meet the requirements set forth in Section 603(c) of the RFA to describe ``any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.''

The Department carefully reviewed the comments related to the proposed wage-setting methodology and to the alternatives laid out in the EO 12866 analysis and the IRFA. After considering the comments, the Department has decided to set the monthly AEWR for range herders of sheep, goats, and other livestock using a formula based on the current FLSA minimum wage as a starting point, with annual adjustment based on inflation. This decision is in line with the second of two alternative proposals set forth by Mountain Plains and Western Range, which was endorsed by the ASI and many individual employers; however, it also was slightly modified consistent with the suggestions in the ***Worker*** Advocates' Joint Comment. As discussed in detail in the preamble, the Department concludes that this wage rate is both necessary to provide a meaningful test of the labor market for

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available U.S. ***workers*** and to protect against adverse effect on ***workers*** in the United States similarly employed.

The Department has considered three alternatives in addition to the new wage setting methodology in the Final Rule analysis:

(1) To base the monthly AEWR on the 1994 TEGL wage rates ($800, which was approximately the highest 1994 TEGL rate), adjusted to a 2014 monthly wage using the ECI capped at a maximum annual increase of 2.5 percent, the forecasted ECI for wages and salaries values applied to the estimated 2014 monthly wage, and which is introduced over a three-year transition period with full implementation in year four;

(2) to base the monthly AEWR on the current FLSA minimum hourly wage, the forecasted ECI for wages and salaries values applied beginning in year five, a 44-hour workweek, and which is introduced over a three-year transition period with full implementation in year four; and

(3) to base the monthly AEWR on forecasted hourly AEWRs for combined field and livestock ***workers*** by state, a 65-hour workweek, with full implementation in year one, and incorporating a monthly food deduction estimate as permitted in the standard H-2A program, which is adjusted by the average CPI-U over 2012 to 2014.

The preamble and the EO 12866 analysis describe in detail the methodology we adopted in the Final Rule and the reasons for its selection over the three alternatives that we considered. The three alternatives that we considered are described in detail below.

i. 1994 TEGL Wage Adjusted Based on Capped ECI With a Three-Year Transition Period

Under this alternate wage determination methodology, the Department

adjusts the estimated 1994 TEGL wage ($800.00) as recommended by Mountain Plains, Western Range, ASI and others using a capped ECI approach.\101\ Under the capped ECI approach, we adjust the wage for each year as follows:

\101\ The employer commenters proposed using $800 as the 1994 wage to index; although $800 is higher than the wage in all but one state, it was not used in any state and is lower than the $820 sheep and goat herder wage in Arizona in 1994. The alternative wage methodology does not account for wages paid by livestock herders, which are not available for 1994.

By 1.5 percent if the percentage increase in the wages and salaries ECI during the previous calendar year was less than 1.5 percent;

By the percentage increase if the percentage increase in the wages and salaries ECI during the previous calendar year was between 1.5 percent and 2.5 percent, inclusive; or

By 2.5 percent if the percentage increases in the wages and salaries ECI during the previous calendar year was greater than 2.5 percent.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.019

We then apply the growth rate calculated under the Final Rule's source--the average year-to-year-growth rate of the average quarterly wages and salaries ECI for each year from 2012 through 2014 (2.0 percent)--to the 2014-indexed wage ($1,261.84) and forecast the indexed monthly wage required under Alternative 1 for 2016 to 2025. The wage rate determination methodology includes a three-year transition period, with full implementation in year four. The Department estimates the hourly wage rate for each year of the analysis period as follows (Exhibit 13):

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[GRAPHIC] [TIFF OMITTED] TR16OC15.020

Exhibit 14 presents the forecasted ECI-adjusted cap-indexed 1994 TEGL wage with a three-year transition period and full implementation in 2019 under Alternative 1.

[GRAPHIC] [TIFF OMITTED] TR16OC15.021

Exhibits 15 and 16 present the wage differential between the monthly wage under Alternative 1 and the baseline by state for sheep and goat herders and range livestock production ***workers***, respectively.

In the case of California and Oregon, the monthly wage under Alternative 1 is lower than the baseline wage in every year. In the case of Hawaii, where the monthly wage of $1,422.52 is based on a 2012 prevailing wage survey conducted by California, the monthly wage under Alternative 1 is lower than Hawaii's current baseline wage in the first five years. In these instances, the Department assumes that the ***workers*** will continue to receive the baseline wage in the applicable year; therefore, no wage differential results. Additionally, the monthly wage differentials for states that did not have a baseline wage because there were no H-2A ***workers*** certified are denoted as ``N/A.'' Note that these values are for informational purposes only and were not used in the analysis.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.022

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[GRAPHIC] [TIFF OMITTED] TR16OC15.023

ii. Forecasted ECI-Adjusted $7.25 Multiplied by 44 Hours/Week With a

Three-Year Transition Period

Under this alternate monthly wage rate determination methodology, which also was generally suggested by Mountain Plains, Western Range, ASI, and other employer commenters, the Department estimates the hourly base wage rate by applying the 2-percent growth rate estimated under the Final Rule's wage methodology, which is the average year-to-year-growth rate of the average quarterly ECI for wages and salaries for each year from 2012 through 2014, to $7.25 for each year beginning in 2020.\102\ The wage rate determination methodology uses a three-year transition period, with full implementation in year four. The Department estimates the hourly wage rate for each year of the analysis period as follows (Exhibit 17):

\102\ Because the average year-to-year ECI growth rate was 2.0 percent, it fell within the cap range (1.5 to 2.5 percent) suggested by Mountain Plains and Western Range; therefore, the increase is the same whether using the capped or uncapped methodology.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.024

To convert the hourly base wage rate to a monthly wage rate, the Department multiplies the hourly wage rate by 44 hours per workweek and 4.333 weeks per month. Exhibit 18 presents the monthly AEWR.

[GRAPHIC] [TIFF OMITTED] TR16OC15.025

Exhibits 19 and 20 present the wage differential between the monthly wage under Alternative 2 and the baseline by state for sheep and goat herders and range livestock production ***workers***, respectively. In the case of California and Oregon, the monthly wage under Alternative 2 is lower than the baseline wage in every year. In the case of Hawaii, where the monthly wage of $1,422.52 is based on a 2012 prevailing wage survey conducted by California, the monthly wage under Alternative 2 is lower than Hawaii's current baseline wage in the first five years. In these instances, the Department assumes that the ***workers*** will continue to receive the baseline wage in the applicable year; therefore, no wage differential results. Additionally, the monthly wage differentials for states that did not have a baseline wage are denoted as ``N/A.'' Note that these values are for informational purposes only and were not used in the analysis.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.026

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[GRAPHIC] [TIFF OMITTED] TR16OC15.027

iii. Forecasted FLS-Based AEWR, 65-Hour Week, With Food Deductions and No Transition Period

Under this alternate wage rate determination methodology, based generally upon the recommendation made in the Joint ***Workers***' Advocate Comment, the Department first calculates the annual percentage change in each state's average FLS-based AEWR for each year from 2013 to 2015. We then take the averages of the resulting two values to estimate the average annual percentage changes by state as shown in Exhibit 21.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.028

Using each state's geometric average annual percent change, we forecast each state's FLS-based AEWR for 2016 to 2025.\103\

\103\ The geometric mean of the annual percent changes provides the rate of growth which, if experienced each year, would lead to

the same total change in wages as that observed between 2013 and 2015. In this case, the formula for the geometric mean is: (see equation above) where rmean is the geometric mean and r2013-2014 and r2014-2015 are the annual percent changes between 2013-2014 and 2014-2015, respectively.

Using Alabama as an example, the geometric average annual percent change over the two years is 1.1 percent. The Department applies the 1.1-percent growth rate to the 2015 hourly AEWR to obtain the forecasted 2016 hourly AEWR ($10.00 x 1.011 = $10.11). We then apply the same 1.1 percent growth rate to the forecasted 2016 hourly AEWR to forecast the 2017 hourly AEWR ($10.11 x 1.011 = $10.22). We repeat this calculation to forecast the hourly AEWRs for the remaining years in the analysis period. Exhibit 22 presents the forecasted hourly AEWRs for each state.

[GRAPHIC] [TIFF OMITTED] TR16OC15.038

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[GRAPHIC] [TIFF OMITTED] TR16OC15.029

As recommended in the ***Worker*** Advocates' Joint Comment, this wage

rate option does not use a transition period. To convert the hourly FLS-based AEWR to a monthly wage rate, the Department multiplies the hourly wage rate by 65 hours per workweek and 4.333 weeks per month. To account for the food deduction, we convert the 2015 daily food deduction of $11.86 per ***worker*** to the monthly food deduction of $359.73 per ***worker*** by multiplying the daily food deduction by the number of days per week (7) by the number of weeks per month (4.333).\104\ We then apply the average year-to-year change in the CPI-U from 2012 to 2014 (1.5 percent) to the monthly food deduction for each year beginning in 2016. Exhibit 23 presents the monthly food deductions by year.

\104\ The daily meal cost estimate of $11.86 is from Allowable Meal Charges and Reimbursements for Daily Subsistence published by the U.S. Department of Labor, Employment & Training Administration (Source: http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm. Accessed July 30, 2015).

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[GRAPHIC] [TIFF OMITTED] TR16OC15.030

We subtract the monthly food deduction from the monthly wage. Exhibit 24 presents the monthly wages with the food deductions taken into account.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.031

Exhibits 25 and 26 present the wage differential between the monthly wage under Alternative 3--the forecasted FLS-based AEWR with food deductions taken into account--and the baseline by state for sheep and goat herders and range livestock production ***workers***, respectively. Additionally, the monthly wage differentials for states that did not have a baseline wage because there were no H-2A ***workers*** employed as herders or range livestock ***workers*** are denoted as ``N/A.'' Note that these values are for informational purposes only and were not used in the analysis.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.032

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[GRAPHIC] [TIFF OMITTED] TR16OC15.033

As discussed in the preamble and the EO 12866 analysis, the Department concludes that the Final Rule's methodology for setting the monthly AEWR is the most appropriate as it will begin to address immediately and substantially the wage stagnation that has occurred over the past decades. Some transition period is necessary because the comments indicate that requiring the full monthly increase immediately could lead to significant disruptions that might cause job losses ***due*** to some employers going out of business or scaling back their operations. Based on all the information in the comments, including balance sheet information from individual

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employers, the state enterprise budgets, and the other data in the record such as regarding average prices for lamb and wool over the last 15 years, the Department concludes that ***given*** the Final Rule's methodology for setting the monthly AEWR a two-year transition period is sufficient to avoid such disruptions. We do not believe that the lengthier transition periods in the first two alternatives we considered are necessary. However, we also do not believe that the third alternative, with substantially higher wages based on the FLS-

based hourly wages with no transition period, is appropriate; the evidence indicates that there is a substantial risk that tripling the required wage rates will entirely eliminate annual profits for some employers, which is likely to cause, rather than prevent, adverse effect on U.S. ***workers***.

Exhibit 27 presents a summary of average annual transfers over the 10-year analysis period by wage determination methodology. The Department estimates the average annual transfer from all herding and range livestock production employers to ***workers*** ***due*** to the Final Rule's wage determination methodology, which bases the monthly AEWR on forecasted ECI-adjusted $7.25 base wage, times 48 hours per week with a 2-year transition period, to be $17.46 million per year. This is a decrease relative to the average annual transfer from employers to ***workers*** estimated under the NPRM's wage determination methodology, forecasted AEWR values by USDA region incrementally phased in over a 5-year period, of $45.08 million per year. Of the three alternatives, the largest average annual transfer from employers to employees ***due*** to Alternative 3's revised wage determination methodology (i.e., the forecasted FLS-based AEWR with food deductions taken into account) amounts to $71.38 million per year, followed by Alternative 1's methodology (i.e., the forecasted ECI-adjusted cap-indexed 1994 TEGL wage with a 3-year transition period and full implementation in 2019) at $12.64 million per year, and Alternative 2's methodology (i.e., the

forecasted ECI-adjusted $7.25 base wage, times 44 hours per week with a 3-year transition period) at $12.47 million per year.

[GRAPHIC] [TIFF OMITTED] TR16OC15.034

3. Response to Comments Filed by the Chief Counsel for Advocacy of the SBA

As discussed in Section 2 above, the SBA Office of Advocacy submitted substantive comments regarding a number of issues, including the number of H-2A ***workers*** per small business, the calculation of the number of affected small entities, and the calculation of the significant impact on a substantial number of small entities. This section summarizes separately the SBA Office of Advocacy's comments and the Department's responses.

The SBA Office of Advocacy commented that the Department underestimated the cost of the proposed rule for small herding operations because these operations may hire more than three H-2A ***workers***, which is the value the Department used to estimate costs. In response to this concern, the Department revised the average number of H-2A ***workers*** per employer in the FRFA to 4.2 based on actual H-2A certifications issued during FY 2013 and FY 2014. This figure is consistent with the estimate submitted by the commenters based upon a recent telephone survey conducted by Mountain Plains involving responses from 214 of 275 members.

The SBA Office of Advocacy also commented on the number of small

entities affected, noting that approximately 99 percent of sheep operations in the United States are small businesses. The Department agrees that almost all of the H-2A employers affected by the proposed rule are small entities that meet the SBA's small business size standards, which was reflected in the IRFA and is repeated in the FRFA. However, the Department maintains that its estimate of the average revenue of a small entity ($252,050 in 2013 dollars) is consistent with the average revenue from farm enterprise budgets for range sheep herding reported by commenters. Please note that in the FRFA, the Department updates its analysis to 2014 dollars; thus, the revised estimate of the average revenue of a small entity is $256,138.

The SBA Office of Advocacy stated that the proposed rule would have a significant impact on a substantial number of small entities. SBA also commented that the Department's IRFA may have underestimated costs for small businesses and did not analyze any alternatives that may minimize the economic impact on small businesses. SBA suggested that the Department publish for public comment a Supplemental IRFA analyzing the cost of the proposed rule and alternatives for small businesses that minimize the economic impact. The Department concluded that the proposed rule would have a significant impact on a substantial number of small entities. Therefore, the Department published the IRFA and invited comments on the impact to such small entities. If we were not able to quantify certain costs ***due*** to data limitations, we identified those items and invited comments. Very few, if any, responses were received that provided specific information on such costs.

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The IRFA identified two alternatives for setting the required monthly wage; we did not identify any less costly alternatives in the IRFA because we concluded, at that time, that such alternatives would not allow the Department to fulfill its dual statutory mandate of ensuring that no U.S. ***workers*** are available for the job and that the employment of foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** similarly employed in the United States. Based upon comments received from the industry, the FRFA identifies two less-costly alternatives to the Final Rule wage methodology and, together with the preamble and EO 12866 analysis, explains why the Department did not find either of those alternatives to be appropriate.

The SBA Office of Advocacy expressed concern about the NPRM's definition of ``open range,'' noting that 36 percent of respondents to a Mountain Plains survey thought they would not qualify for the program if fences were prohibited. The Final Rule substantially revises the definition of what qualifies as the ``range'' in recognition of the fact that fences are used in many locations for many purposes, including on Forest Service and BLM lands where animals graze.

The SBA Office of Advocacy also expressed concern that the NPRM relied upon the same hourly wage rate as is paid to regular H-2A field and livestock ***workers***, when herding employers provide housing, food,

clothing, tools, paid vacation, etc. Unlike the NPRM, the Final Rule does not base the monthly AEWR on the FLS-based hourly wage. Moreover, we note that all H-2A employers are required to provide free housing and are required to provide the tools, supplies and equipment necessary to perform the job free of charge. The Department does not require herding employers to provide paid vacation, although we support them if they voluntarily choose to do so.

With regard to the concern that small herding operations have a difficult time hiring U.S. ***workers*** for this work, we anticipate that updating the required monthly wage rate to overcome the many years of wage stagnation may result in more U.S. ***workers*** being interested in this work. California, which has a higher state minimum wage for herders, is consistently among the states with the largest number of U.S. sheepherders identified in SWA surveys.

4. Calculation of the Number of Affected Small Entities

a. Definition of a Small Business

A small entity is one that is ``independently owned and operated and which is not dominant in its field of operation.'' The definition of small business varies from industry to industry, to the extent necessary, in order to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the relevant industries to which a rule applies, which in this case includes Beef Cattle Ranching and Farming (NAICS 112111), Dairy Cattle and Milk Production (NAICS

11212), Sheep and Goat Farming (NAICS 1124), and Other Animal Production (NAICS 1129).\105\ The Department has adopted the SBA definition for these industries, which is an establishment with annual revenues of less than $0.75 million.\106\

\105\ Animal Aquaculture (NAICS 1125) is not considered a relevant industry for this rulemaking. However, the RFA analysis uses data from the 2012 Census of Agriculture, which does not distinguish between Animal Aquaculture (1125) and Other Animal Production (1129). ***Due*** to this data limitation, the Department includes Animal Aquaculture industry data in the calculations of this RFA analysis. In addition, the Department excludes farms in the Cattle Feedlots (NAICS 112112) industry because cattle in feedlots do not graze on the range; therefore, employers in the cattle feedlot industry would not be affected by the rule.

\106\ Source: U.S. Small Business Administration. Table of Small Business Size Standards Matched to North American Industry Classification System Codes (July 2014). Available at *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf* (Accessed Nov. 13, 2014).

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b. Estimated Number of Affected Small Entities

Approximately 99 percent of U.S. farms in the relevant industries

have annual revenues of less than $0.75 million and, therefore, fall within the SBA's definition of a small entity. The Department estimates that by 2025, there will be approximately 485 employer applications filed (not necessarily applicants) under the H-2A program for herding and the range production of livestock. The Department considers a rule to have an impact on a ``substantial number of small entities'' when the total number of small entities impacted by the rule is equal to or great than 15 percent of the relevant universe of small entities affected in a ***given*** industry (in this case, the relevant universe is the employers participating in the program). Therefore, the Department concludes the rule will have an impact on a substantial number of small entities as described by the RFA.

5. Compliance Requirements of the Final Rule, Including Reporting and Recordkeeping

a. Impact on Small Businesses

The Department has estimated the incremental costs for small businesses from the baseline (i.e., the 2010 Final Rule, TEGL 32-10, and TEGL 15-06, Change 1) to this rule. We have estimated the costs of (a) the new methodology for estimating the minimum monthly AEWR employers must offer to their ***workers***; (b) elimination of requirements to advertise in a newspaper of general circulation in the area of intended employment (cost reduction); (c) provision of meals; (d) provision of potable water; (e) provision of expanded cooking/cleaning facilities at the ranch; (f) recording and retaining records of the employees' work locations; (g) providing heating equipment; and (h)

time to read and review the rule. This analysis includes the incremental cost of this rule as it adds to the requirements in the 2010 Final Rule, TEGL 32-10, and TEGL 15-6, Change 1. The cost estimates included in this analysis for the provisions of the Final Rule are consistent with those presented in the EO 12866 section.

The Department identified the following provisions of the Final Rule to have an impact to industry but was not able to quantify the impacts ***due*** to data limitations: proportion/type of work permitted at the ranch (i.e., not on the range); application filing requirements; job order submissions; job order duration; placement of ***workers*** on master applications; and employer-provided items. Thus, although the Department believes those additional costs are minor, the total cost to small entities may be higher than the total cost presented in this analysis (although we conclude the cost of other items may be overestimated).

i. New Methodology for Estimating the Wages of ***Workers***

Under the new wage determination methodology, the use of the forecasted ECI-adjusted $7.25 base wage times 48 hours per week and times 4.333 weeks per month to set the required monthly AEWR, with a two-year transition period, results in an increase of $1.53 in hourly wages (using the assumed 48 hours per week computation) paid to H-2A ***workers*** in 2016. The Department multiplies this average hourly wage increase by 48 hours per workweek to obtain a weekly cost per ***worker*** of

$73.44 ($1.53 x 48) in 2016. The Department then multiplies this weekly cost by 50 weeks, which is the average

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period of need for ***workers*** in these industries. This results in an average increased cost of $3,672.00 ($73.44 x 50) per H-2A ***worker*** in 2016. For employers hiring the average number of H-2A ***workers*** (4.2), this results in an average increased cost of $15,422.40 ($3,672 x 4.2) paid to ***workers*** in wages for 2016.

To estimate the average annual cost of increased wages paid to H-2A ***workers*** under the Final Rule's wage determination methodology, the Department first calculates the average annual assumed hourly wage increase over the period of analysis. ***Given*** the average annual assumed hourly wage increase ($2.93), a 48-hour workweek, and an average period of need for ***workers*** of 50 weeks, the Department estimates an average annual increased cost of $7,039.20 ($2.93 x 48 x 50) per H-2A ***worker***. For employers hiring the average number of H-2A ***workers*** (4.2), this results in an average annual increased cost of $29,564.64 ($7,039.20 x 4.2) paid to ***workers*** in wages over the 10-year analysis period.\107\

\107\ If the results of the FRFA, using an estimated average of 4.2 ***workers*** per employer, were multiplied times 485 (the number of employers), it would not produce identical results to the total impact results estimated in the EO 12866 analysis. As we discussed above, the Department concludes that the EO 12866 analysis produces an overestimate of the likely results, in part because that analysis was based on an assumption that all 2,481 ***workers*** for whom employers receive a labor certification enter the country each year. The FRFA uses an estimate of 4.2 ***workers*** per employer, which mirrors the estimate from the Mountain Plains 2015 telephone survey of its members and is based upon estimates from the Department's data from H-2A applications for labor certification.

To estimate the average annual cost of increased wages paid to H-2A ***workers*** under the first wage determination methodology alternative--the forecasted ECI-adjusted cap-indexed 1994 TEGL wage with a three-year transition--the Department first calculates the average annual monthly wage increase over the period of analysis. ***Given*** the average annual monthly wage increase ($441.66), an average period of need for ***workers*** of 11.54 months,\108\ the Department estimates an average annual increased cost of $5,096.71 ($441.66 x 11.54) per H-2A ***worker***. For

employers hiring the average number of H-2A ***workers*** (4.2), this alternative results in an average annual increased cost of $21,406.19 ($5,096.71 x 4.2) paid to ***workers*** in wages over the 10-year analysis period.

\108\ 11.54 months are equivalent to 50 weeks.

To estimate the average annual cost of increased wages paid to H-2A ***workers*** under the second wage determination methodology alternative--the forecasted ECI-adjusted $7.25 wage rate with a three-year transition based on a 44-hour workweek--the Department calculates the average annual hourly wage increase over the period of analysis. ***Given*** the average annual hourly wage increase ($2.28), a 44-hour workweek, and an average period of need for ***workers*** of 50 weeks, the Department estimates an average annual cost of $5,024.80 ($2.28 x 44 x 50) per H-2A ***worker***. For employers hiring the average number of H-2A ***workers*** (4.2), this alternative results in an average annual increased cost of $21,104.16 ($5,024.80 x 4.2) paid to ***workers*** in wages.

To estimate the average annual cost of increased wages paid to H-2A ***workers*** under the third wage determination methodology alternative--the forecasted State AEWR with food deductions based on a 65-hour

workweek--the Department calculates the average annual hourly wage increase over the period of analysis. ***Given*** the average annual hourly wage increase ($8.85), a 65-hour workweek, and an average period of need for ***workers*** of 50 weeks, the Department estimates an average annual increased cost of $28,772.25 ($8.85 x 65 x 50) per H-2A ***worker***. For employers hiring the average number of H-2A ***workers*** (4.2), this results in an average annual increased cost of $120,843.45 ($28,772.25 x 4.2) paid to ***workers*** in wages.

ii. Newspaper Advertisements

Through the Final Rule, the Department will expand to production of livestock occupations on the range the historical practice of waiving the regulatory requirement to place two advertisements in a newspaper serving the area of intended employment for sheepherding and goat herding occupations. This will result in a minor cost reduction. To estimate this cost reduction, the Department multiplies the number of newspaper advertisements required for each range livestock employer application (2) by the average cost of placing a newspaper advertisement ($258.64) to obtain an avoided cost of purchasing advertising space equal to $517(2 x $258.64) per range livestock employer application per year.\109\ The Department also estimates the labor cost required to prepare the advertisements by multiplying the number of newspaper advertisements required per open range livestock production employer (2) by the assumed time required to prepare a

newspaper advertisement (0.5 hours) and the hourly compensation of a human resources (HR) manager ($78.48), which amounts to $78.48 (2 x 0.5 x $78.48) in avoided labor costs per range livestock employer application per year.\110\ In total, this requirement will result in a cost reduction of $595.76 ($517.28 + $78.48) per application per year for employers involved in the range production of livestock.

\109\ The newspaper advertisement cost estimate is based on an advertisement of 158 words placed in The Salt Lake Tribune for one day. Available at http://placead.yourutahclassifieds.com/webbase/en/std/jsp/WebBaseMain.do (Accessed Nov. 13, 2014).

\110\ The Department assumes estimates that range livestock production employers will spend 0.5 hours to prepare each newspaper advertisement. In addition, the Department estimates that the median hourly wage for a human resources manager is $54.88 (as published by the Department's OES survey, O*Net Online), which we increased by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics) for an hourly compensation rate of $78.48.

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iii. Meals

Under the Final Rule, the Department will require H-2A employers to provide either three sufficient meals per day or free and convenient kitchen facilities and food provisions to ***workers***. This change

represents a cost to range livestock production employers but not to sheepherding or goat herding employers because this is already a requirement under TEGL 32-10. To estimate this cost, the Department multiplies the number of days per week ***workers*** receive meals (7) by the average daily cost of meals ($11.86) and the average duration of need in weeks (50) to obtain a cost of $4,151.00 (7 x $11.86 x 50) per range livestock production ***worker*** per year.\111\ For employers hiring the average number of 4.2 H-2A ***workers***, the average annual cost increase is $17,434.20 ($4,151 x 4.2).

\111\ The meal cost estimate of $11.86 is from Allowable Meal Charges and Reimbursements for Daily Subsistence published by the U.S. Department of Labor, Employment and Training Administration (source: http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm; accessed on July 30, 2015).

In addition to the cost to purchase food, range livestock production employers would also incur costs to transport the food to the ***workers***. The Department assumes that food would be transported to the ***workers*** on a weekly basis along with the potable water. The costs related to transporting food and potable water are accounted for below in the section on costs related to potable water.

iv. Potable Water

The Final Rule requires that the herding or range livestock production employer provide to the ***workers*** adequate provision of potable water (4.5 gallons per day) for drinking and cooking, which is similar to the TEGLs' requirement. The Final Rule continues

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the TEGLs' requirements for water for bathing and adds a requirement for sufficient water for laundry, although the Final Rule does not define a specific minimum quantity for these purposes. Moreover, the Final Rule allows employers to identify an alternate readily available source of water for bathing and laundry. The Department estimates the additional cost of these requirements above the baseline by summing the cost of purchasing the water, the cost of purchasing a trailer to transport the water and meals, the cost of vehicle mileage, and the labor cost of the time required to transport the water and meals to the ***workers***.

As discussed above, in the NPRM the Department assumed that each ***worker*** required 28 gallons of water per ***worker*** per week. Several commenters stated that this was not a sufficient amount and suggested the Department use an estimate based on 4 to 4.5 gallons of potable water per day in clean and sealed containers. In the Final Rule, the Department revises this assumption to be 4.5 gallons of potable water

per day, which amounts to approximately 31.5 gallons of potable water per ***worker*** per week (4.5 x 7).

The Department estimates the cost of purchasing the water by multiplying the cost per gallon of potable water ($0.005) by the number of gallons of water per ***worker*** per week (31.5) and the average duration of need in weeks (50). This calculation yields a cost of providing potable water equal to $7.88 ($0.005 x 31.5 x 50) per ***worker*** per year and $33.08 ($7.88 x 4.2) for employers hiring the average number of 4.2 H-2A ***workers***.\112\

\112\ The potable water cost estimate is calculated using data published in the 2014 Water and Wastewater Survey produced by the Texas Municipal League. (Source: http://www.tml.org/surveys. Accessed Nov. 13, 2014). The estimate is based on the average cost of potable water for commercial entities in all Texas cities with a population below 2,000 using the fee for 50,000 gallons.

The Department estimates the cost of purchasing a utility trailer to be $839.34.\113\ This results in a one-time cost of $839.34 for the average employer who must purchase a trailer in the first year of the rule. This value yields an average annual cost of $83.93 over the 10-

year analysis period.

\113\ The trailer cost estimate is based on the average cost for a 5 x 8 ft. utility trailer from Tractor Supply Co., Lowes, and Home Depot.

The Department estimates the cost of vehicle mileage per employer by multiplying the average vehicle mileage cost ($0.58) by the number of miles driven to transport the potable water and meals roundtrip (100) and the average number of roundtrips per year (50).\114\ This calculation yields a mileage cost equal to $2,900.00 ($0.58 x 100 x 50) per employer per year.

\114\ The cost per mile of owning and operating an automobile is based on the average costs in the DOT Bureau of Transportation Statistics. (Source: *http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_03_17.html*. Accessed Nov. 13, 2014), which cites the costs presented by American Automobile Association Exchange (Source: *http://exchange.aaa.com/automobiles-travel/automobiles/driving-costs/* Accessed July 30, 2015).

The Department estimates the labor cost of time to transport the water and meals to ***workers*** by multiplying the average number of roundtrips required per employer (50) by the assumed time required to transport the water and meals (2.86 hours) and the hourly compensation of an agricultural ***worker*** ($13.40), which amounts to $1,916.20 (50 x 2.86 x $13.40) in labor costs per employer per year.115 116

\115\ The Department assumes that a roundtrip would be 100 miles and that an agricultural ***worker*** would drive at 35 mph. We divide the 100 miles by 35 mph to estimate that it would take an agricultural ***worker*** 2.86 hours to drive roundtrip (100/35).

\116\ The Department assumes estimates that herding and range livestock production employers will spend 2.86 hours transporting water and meals. In addition, the Department estimates that the median hourly wage for an agricultural ***worker*** is $9.37 (as published by the Department's OES survey, O*Net Online), which we increased by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics) for an hourly wage rate of $13.40.

Finally, the Department sums the cost of purchasing water, the cost

of purchasing a trailer to transport the water and meals, the cost of vehicle mileage, and the labor cost of the time required to transport the water and meals to the ***workers***. This requirement will result in a cost of $5,663.42 ($7.88 + $839.34+ $2,900.00 + $1,916.20) per employer hiring only one H-2A ***worker*** during the first year of the rule. The average annual cost of this provision for employers hiring only one H-2A ***worker*** is $4,908.01 ($7.88 + $83.93 + $2,900.00 + $1,916.20) over the 10-year analysis period. For employers hiring the average number of 4.2 H-2A ***workers***, the first-year cost increases to $5,688.62 ($33.08 + $839.34+ $2,900.00 + $1,916.20) and the average annual cost increases to $4,933.21 ($33.01 + $83.93 + $2,900.00 + $1,916.20).

v. Expanded Cooking/Cleaning Facilities

Where a ***worker*** continues to use the mobile housing that was provided by the employer for herding or production of livestock operations on the range while the ***worker*** is temporarily stationed at the ranch to perform production of livestock duties (which includes those that are closely and directly related to herding and/or the production of livestock), the Final Rule requires that the employer provide the ***worker*** with access to facilities such as toilets and showers with hot and cold water under pressure. To estimate this cost, the Department multiplies the average cost per square foot to construct/expand cleaning facilities ($270.00) by the assumed size of

the facility that will be required to be constructed/expanded (150 square feet). This calculation results in a one-time cost of $40,500.00 ($270.00 x 150) for the average employer who must construct such a facility, which amounts to an average annual cost of $4,050.00 over the 10-year analysis period.\117\

\117\ The Department assumes that the average employer will require a cleaning facility of approximately 150 square feet.

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vi. Heating Equipment

In the Final Rule, as specified in Sec. 655.235, the mobile housing unit provided to ***workers*** must include operable heating equipment that supplies adequate heat for ***workers*** in locations where necessary for the health and safety of ***workers*** ***due*** to the climate. The Department estimates the average cost per portable gas heating unit is $150.00 and the propane cost to adequately supply heat for ***workers*** in locations where the temperature is expected to drop below 50 degrees Fahrenheit is $969.00 per year.\118\ This calculation results in the total cost of $1,119.00 ($150.00 + $969.00) for the average employer who must purchase the equipment, which amounts to an average annual cost of $984.00 ($15.00 + $969.00) over the 10-year analysis period.

\118\ $969.00 = $3 x 323 gallons.

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vii. Maintaining Records of Work Location

In response to comments, including from small businesses, the Final Rule modifies the NPRM's proposed recordkeeping requirements by eliminating the requirement to record hours worked when ***workers*** are not on the range and by eliminating the requirement to record the duties performed each day when ***workers*** are not on the range. The Final Rule retains only the requirement to record daily whether work was performed on the range or at the farm or ranch so that the Department can evaluate employers' compliance with the requirement that herding and range livestock ***workers*** must spend at least 50 percent of the job order period on the range.

The Department estimates the cost by multiplying the time required to prepare

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and store the records by the average compensation of a human resources manager at an agricultural business. In the first year of the rule, the Department estimates that the average employer will spend approximately 6 minutes each week or approximately 5 hours a year (based on a 50 week

average period of need) to prepare and store the records, which amounts to approximately $392.40 ($78.48 x 5) in labor costs per year.\119\ For the 485 employers, the total is 2,425 minutes (485 employers x 5 minutes) per week, or 40 hours per week for recording, with an annualized reporting burden of 2,000 hours per year (40 hours per week x 50 weeks). The total recordkeeping burden for 485 employers is 485 minutes (485 employers x 1 minute) per week, or 8 hours per week, with an annualized recordkeeping burden of 400 hours per year (8 hours per week x 50 weeks). When these two sums are added together, the total employer reporting and recordkeeping burden is 2,400 hours per year. Therefore, the total annual respondent hourly cost for this new reporting and recordkeeping burden placed on the employers in herding and the range production of livestock is estimated at 2,400 hours x $78.48 = $188,352 per year.

\119\ The Department estimates that herding and range livestock production employers will spend 5 minutes each week to record and 1 minute to store these records. The average period of need for an H-2A ***worker*** is 50 weeks a year. The median hourly wage for a human resources manager is $54.88 (as published by the Department's OES survey, O*Net Online), which we multiply by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). This calculation yields an hourly labor cost of $78.48.

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viii. Time to Read and Review the Final Rule

During the first year that the Final Rule would be in effect, employers involved in the herding or production of livestock on the range would need to learn about the rule provisions and the requirements necessary to remain compliant. In the first year of the rule, the Department estimates that the average small farm will spend approximately 4 hours of staff time to read and review the new rule, which amounts to approximately $313.92 ($78.48 x 4) in labor costs per employer in the first year of the rule. This amounts to an average annual cost of $31.39 ($313.92/10) over the 10-year analysis period.\120\

\120\ The Department estimates that employers will spend 2 hours to read the new rule. In addition, the Department estimates that the median hourly wage for a human resources manager is $54.88 (as published by the Department's OES survey, O*Net Online), which we increased by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics) for an hourly compensation rate of $78.48.

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b. Total Cost Burden for Small Entities

The Department's calculations indicate that the total average annual cost is $39,955.64 (or 15.6 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in sheepherding or goat herding occupations.\121\ The total average annual cost is $56,794.08 (or 22.2 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in range livestock production occupations.\122\

\121\ For illustration, the total average annual cost of $39,939.95 for the results from summing the average annual totals for the various rule requirements described above as follows: $39,939.95 = $29,565.64 + $4,933.21 + $4,050.00 + $984.00 + $392.40 + $15.70.

\122\ For illustration, the total average annual cost of $56,778.39 results from summing the totals for the various rule requirements described above as follows: $56,778.39 = $29,564.64--$595.76 + $17,434.20 + $4,933.21 + $4,050.00 + $984.00 + $392.40 + $15.70.

For small entities that apply for one ***worker*** instead of 4.2--representing the smallest of the small farms that hire ***workers***--the Department estimates that the total average annual cost of the rule is $17,405.00 (or 6.8 percent of annual revenues) for entities employing a

worker in a sheepherding or goat herding occupation.\123\ The Department estimates that the total average annual cost of the rule is $20,960.24 (or 8.2 percent of annual revenues) for small entities applying for one ***worker*** in a range livestock production occupation.\124\

\123\ For illustration, the total average annual cost of $17,389.31 results from summing the totals for the various rule requirements described above as follows: $17,389.31 = $7,039.20 + $4,908.01 + $4,050.00 + $984.00 + $392.40 + $15.70.

\124\ For illustration, the total average annual cost of $20,944.55 results from summing the totals for the various rule requirements described above as follows: $20,944.55 = $7,039.20- $595.76+ $4,151 + $4,908.02 + $4,050.00 + $984.00 + $392.40 + $15.70.

Exhibit 28 presents a summary of the average annual cost per employer. The Department focuses on the average annual cost of the rule rather than costs in the first year because the wage methodology increases the costs of compliance over the analysis time period. The total cost per employer varies depending on whether the employer is a sheepherding or goat herding employer or a range livestock production

employer. The Department defines a ``significant economic impact'' as an impact that amounts to at least three percent of annual revenues.

Due primarily to the increase in wages paid to H-2A ***workers***, the proposed rule is expected to have a significant economic impact on affected small entities. The average annual costs reflected in Exhibit 28 are an overestimate for most employers as they would apply only to an employer who must bear all the possible costs, including purchasing a trailer to deliver water, constructing a cleaning facility, and purchasing portable heating equipment. Because those costs apply to only a small percentage of the participating employers, the actual average annual cost for most employers will be substantially less than the cost shown.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.035

c. Alternatives to the Final Rule

The Department has considered three alternatives to the wage methodology contained in the Final Rule, in which the monthly AEWR is based on the current FLSA minimum hourly wage as a starting point (i.e., the $7.25 hourly wage rate), the forecasted ECI for wages and salaries as published by the BLS applied beginning in year two, a 48-hour workweek, 4.333 weeks per month, and is introduced over a two-year transition period with full implementation in year three. Those three

alternatives are: (1) To base the monthly AEWR on the 1994 TEGL wages ($800) adjusted to the 2014 monthly wage using the ECI capped at 2.5 percent, the forecasted annual ECI for wages and salaries values applied to the estimated 2014 monthly wage, and to introduce it over a three-year transition period with full implementation in year four; (2) to base the monthly AEWR on the FLSA minimum hourly wage, the forecasted ECI for wages and salaries values applied beginning in year five, a 44-hour workweek, and to introduce over a three-year transition period with full implementation in year four; and (3) to base the monthly AEWR on forecasted hourly AEWRs for combined field and livestock ***workers*** by state, a 65-hour workweek, with full implementation in year one, incorporating a monthly food deduction estimate, which is adjusted by the average CPI-U over 2012 to 2014.

The Department believes that the option adopted in the Final Rule will most effectively enable the Department to meet its statutory obligations to determine that there are not sufficient ***workers*** available to perform the labor or services requested, and that the employment of foreign ***workers*** will not adversely affect the wages and working conditions of ***workers*** in the United States similarly employed before the admission of foreign ***workers*** is permitted, ***given*** these occupations and their unique characteristics that have historically resulted in a limited number of U.S. ***workers*** interested in performing these jobs. The new wage methodology will begin to address immediately

the wage stagnation concerns discussed earlier.

Exhibit 29 presents a summary of the average annual cost per employer for the Final Rule, the NPRM, and the three alternatives. The Final Rule and three alternatives vary only ***due*** to their respective revised wage determination methodologies. Note that the average annual cost per employer for the NPRM is in 2013 dollars and did not include annual costs associated with earnings records or heating equipment. In each case, the total cost per employer varies depending on whether the employer is a sheepherding or goat herding employer or a range livestock production employer.

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[GRAPHIC] [TIFF OMITTED] TR16OC15.036

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The Department estimated the total cost burden on small entities for each of the alternatives as follows.

i. Forecasted ECI-Adjusted Cap-Indexed 1994 TEGL Wage With a Three-Year Transition Period

The first alternative retains the same features of the 2010 Final

Rule, TEGL 32-10, TEGL 15-06, Change 1, and includes the same provisions as the Final Rule except that the wage determination methodology uses the forecasted ECI-adjusted cap-indexed 1994 TEGL wage with a three-year transition period. The Department's calculations indicate that the total average annual cost of this alternative would be $31,797.19 (or 12.4 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in sheepherding or goat herding occupations.\125\ The total average annual cost of this alternative would be $48,635.63 (or 19.0 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in range livestock production occupations.\126\

\125\ For illustration, the total average annual cost of $31,781.49 for the average small entity applying for 4.2 ***workers*** in sheepherding or goat herding occupations results from summing the totals for the various rule requirements described above as follows: $31,781.49 = $5,096.71 x 4.2 + $7.88 x 4.2 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

\126\ For illustration, the total average annual cost of $48,619.93 for the average small entity applying for 4.2 ***workers*** in range livestock production occupations results from summing the totals for the various rule requirements described above as follows: $48,619.93 = $5,096.71 x 4.2 - $595.76 + 4,151.00 x 4.2 + $7.88 x

4.2 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

For small entities that apply for one ***worker*** instead of 4.2--

representing the smallest of the small farms that hire ***workers***--the Department estimates that the total average annual cost of this alternative would be $15,462.51 (or 6.0 percent of annual revenues) for entities employing a ***worker*** in a sheepherding or goat herding occupation.\127\ The total average annual cost of this alternative would be $19,017.75 (or 7.4 percent of annual revenues) for small entities employing a ***worker*** in a range livestock production occupation.\128\

\127\ For illustration, the total average annual cost of $15,446.82 for the average small entity applying for one ***worker*** in a sheepherding or goat herding occupation results from summing the totals for the various rule requirements described above as follows: $15,446.82 = $5,096.71 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

\128\ For illustration, the total average annual cost of $19,002.06 for the average small entity applying for one ***worker*** in a

range livestock production occupation results from summing the totals for the various rule requirements described above as follows: $19,002.06 = $5,096.71 - $595.76 + $4,151.00 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

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ii. Forecasted ECI-Adjusted $7.25 Wage Rate With a Three-Year Transition Period

The second alternative retains the same features of the 2010 Final Rule, TEGL 32-10, TEGL 15-06, Change 1, and includes the same provisions as the Final Rule except that the wage determination methodology uses a three-year transition period and is based on a 44-hour workweek. The Department's calculations indicate that the total average annual cost of this alternative would be $31,495.16 (or 12.3 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in sheepherding or goat herding occupations.\129\ The total average annual cost of this alternative would be $48,333.60 (or 18.9 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in range livestock production occupations.\130\

\129\ For illustration, the total average annual cost of $31,479.47 for the average small entity applying for 4.2 ***workers*** in sheepherding or goat herding occupations results from summing the

totals for the various rule requirements described above as follows:

$31,479.47 = $5,025 x 4.2 + $7.88 x 4.2 + $83.93 + $2,900.00 +

$1,916.20 + $4,050.00+ $984.00 + $392.39 + $15.70.

\130\ For illustration, the total average annual cost of

$48,317.91 for the average small entity applying for 4.2 ***workers*** in

range livestock production occupations results from summing the

totals for the various rule requirements described above as follows:

$48,317.91 = $5,024.80 x 4.2 - $595.76 + 4,151.00 x 4.2 + $7.88 x

4.2 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39

+ $15.70.

For small entities that apply for one ***worker*** instead of 4.2--

representing the smallest of the small farms that hire ***workers***--the

Department estimates that the total average annual cost of this

alternative would be $15,390.60 (or 6.0 percent of annual revenues) for

entities employing a ***worker*** in a sheepherding or goat herding

occupation.\131\ The total average annual cost of this alternative

would be $18,945.84 (or 7.4 percent of annual revenues) for small

entities employing a ***worker*** in a range livestock production

occupation.\132\

\131\ For illustration, the total average annual cost of

$15,374.91 for the average small entity applying for one ***worker*** in a sheepherding or goat herding occupation results from summing the totals for the various rule requirements described above as follows: $15,374.91 = $5,024.80 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

\132\ For illustration, the total average annual cost of

$18,930.15 for the average small entity applying for one ***worker*** in a range livestock production occupation results from summing the totals for the various rule requirements described above as follows: $18,930.15 = $5,024.80 - $595.76 + $4,151.00 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

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iii. Forecasted Hourly State AEWR With Food Deductions and No Transition Period

The third alternative retains the same features of the 2010 Final Rule, TEGL 32-10, TEGL 15-06, Change 1, and includes the same provisions as the Final Rule except that the wage determination methodology uses the forecasted state AEWR with food deductions, does not utilize a transition period, and is based on a 65-hour workweek. The Department's calculations indicate that the total average annual cost of this alternative would be $131,234.45 (or 51.2 percent of

annual revenues) for the average small entity employing 4.2 ***workers*** in

sheepherding or goat herding occupations.\133\ The total average annual cost of this alternative would be $148,072.89 (or 57.8 percent of annual revenues) for the average small entity employing 4.2 ***workers*** in range livestock production occupations.\134\

\133\ For illustration, the total average annual cost of $133,552.91 for the average small entity applying for 4.2 ***workers*** in sheepherding or goat herding occupations results from summing the totals for the various rule requirements described above as follows: $133,552.91 = $29,328.00 x 4.2 + $7.88 x 4.2 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

\134\ For illustration, the total average annual cost of $150,391.35 for the average small entity applying for 4.2 ***workers*** in range livestock production occupations results from summing the totals for the various rule requirements described above as follows: $150,391.35 = $29,328.00 x 4.2 - $595.76 + 4,151.00 x 4.2 + $7.88 x 4.2 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $ 392.39 + $15.70.

For small entities that apply for one ***worker*** instead of 4.2-- representing the smallest of the small farms that hire ***workers***--the

Department estimates that the total average annual cost of this alternative would be $39,138.05 (or 15.3 percent of annual revenues) for entities employing a ***worker*** in a sheepherding or goat herding occupation.\135\ The total average annual cost of this alternative would be $42,693.29 (or 16.7 percent of annual revenues) for small entities employing a ***worker*** in a range livestock production occupation.\136\

\135\ For illustration, the total average annual cost of $39,678.11 for the average small entity applying for one ***worker*** in a sheepherding or goat herding occupation results from summing the totals for the various rule requirements described above as follows: $39,678.11 = $29,328.00 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

\136\ For illustration, the total average annual cost of $43,233.35 for the average small entity applying for one ***worker*** in a range livestock production occupation results from summing the totals for the various rule requirements described above as follows: $43,233.35 = $29,328.00 - $595.76 + $4,151.00 + $7.88 + $83.93 + $2,900.00 + $1,916.20 + $4,050.00 + $984.00 + $392.39 + $15.70.

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6. Steps Taken To Minimize the Economic Impact on Small Entities

This Final Rule will have a significant economic impact on a substantial number of small entities. We recognize the concerns expressed by small businesses and have made every effort to minimize the burden on all users to the extent consistent with DOL's obligations under the INA. The Department's responsibilities under the INA, however, severely constrain our ability to make adjustments to program requirements in an effort to address concerns unique to small business. The Department's mandate under the H-2A program is to set requirements for employers who wish to recruit and hire foreign agricultural ***workers***. Those standards are designed to provide both that foreign ***workers*** are hired only if qualified domestic ***workers*** are not available and that bringing in H-2A ***workers*** will not adversely affect the wages and working conditions of similarly employed domestic ***workers***. These regulations set those standards for range herding occupations. To create different and likely lower standards for small businesses would essentially sanction the very adverse effect that the Department is compelled to prevent. The need for parity among employers regardless of size is illuminated by the fact that Congress within the INA carved out a specific dispensation for small businesses in a specific area of the statute. Section 218(c)(3)(B)(ii) of the INA (8 U.S.C.

1188(c)(3)(B)(ii)) exempts certain small businesses from the application of the 50-percent rule regarding the period that priority hiring rights for U.S. applicants exist. Where Congress has so clearly demonstrated its ability to modify H-2A program requirements to accommodate small businesses, it would be inappropriate and outside of the Secretary's authority for the Department to carve out additional exceptions. Moreover, because commenters indicated that more than 99 percent of sheep operations in the United States qualify as small businesses under the SBA definition, there is no basis for considering special relief for small businesses.

As previously discussed, after considering the comments, DOL determines that it is appropriate and consistent with the Department's obligation to protect against adverse effect to U.S. ***workers*** to set the monthly AEWR for these occupations by borrowing the current federal minimum wage of $7.25/hour, multiplied by an estimated 48 hours per week, and adjusted annually based on the ECI. In reaching this result, DOL concludes that the wage source proposed in the NPRM was likely to result in adverse effect to U.S. ***workers*** by causing a substantial number of herding employers to close or significantly downsize their operations. In addition to other reasons discussed fully above, we conclude that $7.25/hour is an appropriate starting point to set the monthly rate because the persistent lack of ***workers*** in these herding occupations is likely ***due*** in part to the reality that U.S. ***workers*** can

earn at least the federal minimum wage elsewhere. We use the uncapped ECI to adjust wages beginning in year two to require that wages in these occupations continue to rise apace with wages across the U.S. economy and adopt an estimate of 48 hours worked per week, a calculation from data reported on Form ETA-9142A, because it is the most comprehensive and detailed data source from which to establish an hourly calculation. In light of the scope of the increase and the economic data provided by commenters, discussed above, a transition period to the new wage is needed. Recognizing that any transition must not be longer than necessary to prevent adverse effect, we adopt a two-year transition with full implementation in year three. As noted above, the Final Rule does not provide any different wage or implementation period for small businesses, as virtually all employers subject to the Rule are small businesses. However, we believe that the Final Rule's monthly AEWR methodology (which was modeled on one of the methodologies suggested by the three leading industry representatives), together with the other changes made in the Final Rule, such as those relating to the definition of the ``range'' and the deletion of the 20 percent cap on incidental work at the ranch, will allow small businesses to continue to participate successfully in the program.

In addition to the wage methodology adopted, DOL considered several significant alternative methodologies for setting the monthly AEWR. First, we considered setting the monthly wage rate based on the 1994 TEGL wages adjusted based on the capped ECI, with a three-year transition and full implementation in year four as recommended by

Mountain Plains, Western Range, and many others including individual small employers. As discussed further above, we do not adopt this recommendation because it is premised on a misunderstanding of the 1994 data in the NPRM. Further, ***given*** the absence of any data to assess an appropriate year and wage rate to index, and what many commenters characterize as the persistent lack of U.S. ***workers*** in these occupations for decades, we are concerned that continued reliance on the TEGL wages, even in indexed form, could be inconsistent with DOL's obligation to protect against adverse effect on U.S. ***workers***. In addition, capping the ECI as recommended by commenters would lead to further wage stagnation.

Second, we considered setting the monthly AEWR by borrowing the current federal minimum wage rate of $7.25/hour and multiplying it by 44 hours per week, with a three-year transition and full implementation in year four, using the capped ECI to adjust wages after year four as recommended by Mountain Plains, Western Range and many individual small employers. As discussed fully above, we have adopted the $7.25 rate from this recommendation as the starting point, but have used a 48-hour estimate rather than a 44-hour estimate so that the hourly estimate is based on the most comprehensive data source available. Recognizing that any transition must not be longer than necessary to prevent adverse effect, this Final Rule requires a two-year transition, rather than the three-year transition recommended by these commenters.

Third, we considered setting the monthly wage rate using the FLS-

based AEWR, multiplied by a compromise number of weekly hours (65)

between the data submitted by ***workers*** from the Colorado Legal Services survey, which found that 62 percent of herders worked at least 81 hours per week, and the 48-hour estimate from the Form ETA-9142A data. This option would have been implemented immediately and permitted a food deduction. As discussed above, DOL did not elect to use the FLS-based AEWR to set the monthly wage rate because we conclude that the FLS-

based methodology is likely to cause adverse effect to U.S. ***workers*** by causing a substantial number of herding employers to close or significantly downsize their operations--leaving fewer herding jobs

available to U.S. ***workers*** and creating significant economic dislocation. We do not adopt a 65-hour threshold because this Final Rule relies only on the Form ETA-9142A data, the most comprehensive and detailed data source from which to establish an hourly calculation,

rather than the calculation based on ***worker*** data in a single state. Finally, we do not require immediate implementation because we conclude that a brief transition period is needed for the reasons discussed above.

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C. Unfunded Mandates Reform

Executive Order 12875--This Final Rule will not create an unfunded

Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. This Final Rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a ``Federal intergovernmental mandate'' or a ``Federal private sector mandate.'' A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2A ***worker*** is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs are mandated to perform certain activities for the Federal Government under this program, and are compensated for the resources used in performing these activities.

This Final Rule includes no new mandates for the SWAs in the H-2A application process and does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more. It also does not result in increased expenditures by the private sector of $100 million or more, because participation in the H-2A program is entirely voluntary. SWA activities under the H-2A program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 et seq. The Department anticipates continuing funding

under the Wagner-Peyser Act. As a result of this Final Rule, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this Final Rule will impose a significant economic impact on a substantial number of small entities under the RFA; therefore, the Department will be required to produce a Compliance Guide for Small Entities as mandated by SBREFA. The Department has concluded that this Final Rule is not a major rule requiring review by the Congress under SBREFA because it will not likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

E. The Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 et seq.) requires rules to be submitted to Congress before taking effect. We will submit to Congress and the Comptroller General of the United States a report

regarding the issuance of this Final Rule prior to its effective date, as required by 5 U.S.C. 801(a)(1).

F. Executive Order 13132--Federalism

The Department has reviewed this Final Rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The Final Rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, the Department has determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

G. Executive Order 13175--Indian Tribal Governments

This Final Rule was reviewed under the terms of E.O. 13175 and determined not to have Tribal implications. The Final Rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. As a result, no Tribal summary impact statement has been prepared.

H. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires the Department to assess the impact of this NPRM on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. The Department has assessed this Final Rule and determines that it will not have a negative effect on families.

I. Executive Order 12630--Government Actions and Interference With Constitutionally Protected Property Rights

This Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

J. Executive Order 12988--Civil Justice

This Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and

ambiguities.

K. Plain Language

The Department drafted this Final Rule in plain language.

L. Executive Order 13211--Energy Supply

This Final Rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

M. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor (the Department) conducts a preclearance consultation process to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)).

This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data and in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on

respondents. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l).

The information collected is mandated in this Final Rule at Sec. 655.210(f). The Department did not create a specific form for this new

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collection requirement. The Final Rule requires that employers keep daily records indicating the site of the employee's work, whether it was on the open range or on the ranch or farm. Any absences from work for which the employer prorates a ***worker***'s monthly wage pursuant to section 655.210(g)(2) must include the reason for the ***worker***'s absence. Such records will enable the employer, and the Department, if necessary, to determine whether the ***worker*** performed work on the range at least 50 percent of the days during the contract period.

In accordance with the PRA, 44 U.S.C. 3501, information collection requirements that must be implemented as a result of this regulation must receive approval from the Office of Management and Budget (OMB). Therefore, a clearance package containing the new requirements was submitted to OMB on April 15, 2015 as part of the proposed rule for the hiring of foreign ***workers*** in the H-2A program for herding or production of livestock on the open range in the United States under OMB Control

Number 1205-0519. The public was ***given*** 60 days to comment on this information collection. OMB filed a comment asking the Department to resubmit the information collection at the final rule stage after considering public comments on the NPRM. The Department did resubmit the package prior to publication of this Final Rule. As of publication of this rule, OMB has not approved the information collection under OMB control number 1205-0519. No person is required to respond to a collection of information request unless the collection of the information has a valid OMB control number and expiration date. Therefore, until the Department publishes a Federal Register notice informing the public of the approval by OMB and the expiration date of the information collection, the affected parties do not have to comply with this information collection.

The Department received more than fifty comments about the new recordkeeping requirement as described in the NPRM. Forty seven of the comments opposed the new requirement and four supported the requirement. Many of those who opposed the new requirement misunderstood the requirement and thought that employers would need to keep hourly logs. In actuality, the logs only needed to reflect days on the range; and on those days when an employee worked on the ranch or farm, the employer needed to write down the number of hours worked and a description of the duties performed. The duties did not need to be accounted for by hour and minutes. Those who agreed with the new requirement thought the burden was minimal.

However, in light of these and other comments, and as discussed

above in Sec. IV.B.2.e. of the preamble related to Sec. 655.210(f), the Department has decided to change this requirement in the Final Rule. Employers will now only be required to notate whether employees spend days on the ranch or on the range and the reason for any prorated salary paid.

This information collection in this Final Rule creates an associated paperwork burden on the employers that must be assessed under the PRA. Based on the average number of employers filing applications for H-2A ***workers*** to perform herding work filed with the Department in 2013 and 2014, the Department estimates that the information collection will affect 485 employers employing foreign sheepherders, goat herders, and other ***workers*** engaged in the open range production of livestock. The Department further estimates that it will take each employer, on average, 5 minutes each week to prepare timesheets for its employees, and 1 minute each week to store these timesheets. Thus, the reporting burden for 485 employers is 2,425 minutes (485 employers x 5 minutes) per week, or approximately 40 hours per week. When annualized, the total reporting burden is 2,000 hours per year (40 hours per week x 50 weeks). The total record keeping burden for 485 employers is 485 minutes (485 employers x 1 minute) per week, or 8 hours per week. When annualized, the total recordkeeping burden is 400 hours per year (8 hours per week x 50 weeks). When these two sums are added together, the total employer reporting and recordkeeping burden is 2,400 hours per year.

When estimating the cost burden of paperwork requirements, the

Department used the average salary of a Human Resources Manager based on the national cross-industry mean hourly wage rate for a Human Resources Manager ($54.88), from the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,\137\ and increased by a factor of 1.43 to account for employee benefits and other compensation, for a total hourly cost of $78.48. This number was multiplied by the total hourly annual burden created for this new requirement, which, as noted above, is 2,400 hours per year. The total annual respondent hourly costs for this new burden placed on the employers in the sheepherding and open range production of livestock is estimated as follows:

\137\ Source: Bureau of Labor Statistics, Occupational Employment Statistics: May 2014 National Occupational Employment and Wage Estimates; Management Occupations.

Total burden cost of this provision is 2,400 hours x $78.48 = $188,352 per year. The total costs other than the time associated with the information collections required under this Final Rule, as defined by the PRA, are zero dollars per employer.

As noted above, this collection of information is subject to the PRA. Accordingly, this information collection in this Final Rule has been submitted to OMB for review under 44 U.S.C. 3507(d) of the PRA.

For an additional explanation of how the Department calculated the burden hours and related costs, the PRA package for this information collection (OMB Control Number 1205-0519) can be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/dol/pramain* or by contacting the Department at Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210 or by phone request to 202-693-3700 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*

Overview of the Information Collection

Type of Review: New Collection.

Agency: Employment and Training Administration.

Title: H-2A Sheepherder Recordkeeping Requirement.

OMB Number: 1205-0519.

Affected Public: Farm businesses.

Form(s): None.

Total Annual Respondents: 485.

Annual Frequency: Weekly (50 weeks).

Total Annual Responses: 242,250.

Average Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 2,400 hours per year.

Total Annual Start-up/Capital/Maintenance Costs for Respondents: $0.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign ***workers***, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons discussed in the preamble, the Department of Labor amends 20 CFR part 655 as follows:

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PART 655--TEMPORARY EMPLOYMENT OF FOREIGN ***WORKERS*** IN THE UNITED STATES

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1. Revise the general authority citation and the subpart B authority citation for part 655 to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note);

sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L.103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

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Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

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2. Subpart B is amended by adding the following undesignated center heading, and Sec. Sec. 655.200, 655.201, 655.205, 655.210, 655.211, 655.215, 655.220, 655.225, 655.230, and 655.235 to read as follows:

Labor Certification Process for Temporary Agricultural Employment in Range Sheep herding, Goat Herding, and Production of Livestock Occupations

Sec.

Sec. 655.200 Scope and purpose of herding and range livestock regulations.

(a) Purpose. The purpose of Sec. Sec. 655.200-655.235 is to establish certain procedures for employers who apply to the Department of Labor to obtain labor certifications to hire temporary agricultural foreign ***workers*** to perform herding or production of livestock on the range, as defined in Sec. 655.201. Unless otherwise specified in Sec. Sec. 655.200-655.235, employers whose job opportunities meet the qualifying criteria under Sec. Sec. 655.200-655.235 must fully comply with all of the requirements of Sec. Sec. 655.100-655.185; part 653,

subparts B and F; and part 654 of this chapter.

(b) Jobs subject to Sec. Sec. 655.200-655.235. These procedures apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under Sec. 655.201;

(2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and

(3) The work activities generally require the ***workers*** to be on call 24 hours per day, 7 days a week.

Sec. 655.201 Definition of herding and range livestock terms.

The following are terms that are not defined in Sec. Sec. 655.100-655.185 and are specific to applications for labor certifications involving the herding or production of livestock on the range.

Herding. Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the range.

Livestock. An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of Sec. Sec. 655.200-655.235, livestock refers to those species raised on the range.

Production of livestock. The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock. This term also includes duties performed off the range that are closely and directly related to herding and/or the production of livestock. The following are non-exclusive examples of ranch work that is closely and directly related: repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the ***workers*** use on the range to assist with herding or guarding the flock; feeding and caring for the horses that the ***workers*** use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. The following are examples of ranch work that is not closely and directly related: working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy

equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range.

Range. The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: it involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Range housing. Range housing is housing located on the range that meets the standards articulated under Sec. 655.235.

Sec. 655.205 Herding and range livestock job orders.

The employer whose job opportunity has been determined to qualify for these procedures, whether individual, association, or H-2ALC, is not required to comply with the job order filing requirements in Sec. 655.121(a) through (d). Rather, the employer must submit

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Form ETA-790, directly to the National Processing Center (NPC) designated by the Office of Foreign Labor Certification (OFLC Administrator) along with a completed H-2A Application for Temporary Employment Certification, Form ETA-9142A, as required in Sec. 655.215.

Sec. 655.210 Contents of job herding and range livestock orders.

(a) Content of job offers. Unless otherwise specified in Sec. Sec. 655.200-655.235, the employer, whether individual, association, or H-2ALC, must satisfy the requirements for job orders established under Sec. 655.121(e) and for the content of job offers established under part 653, subpart F of this chapter and Sec. 655.122.

(b) Job qualifications and requirements. The job offer must include a statement that the ***workers*** are on call for up to 24 hours per day, 7

days per week and that the ***workers*** spend the majority (meaning more than 50 percent) of the workdays during the contract period in the herding or production of livestock on the range. Duties may include activities performed off the range only if such duties constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). All such duties must be specifically disclosed on the job order. The job offer may also specify that applicants must possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. ***workers*** any restrictions or obligations that will not be imposed on the employer's H-2A ***workers*** engaged in herding or the production of livestock on the range. Any such requirements must be applied equally to both U.S. and foreign ***workers***. Each job qualification and requirement listed in the job offer must be bona fide, and the Certifying Officer (CO) may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) Range housing. The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in Sec. 655.235.

(d) Employer-provided items. (1) The employer must provide to the ***worker***, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the ***worker***.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the ***worker***'s needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the ***worker*** during the entire period of employment; and

(ii) If there are periods of time when the ***workers*** are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the ***workers*** to monitor the ***worker***'s well-being. This contact must include either arrangements for the ***workers*** to be located, on a regular basis, in geographic areas where the electronic communication devices operate

effectively, or arrangements for regular, pre-scheduled, in-person visits between the ***workers*** and the employer, which may include visits between the ***workers*** and other persons designated by the employer to resupply the ***workers***' camp.

(e) Meals. The employer must specify in the job offer and provide to the ***worker***, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the ***worker*** to prepare his own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range ***workers*** are also addressed in Sec. 655.235(e).

(f) Hours and earnings statements. (1) The employer must keep accurate and adequate records with respect to the ***worker***'s earnings and furnish to the ***worker*** on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day, the time the ***worker*** begins and ends each workday, as well as the nature and amount of work performed, but all other regulatory requirements in Sec. 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating whether the

site of the employee's work was on the range or off the range. If the employer prorates a ***worker***'s wage pursuant to paragraph (g)(2) of this section because of the ***worker***'s voluntary absence for personal reasons, it must also keep a record of the reason for the ***worker***'s absence.

(g) Rates of pay. The employer must pay the ***worker*** at least the monthly AEWR, as specified in Sec. 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each ***worker*** free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if an employee is voluntarily unavailable to work for personal reasons.

(h) Frequency of pay. The employer must state in the job offer the

frequency with which the ***worker*** will be paid, which must be at least twice monthly. Employers must pay wages when ***due***.

Sec. 655.211 Herding and range livestock wage rate.

(a) Compliance with rates of pay. (1) To comply with its obligation under Sec. 655.210(g), an employer must offer, advertise in its recruitment and pay each ***worker*** employed under Sec. Sec. 655.200-655.235 a wage that is the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than both the agreed-upon collective bargaining

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wage and the applicable minimum wage imposed by Federal or State law or judicial action in effect at the time the work is performed, the employer must pay that adjusted monthly AEWR upon publication by the Department in the Federal Register.

(b) Publication of the monthly AEWR. The OFLC Administrator will publish a notice in the Federal Register, at least once in each

calendar year, on a date to be determined by the OFLC Administrator, establishing the monthly AEWR.

(c) Monthly AEWR Rate. (1) The monthly AEWR shall be $7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month; and

(2) Beginning for calendar year 2017, the monthly AEWR shall be adjusted annually based on the Employment Cost Index for wages and salaries published by the Bureau of Labor Statistics (ECI) for the preceding October--October period.

(d) Transition Rates. (1) For the period from the effective date of this rule through calendar year 2016, the Department shall set the monthly AEWR at 80% of the result of the formula in paragraph (c) of this section.

(2) For calendar year 2017, the Department shall set the monthly AEWR at 90% of the result of the formula in paragraph (c) of this section.

(3) For calendar year 2018 and beyond, the Department shall set the monthly AEWR at 100% of the result of the formula in paragraph (c) of this section.

Sec. 655.215 Procedures for filing herding and range livestock applications for temporary employment certification.

(a) Compliance with Sec. Sec. 655.130-655.132. Unless otherwise

specified in Sec. Sec. 655.200-655.235, the employer must satisfy the requirements for filing an H-2A Application for Temporary Employment Certification with the NPC designated by the OFLC Administrator as required under Sec. Sec. 655.130-655.132.

(b) What to file. An employer must file a completed H-2A Application for Temporary Employment Certification (Form ETA-9142A), Agricultural and Food Processing Clearance Order (Form ETA-790), and an attachment identifying, with as much geographic specificity as possible for each farmer/rancher, the names, physical locations and estimated start and end dates of need where work will be performed under the job order.

(1) The H-2A Application for Temporary Employment Certification and Form ETA-790 may be filed by an individual employer, association, or an H-2ALC, covering multiple areas of intended employment and more than two contiguous States.

(2) The period of need identified on the H-2A Application for Temporary Employment Certification and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days. The period of need identified on the H-2A Application for Temporary Employment Certification and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.

(3) An association of agricultural employers filing as a joint employer may submit a single Form ETA-790 and master H-2A Application for Temporary Employment Certification on behalf of its employer-

members located in more than two contiguous States with different start dates of need. Unless modifications to a sheep or goat herding or production of livestock job order are required by the CO or requested by the employer, pursuant to Sec. 655.121(e), the association is not required to re-submit the Form ETA-790 during the calendar year with its H-2A Application for Temporary Employment Certification.

Sec. 655.220 Processing herding and range livestock applications for temporary employment certification.

(a) NPC Review. Unless otherwise specified in Sec. Sec. 655.200-655.235, the CO will review and process the H-2A Application for Temporary Employment Certification and the Form ETA-790 in accordance with the requirements outlined in Sec. Sec. 655.140-655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with Sec. Sec. 655.140-655.141.

(b) Notice of acceptance. Once the job order is determined to meet all regulatory requirements, the NPC will issue a Notice of Acceptance consistent with Sec. 655.143(b)(1). The CO will provide notice to the employer authorizing conditional access to the interstate clearance system; identify and transmit a copy of the Form ETA-790 to any one of the SWAs having jurisdiction over the anticipated worksites, and direct the SWA to place the job order promptly in intrastate and interstate clearance (including all States where the work will take place); and

commence recruitment of U.S. ***workers***. Where an association of agricultural employers files as a joint employer and submits a single Form ETA-790 on behalf of its employer-members, the CO will transmit a copy of the Form ETA-790 to the SWA having jurisdiction over the location of the association, again directing that SWA to place the job order in intrastate and interstate clearance, including to those other States where the work will take place, and commence recruitment of U.S. ***workers***.

(c) Electronic job registry. Under Sec. 655.144(b), where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, the Department will keep the job order posted on the OFLC electronic job registry until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order.

Sec. 655.225 Post-acceptance requirements for herding and range livestock.

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. ***workers*** by the employer and SWA must be satisfied, as specified in Sec. Sec. 655.150-655.158.

(b) Interstate clearance of job order. Pursuant to Sec.

655.150(b), where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, each of the SWAs to which the Form ETA-790 was transmitted by the CO or the SWA having jurisdiction over the location of the association must keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order, and must refer to the association each qualified U.S. ***worker*** who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. ***worker*** who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to him/her absent a request for a different location by the U.S. ***worker***. Employers must make reasonable efforts to accommodate such placement requests by the U.S. ***worker***.

(d) The employer will not be required to place an advertisement in a newspaper of general circulation serving the area of intended employment, as required in Sec. 655.151.

(e) An association that fulfills the recruitment requirements for its members is required to maintain a written recruitment report containing the information required by Sec. 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

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Sec. 655.230 Range housing.

(a) Housing for work performed on the range must meet the minimum standards contained in Sec. 655.235 and Sec. 655.122(d)(2).

(b) The SWA with jurisdiction over the location of the range housing must inspect and certify that such housing used on the range is sufficient to accommodate the number of certified ***workers*** and meets all applicable standards contained in Sec. 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards, the CO may deny the H-2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in Sec. 655.235 only when the employer has received a certification from the SWA for the range housing it seeks to use within the past 36 months.

(2) To self-certify the range housing, the employer must submit a

copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of ***workers*** being requested for temporary labor certification, and meets all the applicable standards for range housing contained in Sec. 655.235.

(d) The use of range housing at a location other than the range, where fixed site employer-provided housing would otherwise be required, is permissible only when the ***worker*** occupying the housing is performing work that constitutes the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). In such a situation, ***workers*** must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in Sec. 655.122(d)(1)(i). When such work does not constitute the production of livestock, ***workers*** must be housed in housing that meets all the requirements of Sec. 655.122(d).

Sec. 655.235 Standards for range housing.

An employer employing ***workers*** under Sec. Sec. 655.200-655.235 may

use a mobile unit, camper, or other similar mobile housing vehicle, tents, and remotely located stationary structures along herding trails, which meet the following standards:

(a) Housing site. Range housing sites must be well drained and free from depressions where water may stagnate.

(b) Water supply. (1) An adequate and convenient supply of water that meets the standards of the state or local health authority must be provided.

(2) The employer must provide each ***worker*** at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the ***workers*** will have at least this amount available for their use until this supply is next replenished.

Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each ***worker***. This additional water may be non-potable, and an employer may require a ***worker*** to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. If an employer relies on alternate water sources to meet any of the ***workers***' needs, it must take precautionary measures to protect the ***worker***'s health where these sources are also used to water the herd, dogs, or horses, to prevent contamination of the sources if

they collect runoff from areas where these animals excrete.

(3) The water provided for use by the ***workers*** may not be used to water dogs, horses, or the herd.

(4) In situations where ***workers*** are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to ***workers***, provided the following conditions are satisfied:

(i) It seeks the variance at the time it submits its H-2A Application for Temporary Employment Certification, Form ETA-9142A;

(ii) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the ***worker*** is at that location;

(iii) It attests that it shall provide each ***worker*** an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and

(iv) The CO approves the variance.

(5) Individual drinking cups must be provided; and

(6) Containers appropriate for storing and using potable water must be provided and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing.

(c) Excreta and liquid waste disposal. (1) Facilities, including

shovels, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the state health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with state and local health and sanitation requirements.

(d) Housing structure. (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window that can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial housing.

(e) Heating. (1) Where the climate in which the housing will be used is such that the safety and health of a ***worker*** requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate

heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the

workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or

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stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) Lighting. (1) In areas where it is not feasible to provide

electrical service to range housing units, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

(2) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit, including tents.

(g) Bathing, laundry, and hand washing. Bathing, laundry and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) Food storage. When mechanical refrigeration of food is not feasible, the ***worker*** must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

(i) Cooking and eating facilities. (1) When ***workers*** or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation; and

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(j) Garbage and other refuse. (1) Durable, fly-tight, clean containers must be provided to each housing unit, including tents, for storing garbage and other refuse; and

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary,

except where the terrain in which the housing is located cannot be accessed by motor vehicle and the refuse cannot be buried, in which case the employer must provide appropriate receptacles for storing the refuse and for removing the trash when the employer next transports supplies to the location.

(k) Insect and rodent control. Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents and other vermin.

(l) Sleeping facilities. A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement, unless a variance is requested from and granted by the CO. When filing an application for certification and only where it is demonstrated to the CO that it is impractical to provide a comfortable and clean bed, cot, or bunk, with a clean mattress, for each range ***worker***, the employer may request a variance from this requirement to allow for a second ***worker*** to join the range operation. Such a variance must be used infrequently, and the period of the variance will be temporary, i.e., the variance shall be for no more than 3 consecutive days. Should the CO grant the variance, the employer must supply a sleeping bag or bed roll for the second occupant free of charge or deposit charge.

(m) Fire, safety, and first aid. (1) All units in which people sleep or eat must be constructed and maintained according to applicable state or local fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in

or next to rooms used for living purposes, except for those needed for current household use.

(3) Housing units for range use must have a second means of escape through which the ***worker*** can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used.

(5) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the range housing.

Signed in Washington this 9th day of October, 2015.

Portia Wu,

Assistant Secretary, Employment and Training Administration.

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