

This \$444 in cost savings is in addition to any benefits that might accompany potentially higher seed germination rates. If seed germination rates improve as anticipated, grower yield and sales may increase by as much as 2 percent.

Thus, the economic impact of the interim rule on small entities will be positive, but relatively insignificant, equivalent to no more than 3 percent of the annual sales for the average wheat grower.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Incorporation by reference, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 62 FR 64263–64265 on December 5, 1997.

Authority: 7 U.S.C. 147a, 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.22, 2.80, and 371.2(c).

Done in Washington, DC, this 28th day of August, 1998.

Joan M. Arnoldi,

Acting Administrator, Animal and Plant Health Inspection Service.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 1 and 3

[Docket No. 93–076–10]

RIN 0579–AA59

Animal Welfare; Marine Mammals, Swim-With-the-Dolphin Programs

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Animal Welfare regulations to establish standards for “swim-with-the-dolphin” interactive programs. These standards are being promulgated under the authority of the Animal Welfare Act and

are necessary to ensure that the marine mammals used in these programs are handled and cared for in a humane manner.

EFFECTIVE DATE: October 5, 1998.

FOR FURTHER INFORMATION CONTACT: Dr. Barbara Kohn, Senior Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1228, (301) 734–7833.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*) (AWA), Congress authorized the Department of Agriculture to promulgate regulations and standards for the humane handling, care, treatment, and transportation of captive marine mammals by regulated entities. The AWA regulations are contained in title 9 of the Code of Federal Regulations, chapter I, subchapter A, parts 1, 2, and 3. Part 1 provides definitions of terms used in parts 2 and 3. Part 2 is designated as “Regulations,” and part 3 is designated as “Standards” for the humane handling, care, treatment, and transportation of covered animals by regulated entities. Subpart E of part 3 contains the standards applicable to marine mammals.

On January 23, 1995, we published in the **Federal Register** (60 FR 4383–4389, Docket No. 93–076–2) a proposal to amend the regulations by establishing standards for “swim-with-the-dolphin” (SWTD) programs in a new § 3.111.

We solicited comments concerning our proposal for an initial comment period of 30 days ending February 22, 1995, followed by three extensions ending March 24, 1995 (see 60 FR 10810, Docket No. 93–076–4; 60 FR 12908, Docket No. 93–076–5; and 60 FR 15524–15525, Docket No. 93–076–6).

Comments Received on the SWTD Proposed Rule

From January 23, 1995, the date the comment period on proposed rule Docket No. 93–076–2 opened, until March 24, 1995, the final close of the comment period, we received a total of 22 comments. They came from exhibitors, exhibitor associations, animal protection organizations, Federal agencies, and other members of the public. The comments are discussed below by topic.

In this final rule, we are establishing regulations and standards for the humane handling, care, and treatment of cetaceans used in SWTD programs. These regulations and standards address space requirements, veterinary care, personnel and handling requirements, and recordkeeping.

We are amending the definition we proposed for “Swim-with-the-dolphin (SWTD) program” to substitute the word “cetacean” for “dolphin” in the first sentence and throughout this final rule, except in the generally accepted name of these interactive programs. We consider the term cetacean to more accurately describe the types of marine mammals that may be used in SWTD programs. For consistency’s sake, in the preamble of this final rule, we use the term cetacean in discussing the comments submitted by the public. We consider such use to be consistent with the intent of the issues raised.

Opposition to SWTD Programs

One commenter opposed SWTD programs because of what the commenter saw as the risk of zoonotic diseases being transmitted to the cetaceans from humans. The commenter stated that because cetaceans tend to mask signs of illness, they do not lend themselves to efficient diagnosis, and, therefore, are unsuited to captivity.

The issues raised by the commenter, those of whether cetaceans should be used in SWTD programs, and whether cetaceans should be kept in captivity at all, transcend the scope of the proposed rule. The rule as proposed was predicated on the assumption that marine mammals will continue to be used in interactive programs. The proposed provisions were intended to address the regulatory needs of the specialized captive display SWTD programs, so that the animals used in the programs are treated in a humane manner. The statement that cetaceans tend to mask signs of illness as long as possible can be made for many species. However, competent use of behavioral and feeding observations, and preventive and therapeutic veterinary medical programs of care, can and do provide adequate information and a strong basis for efficient medical diagnosis and treatment. Therefore, we are making no changes to the final rule based on this comment.

One commenter stated that no new SWTD programs should be approved until APHIS has independent, trained observers conduct a long-term continuous study on all aspects of human/cetacean interaction.

Prior to the reauthorization of the Marine Mammal Protection Act (MMPA) and the cessation of SWTD program oversight by the National Marine Fisheries Service (NMFS), U.S. Department of Commerce, NMFS commissioned an independent study of the SWTD programs operating at that time. The results of that study, submitted to NMFS in 1994, and

published in the journal *Marine Mammal Science*,¹ were considered in the development of the proposed rule. APHIS has concluded that commissioning another such study would be duplicative and not cost efficient, and would pose an unnecessary delay in the development of the rule. Therefore, we are making no changes to the final rule based on this comment.

One commenter recommended that SWTD programs be classified as "experimental" until review of current and future information warrants the designation of permanent status. The commenter stated that this approach could include setting specific dates for future programmatic review and reconsideration of permanent status.

The granting of "experimental" or temporary licenses is outside the authority of APHIS under the AWA, and we are making no changes to the final rule based on this comment.

Public Involvement in Development of the Proposed Rule

One commenter stated that it was "offensive and inequitable" that no input was sought from animal welfare groups in the development of the proposed rule. Another commenter objected to what the commenter termed "industry conflict of interest" because our proposal stated that the proposed minimum space requirements were developed "in conjunction with professional industry organizations."

APHIS has conducted this rulemaking in accordance with the Administrative Procedure Act (APA) and other applicable laws and executive orders. As stated in the preamble of the proposed rule, APHIS developed the proposed rule using several sources of information. This information was in APHIS's possession at the time the proposed rule was developed. Comments were not solicited from specific groups or organizations during development of the proposal. Following publication of the proposed rule, APHIS provided for an adequate public comment period to provide all interested parties the opportunity to support, oppose, recommend changes, or to otherwise comment on the proposed rule.

One commenter recommended that APHIS publish an interim rule establishing SWTD regulations until a final rule could be published. APHIS examined the possibility of publishing

an interim rule. However, it was determined that this would not be the best regulatory approach. As noted above, by conducting proposed rulemaking rather than publishing an interim rule, APHIS provided the public an opportunity to comment on and recommend changes to the SWTD standards prior to their being made effective.

Need for SWTD Regulations

One commenter stated that, unless APHIS can show that the current regulations are harming animals, the Agency should not say in the preamble of its proposed rule that the rule is necessary to ensure the humane care of program animals.

Until this final rule becomes effective, APHIS does not have in place specific standards that address the special considerations of SWTD programs. The reference in the proposed rule to the need for standards was not intended as a judgment concerning the currently operating programs. However, it was intended to emphasize the need to implement regulatory provisions that specifically address AWA issues with regard to these specialized captive display facilities.

Several commenters stated that establishing regulations specifically for SWTD programs, in addition to those regulations already established regarding marine mammals, was arbitrary and redundant. One commenter stated that standards for SWTD programs should be the same as for any marine mammal facility, except in what the commenter termed "rare" instances where SWTD facilities are necessarily different from other facilities. Several commenters stated that facilities with existing SWTD programs have already established standards for those programs and, therefore, that specific U.S. Department of Agriculture (USDA) standards for such programs are unnecessary.

We consider the special circumstances of SWTD programs, both for the cetaceans involved and the people who participate in them, to require specific regulatory language. The regulations promulgated in this final rule address the humane care and maintenance of marine mammals used in these specialized programs, and we consider them necessary to ensure the marine mammals' continued well-being.

SWTD Program Definitions

A number of commenters commented on the proposed definition of *swim-with-the-dolphin (SWTD) program* that was set forth in § 1.1 of the proposed rule.

One commenter expressed concern that the proposed definition of SWTD programs excluded those programs where members of an audience participate as a minor segment of an educational show. The commenter said the meaning of "minor" was unclear, and that whenever members of the public enter the water with the ability to "swim" with marine mammals, the activity should be regulated.

The use of audience participation as a segment of any presentation, educational or otherwise, is an integral component of the presentations at many regulated marine mammal facilities. The proposed rule was not meant to include such presentations where a member of the public enters the primary enclosure to pet, feed, or issue a behavioral command to the animal(s) as part of such a performance. Since presentations vary greatly from facility to facility, it would be inappropriate to strictly define "minor," and we do not do so in this final rule. SWTD programs are programs that have been designed with the primary purpose of having members of the public interact with the animals in the water by swimming (this includes wading, scuba diving, and snorkeling). This rule has been developed to address the special needs of such programs.

One commenter stated that no facility that conducts shows or performances of any kind should be allowed to conduct SWTD sessions, because such shows cause additional unnecessary stress for cetaceans.

APHIS is unaware of any valid scientific research or other information that documents or supports that performances, as referred to above, cause additional unnecessary stress for the animals. We are not aware of any scientific or other reason to restrict such a program, and we are making no changes to the final rule based on this comment.

Several commenters recommended that the proposed definition of *swim-with-the-dolphin (SWTD) program* be revised to mean [*with the commenters' suggested additions italicized; suggested deletions bracketed*] any human-cetacean interactive program in which a member of the public enters the primary enclosure in which an SWTD designated cetacean is housed [to interact with the animal] for the purpose of swimming, snorkeling, or scuba diving with the cetacean. The commenters recommended that this exclude, but such exclusion not be limited to, feeding and petting pools and the participation of any member(s) of the public audience as a [minor] segment of [an educational] a presentation of a show. The commenter

¹ Amy Samuels and Trevor R. Spradlin, "Quantitative Behavioral Study of Bottlenose Dolphins in Swim-with-the-Dolphin Programs in the United States," *Marine Mammal Science*, 11(4), 1995, pp. 520-544.

stated that this revision would make clear that "swimming" with the animal is the key to an SWTD session. According to the commenter, removing the words "minor" and "educational" in describing exclusions to the definition, and referring only to SWTD-designated cetaceans, would clarify the scope of the programs regulated. Another commenter recommended that "swim" be clarified to mean "immersed in water."

Our intent was to make the definition of SWTD programs as clear as possible without being so restrictive that future activities that would need to be regulated as SWTD programs are excluded. After reviewing the comments on the definition of SWTD programs, APHIS has incorporated language that we believe addresses the concerns raised by the commenters without being unduly narrow in definition. Accordingly, we are defining *swim-with-the-dolphin (SWTD) program* to mean any human-cetacean interactive program in which a member of the public enters the primary enclosure in which an SWTD designated cetacean is housed to interact with the animal. This interaction includes, but such inclusion is not limited to, wading, swimming, snorkeling, or scuba diving in the enclosure. This interaction excludes, but such exclusion is not limited to, feeding and petting pools, and participation of any member(s) of the public audience as a minor segment of an educational presentation or performance of a show.

One commenter recommended that the definition of *swim-with-the-dolphin (SWTD) program* be expanded to specify that the regulations apply to all programs involving swim encounters with cetaceans, including "therapy" programs.

The regulations and standards apply to all facilities that engage in activities for which a license or registration is required under the AWA. At present there may be private therapy programs that are not licensed or registered under the AWA. APHIS cannot enforce AWA regulations and standards at facilities that are not required to be licensed or registered under the AWA. Any SWTD programs that engage in activities for which a license or registration is required under the AWA are subject to this final rule.

In various places in the proposed regulations, we used the word "interactive" to describe sessions or areas where SWTD activities are carried out. Several commenters recommended that the term "interactive" be replaced with "swim-with-the-dolphin" to avoid

confusion with other programs referred to as "interactive."

We do not agree that there would be confusion over the use of the term "interactive." In reviewing its use throughout the rule, we do not find an instance where switching to the term "swim-with-the-dolphin" would clarify the meaning. The terms "interactive area" and "interactive session" are defined in § 1.1. Additionally, § 3.111 is entitled "Swim-with-the-dolphin programs." There should be no reasonable confusion over the terminology used. Therefore, we are making no changes to the final rule based on this comment.

Types of Cetaceans Used in SWTD Programs

Under § 3.111(d), APHIS proposed that only *Tursiops truncatus* may be used in SWTD programs. Several commenters objected to this provision, stating that there is no scientific justification for limiting SWTD programs to *Tursiops truncatus*, and that experience has shown that other cetaceans can be trained and conditioned to take part in such interactive swimming programs.

At the time the proposed rule was published, APHIS believed that the only animals in use in SWTD programs in the United States were *Tursiops truncatus*. This information was incorrect and, therefore, this final rule addresses the use of varied species of cetaceans in SWTD programs. Of the approximately 88 species of cetacea, 35 species have been or currently are being maintained in U.S. aquaria and zoos. While many species may never be considered for inclusion in SWTD programs, based on temperament, difficulty in maintaining them in captivity, conservation and breeding considerations, etc., individual representatives of a species may be suitable for inclusion in a SWTD program.

We are amending § 3.111(d) to read: *Program animals*: Only cetaceans that meet the requirements of § 3.111(e)(2) and (3) may be used in SWTD programs. We believe that this provision will provide safeguards on the animals used in SWTD programs, while providing flexibility to facilities in choosing which animals to use. As long as a cetacean is adequately trained and conditioned in human interaction, and is in good health, it may be used in an SWTD program. All program animals are subject to removal (temporary or permanent) from a SWTD program if they exhibit unsatisfactory, undesirable, or unsafe behaviors (§ 3.111(e)(8) in this final rule). Section 3.111(e)(3) is a new section added to clarify that all animals

used in SWTD programs shall be in good health.

Several commenters took issue with the statement in our proposal that industry experience has demonstrated that *Tursiops truncatus* can be adequately trained and conditioned to interact safely with humans, stating that this conclusion has not been definitively proven by any report issued to date. The commenters stated that injuries have occurred in both petting pools and hands-on interactive sessions.

The statement in the preamble of the proposed rule concerning the training and conditioning of *Tursiops truncatus* to interact safely with humans was not meant to imply that no injuries had ever occurred, only that the incidence of injuries in SWTD programs has been low. According to NMFS statistics during the years of their oversight (1989 to April, 1994) of these programs, there were approximately 14 reported injuries during 166,615 encounters (individuals participating in SWTD sessions). Using these statistics, the overall injury rate was less than 0.01 percent, with yearly rates varying between 0 percent and 0.03 percent. It can be inferred that injuries caused by human-cetacean interaction during SWTD sessions occur at an extremely low rate, and that these interactions are relatively safe.

Several commenters recommended that the animals used in SWTD programs be limited to those that are "captive-born," stating that sufficient numbers of *Tursiops* breed in captivity, and that captive-born animals are more tractable.

It is beyond the scope of the AWA to restrict the activities of a licensee or registrant who is in compliance with the AWA and the regulations and standards. In addition, we believe that the final rule contains adequate safeguards that will ensure that animals which are aggressive or display inappropriate behavior will not be used in SWTD programs. We are not making any changes to the final rule based on this comment.

Handling Requirements and SWTD Enclosure Areas

Proposed § 3.111(a) provided that the primary enclosure for SWTD cetaceans must contain an interactive area, a buffer area, and a sanctuary area, and that movement of cetaceans into the buffer or sanctuary area must not be restricted. Several commenters expressed their support for this requirement. Several commenters recommended that the regulations also provide that there be no verbal or nonverbal reprimands to cetaceans going to the buffer area, that there be

full rations in timely fashion even to cetaceans choosing not to take part in the programs, and that, in general, stronger language be added to make clear that movement into or use by the cetaceans of the buffer or sanctuary area shall not be restricted in any way. Another commenter recommended that the regulations specifically state that the buffer or sanctuary areas may not be intentionally or inadvertently uninviting to program cetaceans.

Handling requirements for all animals are found in § 2.131. Specifically, in § 2.131(a)(2)(ii), the issues of withholding of food are addressed. This regulation prohibits deprivation of food or water in training, working, or other handling. However, the regulations allow for the short-term withholding of food or water from animals by exhibitors, as long as each of the animals affected *receives its full dietary and nutrition requirements each day.* (*emphasis added*). Because a regulation addressing the issue of full rations for all animals is already in effect, it is not necessary to promulgate additional language in this final rule.

In the Supplementary Information section of the proposed rule, the issue of unrestricted movement by the cetaceans into the buffer and/or sanctuary area, as well as the intent of the rule to provide that the designated enclosure areas are not made intentionally uninviting to the animals, was addressed. APHIS wishes to clarify the use of the word "uninviting" as used in this rule. "Uninviting" means that the area is less attractive to the animal for whatever reason. Examples of conditions that may make a certain area "uninviting" to a program animal include, but are not limited to, loud background or other noise, unappealing substrate, different lighting patterns, or uncomfortable water temperature. In this final rule, we are adding language to clarify this intent, by amending § 3.111(a) to provide, in part, that the primary enclosure for SWTD cetaceans must contain an interactive area, a buffer area, and a sanctuary area, that none of these areas shall be made uninviting to the animals, and that movement of the cetaceans into the buffer or sanctuary area must not be restricted in any way.

The intent of the proposed regulations, among other things, was to provide for a sanctuary area that the program animals may choose to use at any time. The buffer area was not intended to be used as an extra sanctuary area. We consider it acceptable for the program animals to be recalled from the buffer area. However, the cetaceans must have the option of

either returning to the interactive area or ignoring the recall command, by staying in the buffer area or moving to the sanctuary area. To emphasize that the animals are not to be recalled from the sanctuary area during an interactive session, we are amending § 3.111(e)(6) as proposed (redesignated as paragraph (e)(7) in this final rule) to provide, in part that each SWTD program must limit interaction between cetaceans and humans so that the interaction does not harm the cetaceans; does not remove the element of choice from the cetaceans by actions such as, but not limited to, recalling the animal from the sanctuary area; and does not elicit unsatisfactory, undesirable, or unsafe responses from the cetaceans.

One commenter stated that the regulations should specify that cetaceans that are "resting" should not be kept in isolation from their conspecifics (members of the same species). Another commenter recommended that facilities be required to have at least two cetaceans resting at the same time.

It is the intent of the standards set forth in § 3.109 of the current regulations that no marine mammal be kept in isolation without medical or compatibility justifications. Under the proposed rule, given the restrictions on public interaction times and the requirement for enclosure design and availability of all areas (interactive, buffer, and sanctuary) to program animals at all times, it seems highly unlikely that any active program animal will be kept in isolation from conspecifics for other than justifiable medical reasons. Therefore, we do not consider it necessary to make any changes to the final rule based on these comments.

Two commenters recommended that the regulations include language that states: "Construction and configuration of the interactive, buffer, and sanctuary areas should be similar in design and consistent in location. Redesign or reconfiguration of these areas should not be undertaken without prior authorization by the Administrator." The commenters stated that such requirements would help ensure that cetaceans would be equally comfortable in the sanctuary area and the interactive area.

The proposed rule included the requirements that the buffer and sanctuary area each offer at least as much space as the interactive area, that movement be unrestricted, and that the animals not be recalled from the sanctuary area during an interactive session. We consider the revision to § 3.111(a) in this final rule, discussed

above in response to concerns about space requirements, to adequately address the issues raised by the commenters. We do not consider it necessary to oversee enclosure changes that comply with the regulations.

A number of commenters supported the proposed requirements for the three areas and for their minimum size. Several commenters objected to the requirement for a buffer area in an SWTD program. One commenter stated that forcing an existing facility to divide one interactive area into three areas may be impracticable, would result in a small area for interaction, and would penalize those facilities that do not use food to lure cetaceans. One commenter recommended that, in place of a buffer zone, a 2:1 human participant-to-cetacean ratio be established, and space requirements be based on the following calculations: Program cetaceans would be provided with over half the available surface area that is not within 2 meters of any swimming human (assuming that all swimmers are maximally dispersed—i.e., not within 2 meters of each other).

The intent of the buffer area is to allow the animals to leave the interactive area, but still be recalled, as well as provide a buffer zone from human contact during sessions. Because the rule requires the interactive sessions to be controlled swims, the animals will be under the direction of the trained personnel, and it will be up to the behaviorists to determine if food or other reinforcement measures are used to reward the animals.

With regard to calculating required space (surface area) as recommended by the commenter in lieu of a buffer zone, we consider the method recommended by the commenter to be unduly complicated, and subject to the hypothetical placement of humans during a session. In addition, no justification for or advantages of this proposed method were offered. Therefore, we are making no changes to the final rule based on this comment.

One commenter supported the concept of requiring a buffer zone between the interactive area and the sanctuary area, but objected to the requirement that it be the same size as the sanctuary area. The commenter stated that, with the buffer zone and the sanctuary area being the same size, two-thirds of the pool would be a cetaceans-only area. Conversely, several other commenters stated that, although captive cetaceans may swim away from human swimmers in designated refuge areas, humans still remain in close proximity to them. To help reduce the stress to cetaceans, the commenters

recommended that the buffer and sanctuary areas be at least three times larger than the interactive area.

The need for three areas within the enclosure for SWTD cetaceans has been discussed above, as has the rationale for requiring the areas to be equivalent in size and acceptability to the cetaceans. Requiring a sanctuary and buffer area to be at least three times the interactive area would place an undue burden on the facilities, and would require some existing programs to terminate sessions for lack of required space. Further, no documented evidence of the necessity for such expansive sanctuary or buffer areas has been presented to APHIS. Therefore, we are making no changes to the final rule based on this comment.

One commenter stated that, in addition to the three areas proposed, each SWTD facility should have a fourth area for cetaceans that are resting, to keep the cetaceans from the interactive area during their resting period. The commenter recommended that the resting area have the same minimum requirements as the other three areas, in case it is used for cetacean retraining.

Because the sanctuary area will provide the cetaceans with an area from which they cannot be recalled during an interactive session, we consider a fourth area of equal proportion to be duplicative and to place an unnecessary space burden on the facility, and are not requiring such an area in this rule. There are more economical means available at most facilities housing marine mammals (*i.e.*, holding pools, other enclosures, etc.) To handle animals that should not be participating in a given session.

Swimmer-to-Cetacean and Swimmer to Attendant Ratios

In § 3.111(e)(3) as proposed (redesignated in this final rule as paragraph (e)(4)), we provided that neither the ratio of human participants to cetaceans in an SWTD session, nor the ratio of human participants to attendants, may exceed 3:1. In the explanatory information to our proposal, we stated that these ratios were based on permit requirements established by NMFS as part of its regulation of SWTD programs.

A number of commenters opposed the proposed 3:1 ratio for both swimmers to cetaceans and human participants to attendants. Several commenters stated that the ratio of swimmers to cetaceans set forth in the NMFS regulations was 2:1, and supported that ratio. Several commenters recommended that the allowable ratio of swimmers to cetaceans be 1:1. One of these commenters stated that at a 2:1 ratio,

high risk behaviors were observed during SWTD programs. Several commenters stated that, if only controlled swims (discussed below) are allowed, the maximum ratio of swimmers to cetaceans should be 4:1.

One commenter stated that NMFS did not specify a required human participant-to-attendant ratio, but that under NMFS regulations, all sessions had to be supervised by at least two attendants. One commenter stated that there should be at least one attendant for each two participating swimmers. Another commenter recommended no more than a 1:1 ratio for human participants to attendants in the water, attendants in the water to cetaceans, and attendants in the water to human participant-cetacean pairs.

We consider that the two 3:1 ratios proposed allow for adequate supervision of SWTD sessions under normal circumstances, without imposing an undue burden on SWTD facilities, and are, therefore, making no changes to the final rule based on these comments. Although we stated in the explanatory information of the proposed rule that the proposal was based on pre-existing NMFS permit conditions for programs prior to April 1994, we did not intend to imply that the precise permit conditions were set forth in the proposed rule. We regret any confusion the explanatory wording may have caused.

One commenter stated that, if cetaceans enter the buffer area or the sanctuary area for an extended period of time, human participants should be removed from the interactive area to maintain the allowable human-to-cetacean ratio.

To achieve compliance with the required human participant-to-cetacean ratio, a facility may need to address what measures would be taken to assure that the maximum ratio will not be exceeded if a cetacean leaves the interactive area. Although this contingency may have been implied in the proposed rule, we believe there is merit in including specific language in the final rule. The methods of complying with the handling requirements are left to the discretion of the facility. Therefore, we are amending § 3.111(e)(7) (redesignated as paragraph (e)(8) in this final rule), which specified the information that an SWTD facility must provide in a description of the program, to include the protocol for maintaining compliance with the required human participant-to-cetacean ratio if an animal is removed from or leaves the interactive and buffer area during an interactive session.

SWTD Personnel Requirements

In proposed § 3.111(c), we set forth proposed minimum requirements for personnel at an SWTD program. We proposed that each program must have at least a licensee or manager, a primary behaviorist, a supervising attendant, and an attending veterinarian, and we described the minimum qualifications for each position. One commenter recommended that the regulations require an SWTD program to have at least one attendant for every two cetaceans. The commenter also recommended that the supervising attendant should have at least 3 years experience with SWTD programs and the operant conditioning of cetacean in such programs.

The proposed rule required at least one attendant for every three human participants in an interactive session. It also required at least two attendants per session. Compliance with each of these requirements would ensure that the commenter's recommended ratio of at least one attendant per two cetaceans will be met and exceeded. Allowing only one attendant per two cetaceans would mean that one attendant would need to supervise two areas of activity and up to six humans. We do not consider this to be in the best interests of safety for the animals or the human participants. In light of the training and experience requirements for other personnel, we do not consider it necessary to require comparable training experience for the supervising attendant. Therefore, we are making no changes to the final rule based on this comment.

One commenter stated that because proposed § 3.111(e)(5) (redesignated as paragraph (e)(6) of this final rule) requires each session to have at least two attendants, such a personnel requirement should be included along with the other personnel requirements in § 3.111(c)(3).

Handling requirements are found in § 3.111(e) as proposed. We consider it appropriate to include with the handling requirements the requirement that at least two attendants be present during an interactive session. We do not consider it necessary or appropriate to include that requirement in § 3.111(c), cited by the commenter, because that paragraph deals with personnel qualifications and overall staff requirements.

One commenter stated that the regulations should require that the supervising attendant have 3 years experience within the past 5 years. Another commenter, while opposing the inclusion of specific personnel

qualifications in the regulations, recommended that, if qualifications are included, they should include a recent time frame within which a person must have had experience that qualifies them for a given personnel designation. The commenter recommended that the following personnel requirements be added to the regulations in place of those proposed:

Experienced head trainer: At least one full-time staff member with at least 6 years experience in training cetaceans for SWTD behaviors, or with an equivalent amount of experience involving in-water training of cetaceans, who serves as the head trainer for the SWTD program. The required experience must have been obtained within the last 10 years.

Experienced qualified trainer: At least one full-time staff member with at least 3 years experience involving human/cetacean interactions. The required experience must have been obtained within the last 5 years.

Attendants or employees: The experienced qualified trainer, in consultation with the experienced head trainer and/or licensee or manager, may designate other adequately trained attendants or employees from the licensee's staff to conduct and monitor individual SWTD program sessions consistent with the regulations.

Attending veterinarian: At least one staff or consulting veterinarian who was graduated from an accredited college of veterinary medicine and is licensed to practice veterinary medicine.

As proposed, § 3.111(c), "Employees and Attendants," sets forth minimum experience requirements for SWTD personnel. We agree that the names recommended by the commenter represent titles more consistent with those used elsewhere in the industry, without affecting the intent or implementation of this rule. For the purposes of this document, the required positions will be referred to as licensee/manager, head trainer/behaviorist, trainer/supervising attendant, attendant, and attending veterinarian.

We agree that the key personnel position of head trainer/behaviorist must be held by an individual knowledgeable of up-to-date training and handling techniques and behavioral training theories. This person will hold major responsibility for the training programs for the animals and the implementation of the SWTD program, and will have supervisory responsibilities over the other trainers and attendants. This final rule will require that the 6 years of experience required of the head trainer/behaviorist have been obtained within the previous

10 years. With this provision, we do not consider it necessary to specify the time period for the experience for the licensee/manager, trainer/supervising attendant, and attendants, as long as these personnel meet the experience and training requirements set forth in this rule.

We agree that including a requirement for the training of the attendants will serve to clarify the intent of the regulations, that of providing adequately and appropriately trained staff participating in interactive sessions and providing for the safety of the cetaceans and the human participants within reasonably expected limits. Therefore, we are adding such a requirement at § 3.111(c)(4).

With respect to the criteria recommended by the commenter for the attending veterinarian, the AWA is not intended to supersede any State Board of Veterinary Medicine. While requiring that the attending veterinarian be licensed to practice veterinary medicine is an acceptable clarification of the requirements, and we are adding such a clarification in this rule, most State licensing boards have provisions for licensing foreign graduates and/or graduates from non-accredited veterinary schools. We are, therefore, not including a requirement that the attending veterinarian have been graduated from an accredited college.

One commenter stated that, although proposed § 3.111(c)(4) would require the attending veterinarian at an SWTD facility to have had at least the equivalent of 2 years' full-time experience with cetacean medicine, the word "equivalent" is not defined. The commenter stated that the lack of such a definition makes the regulatory requirement virtually meaningless.

The requirement for "at least the equivalent of 2 years full-time experience with cetacean medicine within the past 10 years" was intended to mean that, although it is not required that the attending veterinarian work as a full-time marine mammal veterinarian for at least 2 years, he or she must have the equivalent in experience (at least 4,160 hours of actual marine mammal medicine work). We are, therefore, amending the definition of *attending veterinarian* to clarify this intent.

In this final rule, we are amending § 3.111(c) to require that each SWTD program have, at the minimum, the following personnel, with the following minimum backgrounds (each position must be held by a separate individual, with a sufficient number of attendants to comply with § 3.111(e)(4)). We are also amending § 3.111(c)(4) of this final

rule to clarify our intent concerning the training of attendants.

1. The *licensee or manager* must be at least one full-time staff member, with at least 6 years experience in a professional or managerial position dealing with captive cetaceans.

2. The *head trainer/behaviorist* must be at least one full-time staff member with at least 6 years experience within the past 10 years in training cetaceans for SWTD behaviors, or an equivalent amount of experience involving in-water training of cetaceans, who serves as head trainer for the SWTD program.

3. The *trainer/supervising attendant* must be at least one full-time staff member with at least 3 years training and/or handling experience involving human/cetacean interaction programs.

4. An adequate number of *attendants* at a facility must be adequately trained in the care, behavior, and training of the program animals. Attendants shall be designated by the trainer, in consultation with the head trainer/behaviorist and licensee/manager to conduct and monitor interactive sessions in accordance with § 3.111(e).

5. The facility must have an *attending veterinarian*, who is at least one staff or consultant veterinarian with at least the equivalent of 2 years full-time experience (4,160 or more hours) with cetacean medicine within the past 10 years, and who is licensed to practice veterinary medicine.

One commenter recommended that the regulations require that the experienced head trainer or experienced qualified trainer be on-site at all times while in-water SWTD program sessions are in progress.

We do not consider this recommended change to be necessary. If attendants are required to be adequately trained to conduct and monitor an SWTD session, as discussed above, and all other handling and personnel requirements are met, it should not be necessary to require that specific additional personnel be present during the session.

One commenter stated that it was not clear from the proposal whether only the facility personnel required by the regulations could conduct an SWTD program, or whether it would be required merely that one of the personnel be on-site during operation of all SWTD sessions. The commenter recommended the latter. The commenter also recommended that the regulations allow the manager and primary behaviorist to be the same person.

The intent of the proposed rule was that only qualified personnel could conduct the sessions. Given the

requirements discussed above, this will include adequately trained attendants, as well as the designated trainers. It is not the intent of the rule to specify the work schedule of individual facilities. No evidence has been presented to support the need for all personnel to be available during a session.

The intent of requiring the manager and the head trainer/behaviorist to be separate people is to minimize the potential conflict of interest between the business aspect of the facility and the welfare of the animals. The designations and requirements were developed to provide safeguards for the protection of the animals. Therefore, we are making no changes to the requirement that these positions be kept separate.

One commenter recommended that the regulations require that all attendants have at least 3 years experience with SWTD programs. The commenter recommended that, to promote this goal, an apprenticeship program should be established that requires on-site supervision at all times by a qualified attendant of any attendant who does not have the required experience.

It is not within APHIS's jurisdiction to establish such an apprenticeship program, nor to require participation in such a program.

Several commenters recommended that the background requirements for supervising attendant under proposed § 3.111(c) be made more specific. One commenter stated that, overall, the proposed personnel requirements contain only general background, experience, and exposure elements. The commenter recommended that the regulations set forth certified job descriptions; explicit skill, knowledge, education, experience, and training levels; formal credential requirements; and valid performance tests to demonstrate the hands-on abilities of applicants.

We cannot tell from the comments what specific requirements the commenters had in mind with regard to supervising attendants. As noted above, we have amended proposed § 3.111(c) to clarify our intent regarding the background requirements for SWTD program personnel.

With regard to personnel requirements overall, we consider the personnel requirements as set forth in this final rule to provide adequate minimum standards for personnel engaged in SWTD programs. The requirements for uniform job descriptions recommended by the commenter could potentially impose an undue burden on the licensees.

One commenter stated that requirements for employees and attendants should specifically require knowledge and experience in "operant conditioning" of animals using positive reinforcement techniques.

At this time, we do not have sufficient supporting scientific evidence to warrant requiring a given training system, and are not including such a requirement in this final rule. The current animal handling regulations, set forth at § 2.131, already prohibit the use of physical abuse, deprivation of food or water, and handling techniques that cause behavioral distress, physical harm, or unnecessary discomfort.

Several commenters stated that requirements for employees and attendants already exist in the current regulations for marine mammals, and that any updating of employee requirements should be incorporated into those existing provisions. Another commenter stated that the requirements for SWTD personnel should be the same "performance-based" requirements as those under the general marine mammal regulations in § 3.108. The commenter also stated that having a certain number of "years of experience" does not necessarily qualify an individual for a position.

As indicated in the Supplementary Information section of the proposed rule, we consider SWTD programs to require more specialized regulations and standards than are set forth in the current regulations regarding marine mammals, due to the intense interactive nature of these programs. Although we agree that a person's ability can not always be gauged by a given number of years of experience, we do consider length of experience to be a measurable, minimum initial standard.

Several commenters objected to the inclusion in the proposed rule of minimum requirements for a licensee or manager. The commenters stated that the definitions in 9 CFR 1.1 already contain a definition of *licensee*, and one commenter stated that the proposed requirements for an SWTD licensee or manager are unduly specific when compared to the broad discretion given to research facilities in § 2.32(a) of the existing regulations.

We do not consider the regulations for research facilities, set forth in § 2.32(a), to be applicable to SWTD facilities. If the requirements of § 2.32(a) were applied to SWTD programs, it would fall on the licensee or manager of the SWTD program to determine whether he or she was qualified for the position. This would represent a substantial conflict of interest. APHIS maintains its position that SWTD programs require

additional requirements, beyond those promulgated to date for public display facilities, and that providing training and experience requirements for all personnel directly responsible for the well-being of the cetaceans is necessary to meet this objective. The definition of licensee (§ 1.1) does not preclude the application of additional training and experience requirements to specific subparts of the regulations as necessary. Therefore, we are making no changes based on these comments.

Restrictions on Cetacean Interaction Time

A number of commenters addressed the requirement set forth in proposed § 3.111(e)(1) that interaction time for each cetacean not exceed 2 hours per day, and that each program cetacean have at least one period in each 24 hours of at least 10 continuous hours without public interaction. Several commenters stated that the interaction time for each cetacean should not exceed 1 hour per day. One of these commenters stated that the recommended 1 hour of interaction time should be divided into two 30-minute sessions per day, with a rest period of at least 2 hours between sessions. The other commenter stated that, in addition to being limited to 1 hour of interaction time per day, any cetacean exposed to human swimmers for 30 consecutive minutes should have at least 4 subsequent uninterrupted hours to rest. Another commenter stated that no animal should interact with more than 16 human participants per week.

One commenter recommended that interactive time for each cetacean be limited to no more than 2 hours per day, divided into no fewer than 4 interactive sessions of 30 minutes each, with at least 90 minutes separating each of these sessions, even if any of the sessions do not run a full 30 minutes. Another commenter stated that each cetacean should average no more than four interactive encounters per day, with no cetacean having more than six of these sessions per day. The commenter recommended that the mean length of these sessions should be no more than 15 minutes each, with none lasting more than 20 minutes.

We consider the minimum handling requirements regarding cetacean interaction time in § 3.111(e)(1) of this final rule, in combination with other handling requirements in this final rule, as well as those in the existing regulations, to be adequate to provide sufficient safeguards to protect the well-being of the program animals. In addition to the requirements of § 3.111(e)(1), the other handling

requirements include (1) the general handling requirements of § 2.131 (handling may not cause, among other things, trauma, behavioral stress, physical harm, or unnecessary discomfort); (2) the handling requirements of § 3.111(e)(6) (redesignated as paragraph (e)(7) in this final rule) to allow the freedom of choice for participation by the cetacean; and (3) § 3.111(e)(7) (redesignated as paragraph (e)(8) in this final rule), which requires the removal of an animal from the session and/or termination of the session if unsatisfactory behaviors occur.

Although we share the commenters' concern that adequate rest periods be provided for SWTD cetaceans, we do not believe that evidence has been presented indicating that the proposed interaction and rest times are not sufficient to protect the health and well-being of the animals. Without such evidence, further restriction of the interaction times or the number of human participants a cetacean may interact with would place an undue burden on the facility, by either requiring the addition of animals to the program in order to maintain current interaction levels, or forcing the facility to sustain a potentially high economic burden in loss of income due to the increased restrictions on interactive sessions. The requirements in this rule pertaining to the enclosure areas, along with a prohibition on the recall of any animal from the sanctuary area during a session, provide each SWTD cetacean the option of avoiding interactive sessions. Therefore, we are making no changes based on these comments.

One commenter opposed the proposed requirement that each program cetacean have at least one period in each 24 hours of at least 10 continuous hours without public interaction. The commenter said that 10 hours of continuous rest would be on the extreme low side, and that the commenter knew of no existing program that had less than 16 hours of continuous rest.

Given the above restrictions on the number of hours of public interaction for program animals (2 hours per day), the required minimum of at least one 10-hour continuous rest period is, in fact, not the only rest period that will be required for program animals. There is no public interaction allowed for 22 of the 24 hours. Requiring at least one of the rest periods to be at least 10 continuous hours does not imply that the animals cannot be rested for longer periods. We see no indication or reason for currently existing facilities to alter their operations to lessen their

established rest periods. By circumstance (business hours), most, if not all, facilities will likely exceed the 10-hour rest period overnight. No compelling, scientifically validated data or other material was supplied to support the above recommendation. Therefore, we are not making any change to the final rule based on this comment.

One commenter recommended that, in addition to 10 consecutive hours of rest in each 24-hour period, each cetacean should have no less than two full, nonconsecutive days of rest in each 7-day period, or no more than 2 days of work followed by 1 day of rest. Another commenter stated that each SWTD cetacean should have 3 full days off per week, and that, therefore, according to the commenter, no animal should take part in interactive sessions more than 4 hours a week.

The restrictions recommended by the commenters were not imposed under the original NMFS permits for the "experimental" programs, and no adverse affects attributed to overwork of animals were reported or documented. No scientifically valid data or other material was supplied to support the commenters' recommendations, and we are not aware of such data or material. Therefore, we are making no changes based on these comments.

One commenter recommended that the provisions regarding the number of hours of cetacean participation per day, and the number of rest hours per day, be more flexible. The commenter, an SWTD facility, stated that it had sometimes altered its normal schedule of sessions per day to accommodate bad weather or peak seasons, with no visible ill effects on program cetaceans.

We are making no changes based on this comment. We consider the provisions regarding the time limits for participation of cetaceans in the interactive sessions to be the minimum requirements necessary for the well-being of the animals affected.

One commenter requested that the regulations clarify that the 2-hour restriction on sessions set forth in proposed § 3.111 apply to the actual swim time with the animal, and not to activities such as introductory explanations by the staff.

The commenter's recommendation is consistent with the intent of the regulation. To clarify this intent, we are amending § 3.111(e)(1) in this final rule to state that interaction time (which we describe as designated interactive swim sessions) for each cetacean shall not exceed 2 hours per day.

One commenter stated that time constraints for human/cetacean

interaction should either be established for all marine mammals or for none. The commenter stated that activities such as training and feeding currently require more than 2 hours at a time throughout the day, with no negative effects to either animals or humans.

The intent of the proposed rule was to provide regulations and standards for SWTD programs, not for all marine mammals. Program animals are, like their non-SWTD counterparts, subject to the training and handling necessary for marine mammal care and well-being. However, the SWTD programs place additional interactive time commitments on the animals. It is this additional interactive activity that this rule is designed to regulate. Therefore, we are making no changes based on this comment.

Training and Behavior of Cetaceans

Proposed § 3.111(e)(2) provided that all cetaceans used in an interactive session must be adequately trained and conditioned in human interaction so that they respond in the session to the attendants with appropriate behavior for safe interaction. One commenter stated that the term "appropriate behavior" was open to broad interpretation and should be precisely defined. One commenter stated that the regulations should specify that, before being used in an SWTD program, cetaceans must be well-trained for "stationing," as well as for immediate "recall" under a wide variety of circumstances. Several commenters recommended that "gate-training" of cetaceans be specifically required.

Several commenters recommended a specified minimum period of training for cetaceans before participation in SWTD programs, ranging from 6 months to 1 year. Several other commenters recommended that, before being used in an SWTD program, cetaceans should have to demonstrate competency for a variety of husbandry/medical behaviors that would be useful for veterinary examinations without inducing excessive stress to cetaceans. One commenter stated that the proposed regulations did not define "adequately trained," and that such an omission would give too much leeway to operators.

We are not making any changes to the final rule regarding the training of program animals. However, in this final rule, § 3.111(e)(7) and (e)(8) (paragraphs (e)(6) and (e)(7) in our proposed rule) are reworded to clarify our intent regarding what constitutes "inappropriate" behavior. We are adding the terms unsatisfactory, undesirable, or unsafe to describe such

behavior. An exhaustive list of "appropriate" behavior would vary in different situations, depending on the facility and program design, and not all behaviors will be necessary in all situations. Such a list is variable, depending on the facility and program design.

Under the requirements set forth in § 3.111(g), semi-annual medical examinations of program animals by the attending veterinarian are required. In order to comply with this requirement, and at the same time meet the general requirement of § 2.131 that handling be conducted so as to minimize stress to the animals, it will be necessary for facilities (management, trainers, and attending veterinarian) to establish a workable veterinary/husbandry protocol that minimizes stress on program animals. This will likely include trained husbandry and veterinary behaviors, but other methods may be developed as well.

Innate animal characteristics, trainability, and temperament, as well as training techniques, training schedule, and prior trained behaviors, will all influence the length of time needed to train an animal to participate safely in an SWTD program. It would not be practical to impose a specific time limit on the training of a program animal. The regulations in § 3.111(f) as proposed required, among other things, that prospective SWTD programs provide APHIS with a description of the training each animal has undergone or will undergo prior to participation in the program. One commenter requested that we require this description to include the number of hours of training for each animal and its responsiveness to the training.

We intended the number of hours of training to be included in the description of training. To clarify this intent, we are requiring at § 3.111(f)(1)(v) of this final rule "a description of the training, including actual or expected number of hours, each cetacean has undergone or will undergo prior to participation in the program." This requirement will give APHIS an overview of each facility's training program. We do not consider a mere description of the animal's responsiveness to training necessary to improve the animal's well-being and are not adding such a requirement to the regulations.

One commenter recommended that cetaceans being trained undergo no greater exposure to humans during each 24-hour period than that allowed for cetaceans already participating in a program.

The proposed rule did not limit cetacean/trainer interaction time, only public interaction time during designated SWTD sessions. It is not the intent of this rule to restrict cetacean/trainer interactions, which are necessary to maintain desirable behaviors, and we are making no changes based on this comment.

Positioning of Attendants

Under the handling requirements proposed at § 3.111(e)(5) (redesignated as paragraph (e)(6) in this final rule), we set forth the requirement that all interactive sessions must have at least two attendants. We proposed further that at least one of the attendants must be positioned in the water, except in cases where at least one attendant is positioned so as to be able to intervene in the session as quickly as if positioned in the water. We proposed, however, that, if a program has had more than two incidents during interactive sessions that have been dangerous or harmful to either a cetacean or a human, at least one attendant must be positioned in the water.

Several commenters opposed the requirement that one attendant be positioned in the water, stating that each attendant would have a better view and be able to respond better if positioned out of the water. Further, the commenters stated that an attendant positioned in the water may distract SWTD cetaceans, and, additionally, might have to continuously tread water at facilities where there is no shoreline or shallow water. Conversely, several commenters stated that there should be no exceptions to the requirement that one attendant be positioned in the water during SWTD sessions. One of these commenters stated that requiring an attendant in the water if there have been more than two dangerous incidents implies that it is safer to do so; therefore, an attendant should be required in the water at all times. Another commenter recommended that the regulations require that one staff member be positioned in the water within 5 feet of each human participant/cetacean pair, and that one attendant be positioned pool side for every two human participant/cetacean pairs.

The proposed provisions regarding how many, if any, attendants need to be in the water were based on the premise that an attendant in the water could observe more easily and react more quickly to a situation where either a cetacean or a human was behaving in a potentially harmful way. The proposed provision that an attendant be required to be in the water at a facility where two or more incidents harmful to a cetacean

or human have taken place, but not necessarily at other facilities, was predicated on the premise that, at a facility where such incidents do not take place, the attendants are adequately positioned out of the water to forestall any such incidents.

We consider the commenters' observations that attendants not positioned in the water have a better view overall, and that an in-water attendant recognized by the cetaceans may be distracting to the cetaceans, to be valid ones, and are addressing the commenters' concerns by revising the final rule as set forth in the following paragraph.

Additionally, we can see why the dual standard we proposed with regard to positioning of attendants might be confusing to readers. In the proposed rule, no limit on the time period during which the two incidents may have occurred was defined. As proposed, the rule would cover the lifetime of the facility. This does not seem reasonable, and it was not the intent of the proposed rule to impose such a restriction. Therefore, we are including in this final rule a 1-year time frame regarding the two incidents that have been dangerous or harmful to either a cetacean or a human. As modified, § 3.111(e)(6) will provide that all interactive sessions must have at least two attendants. At least one attendant must be positioned out of the water. One or more attendants may be positioned in the water. If a facility has more than two incidents during interactive sessions within a year's time span that have been dangerous or harmful to either a cetacean or a human, APHIS, in consultation with the head trainer/behaviorist, will determine if changes in attendant positions are needed.

With regard to the commenter's recommendation that one attendant be required to be in the water for each human participant/cetacean pair, § 3.111(e)(4) of this final rule addresses the minimum number of attendants required for each interactive session by requiring that the ratio of human participants to attendants not exceed 3:1. We consider this requirement to provide an adequate number of attendants and are making no changes to the ratio.

Dangerous or Harmful Incidents

One commenter recommended that any SWTD program that experiences two or more dangerous or harmful incidents in any 6-month period should be forced to close permanently. Another commenter stated that if a program experiences more than two dangerous incidents, interactive sessions should be

suspended until APHIS has reexamined the program.

Formal disciplinary proceedings initiated by APHIS are subject to the AWA and the Administrative Procedure Act's statutory due process requirements. The AWA currently allows the Secretary to impose a 21-day summary license suspension, and any additional license suspension, revocation, or civil penalty can only be imposed after notice and an opportunity for a hearing. If a dangerous or harmful incident occurs at an SWTD facility, APHIS will determine if noncompliance with the regulations contributed to or was responsible for the incident. If such a finding is made, appropriate enforcement action will be taken. This may include letters of warning, stipulations, license suspensions, license revocations, or civil penalties. Due process will be afforded by APHIS to each respondent. Therefore, we are making no changes to the final rule based on these comments.

Space Requirements

In § 3.111(a) of our proposed rule, we proposed requirements for the amount of space that must be provided to cetaceans in SWTD programs. A number of commenters addressed those provisions. One commenter stated the current space requirements for marine mammals in subpart E of the regulations should be expanded, which the commenter stated would eliminate the need to establish space requirements unique to SWTD programs. Several commenters said the SWTD calculations should be extended to all facilities, not just SWTD facilities.

We are in the process of reviewing and considering revisions to the current space requirements for marine mammals, as set forth in § 3.104, and consider it beyond the scope of this rulemaking to address the general space requirements here.

One commenter stated that, even though the proposed space provisions

for SWTD cetaceans exceed those in the current regulations, the increases are so marginal as to be inconsequential. The commenter stated that the regulations should promote what the commenter termed one of the primary principles of captive animal containment—i.e., “space to move in any direction that is normal to the species without being unduly cramped or confined.” One commenter stated that the minimum surface area requirement and the minimum volume requirement for each animal in the interactive area should be tripled.

We do not agree that the proposed increases in space requirements for SWTD cetaceans are “marginal.” For example, under current § 3.104, the minimum horizontal dimension (MHD) for *Tursiops truncatus* is 24 feet; the proposed SWTD MHD was 81 feet (an increase of over 300 percent). Likewise, the proposed depth requirement is 50 percent greater than that found in § 3.104. The surface area requirement in the proposed rule was 572.26 ft² for each area, compared with 95.38 ft² for nonprogram animals under § 3.104. We consider the proposed space requirements for SWTD programs to be sufficient to allow the animals to move freely in all three dimensions. Therefore, we are making no changes to the final rule based on these comments.

Several commenters stated that the regulations should include language to make clear that the proposed space requirements relate only to marine mammals designated for SWTD programs, and that standards for other marine mammals are contained elsewhere in the regulations.

We consider our intent to apply the provisions of this rule to SWTD animals to be clearly stated in the provisions as written, and are making no changes based on the comment.

One commenter stated that the regulations should specify that the space requirements promulgated for SWTD cetaceans shall be calculated on

the basis of the maximum number of SWTD cetaceans participating per session within each primary enclosure for SWTD programs.

As written, the space requirements for an SWTD enclosure are to be calculated based on the number of animals in the enclosure (sanctuary, buffer, and interactive areas). We do not consider it necessary to revise the wording as proposed.

A number of commenters addressing the proposed space requirements for SWTD programs submitted specific recommended calculations. Several commenters stated that the minimum horizontal dimension should be 10 to 12 times the average *Tursiops truncatus* adult body length.

The commenters did not support their recommendations with scientific justification or other evidence. We believe that implementing the standards recommended by the commenters would place an undue economic burden on each licensee, perhaps unnecessarily forcing most, if not all, operations out of business, due either to the cost of expansion or to the inability to obtain the space needed for such expansion. In the absence of evidence that the recommended standards are necessary, we are making no changes to the final rule based on these comments.

Several commenters recommended that the proposed minimum horizontal dimension (MHD) for each of the three areas in SWTD programs should be increased to take into account additional space for each human participant in the water. Several commenters recommended adding 67 inches to the MHD for each person in the water; another commenter recommended adding 7–8 feet for each swimmer. Several commenters recommended that the minimum surface area for one cetacean plus swimmers be based on the following formula:

$$SA = \frac{(10 \times L \text{ of cetaceans}) + (2^* \times L \text{ of human})^2}{2} \times 3.14$$

* Assuming a swimmer-to-cetacean ratio of 2:1.

Commenters also recommended that, at a minimum, the surface area formula for each additional cetacean in excess of one should be:

$$SA = \frac{(3 \times L \text{ of cetaceans}) + (2 \times L \text{ of human})^2}{2} \times 3.14$$

Because the interactive session time per animal is restricted to 2 hours per day (approximately 8 percent of the time), and the public interaction is restricted to the interactive area, we do not consider it practical or necessary to increase the space requirements for the interactive area or the entire enclosure.

One commenter recommended adding an additional shallow section of at least 8' x 12' to accommodate participants who are only wading.

Each SWTD program has the choice to provide certain interactive facilities. It is beyond the scope of APHIS authority to require a facility to allow wading. Space requirements for interactive areas with wading sections are discussed below.

In our proposed rule, we proposed to require a minimum average depth of 9 feet in each of the three SWTD areas. Several commenters said that the minimum average depth for each area should be 3 to 4 times the length of the average cetacean.

At this time, we consider the 9-foot average depth requirement to provide sufficient space for the average cetacean that is currently being used in SWTD programs. This requirement will enable the average cetacean currently being used in SWTD programs to pass under or around the average human participant in the water. Therefore, we are making no changes based on this comment. APHIS will, however, closely monitor this issue to ensure that cetaceans used in SWTD programs are provided adequate space. If the need for any modifications to the average depth requirement or any other requirement becomes necessary in the future, APHIS will address such modifications in a subsequent rulemaking.

One commenter stated that basing required depth on an average minimum of 9 feet is not sufficient, given that mean low tides of open ocean facilities can differ dramatically from, and be significantly less than, their average depth. The commenter said that because sufficient depth is necessary to accommodate inter-specific (cetacean-with-cetacean) interactions, the regulations should include a mean low depth requirement of more than 9 feet.

In natural seawater (sea pen) facilities, the depth requirements in § 3.104 and § 3.111(a)(3) mean that the water depth at low tide must meet or exceed the minimum depth required by each regulatory section. The use of the term "average depth" in § 3.111(a)(3) means that the area depth profile must average at least 9 feet (at low tide). We recognize that not all programs will advocate or require all public participants to be fully immersed in the water and actually swim with the cetaceans. Some facilities

will provide the opportunity for wading with the animals or interacting with the animals from a dock or similar structure. Wading areas, obviously, would not be 9 feet in depth. Including such areas in space requirement calculations would likely require other parts of the enclosure to have areas significantly deeper than 9 feet. This was not the intent of the rule. Consistent with our enforcement of general space requirements for marine mammals in the current regulations (§ 3.104), only those areas that are used in calculating the average depth may be used in calculating whether the area meets the minimum requirements for MHD, surface area, and volume—*i.e.*, other sections may be shallower, and not be included in determining the average depth of the entire area, but may not contribute to meeting other minimum space requirements.

To clarify our intent with regard to calculating the average depth of an interactive area, we are revising § 3.111(a)(3) to provide that although the average depth for each of the enclosure's areas at low tide must be at least 9 feet, a portion of each area (e.g., wading areas) may be excluded when calculating the average depth. However, the excluded portion may not be used in calculating whether the area meets the minimum requirements for MHD, surface area, and volume. In addition, proposed § 3.111(a)(3) contained an inadvertent oversight of depth requirements for non-ocean pen enclosures. Therefore, in this final rule, § 3.111(a)(3) requires that all pools not subject to tidal action shall have an average depth of at least 9 feet.

One commenter stated that one-on-one patient therapy sessions require much less space than other types of interactions.

The space required for an interactive session was not the basis for the space requirements. Rather, the space requirements were developed to provide as stress-free an environment as possible for SWTD animals involved in these types of programs. Interactions with members of the public are the same, whether general open sessions or therapy sessions.

Water Clarity

In § 3.111(b) of our proposal, we proposed that sufficient water clarity must be maintained so that attendants are able to observe cetaceans and humans at all times while within the interactive area. We proposed that if the water clarity does not allow these observations, the interactive sessions must be canceled until the required clarity is provided.

The introductory heading to proposed § 3.111(b) read "*Water quality.*" One commenter stated that the heading was a misnomer, because proposed § 3.111(b) was concerned only with "in-water visibility" in the interactive area.

We agree that the heading to the paragraph in question could be confusing. To clarify our intent, we are revising the heading of § 3.111(b) as proposed to read "*Water clarity.*"

One commenter, while supporting the proposed water clarity provisions, stated that the regulations should require some quantified degree of clarity that makes proprietors totally accountable in the event of any harm to animals or people. Another commenter recommended that the regulations provide that, at facilities with reduced water clarity, swimmers be required to remain at the surface and cetaceans be maintained under direct trainer control.

We are making no changes based on these comments. There exists no recognized or generally accepted quantitative marker of acceptable water clarity. Establishing a quantitative requirement for acceptable water clarity would place an increased recordkeeping and reporting burden on the facility, without recognizable benefit to the animals. If attendants can see the animals and human participants in the session, the water clarity is sufficient. The intent of provisions regarding water clarity is to ensure that attendants maintain visual contact with all session participants. If this is not possible, the session must be terminated. This rule already requires the cetaceans to be under the direct control of the attendants.

Several commenters stated that the same water quality standards should be applied to the sanctuary and buffer areas as are applied to the interactive area. One commenter stated that the existing water quality criteria under § 3.106 (for indoor and outdoor facilities) should be applied to SWTD programs. One commenter, who recommended that the regulations allow only controlled swims (discussed below), said that if all SWTD swims are controlled, it would be necessary to observe SWTD program cetaceans only when in direct contact with participating humans in the interactive area. The commenter stated that proposed § 3.111(b) should therefore either be removed or be revised to reflect the need for limited observation of the cetaceans.

Because SWTD attendants are unlikely to know exactly where program cetaceans and swimmers will move in the interactive area, it is not feasible to provide for only limited application to

the water clarity standards in that area. The same degree of clarity, however, will not always be necessary in the buffer and sanctuary areas. The introductory text to § 3.111 as proposed specified that SWTD programs must comply with both the provisions of § 3.111 and with all other requirements of subpart E pertaining to cetaceans. This includes all water quality requirements found in § 3.106. Under § 3.106(a), the primary enclosure may not contain water that would be detrimental to the health of the marine mammals contained in the enclosure. We consider the wording of §§ 3.106 and 3.111(b) adequate and necessary to provide the water quality and clarity needed for the health of the animals and the safe conduct of SWTD sessions, and are making no changes based on these comments.

One commenter stated that consideration should be given to broadening the required water quality testing to ensure adequate cetacean and human health. The commenter stated that existing standards assume that natural seawater pens do not have the potential for water quality problems except for coliform bacteria.

All general water quality parameters, including any special requirements for natural seawater facilities, will be addressed in a proposed revision of subpart E, currently under development, and are beyond the scope of this rule.

Instructions to the Public

Several commenters specifically supported the proposed provision in § 3.111(e)(4) (redesignated as paragraph (e)(5) in this final rule) that, prior to participating in an SWTD interactive session, members of the public must be provided with written rules and instructions for the session, and that members of the public must agree, in writing, to abide by the rules and instructions. However, the commenters each recommended that the regulations also require that the rules and instructions be presented orally.

Those SWTD programs that are currently operating hold oral orientation sessions prior to the interactive session. APHIS supports this practice, and considers it appropriate to include such a requirement in the regulations. Therefore, we are adding language at the introduction to § 3.111(e)(5) of this final rule to require that prior to participating in an SWTD interaction session, members of the public be provided with oral and written rules and instructions for the session.

Several commenters recommended that customers be informed of the potential risk of injury or disease

transmission, and be warned that, except for staff or program negligence, they participate at their own risk.

There is no documented evidence of any significant zoonotic (disease transmission between cetaceans and humans) risk to date, and we do not consider it appropriate to require that the public be provided with undocumented information. Therefore, we are making no change in response to these comments.

Controlled Sessions

A number of commenters recommended that all SWTD interactive sessions be required to be "controlled." One commenter requested that APHIS acknowledge a 1994 report to NMFS by Amy Samuels, which the commenter stated concluded that controlled SWTD sessions do not pose any significant risk to cetacean or human participants. Several commenters suggested definitions of "controlled swim." Central to each definition was the provision that professional animal trainers or attendants must directly control each human/cetacean interaction. One commenter requested that the regulations include an outline of a typical or anticipated interactive session that demonstrates the trainers' method and degree of control over interactions.

We do not consider it necessary or appropriate to include in the regulations an outline of a typical interactive session. Such an outline could be unnecessarily restrictive and potentially inaccurate, since each facility is allowed to develop its own program within the framework of this rule. However, the intent of the proposed rule was to require head trainer/behaviorist, trainer/supervising attendant, or attendant control of the SWTD interactive sessions. We are amending § 3.111(e)(2) as proposed to clarify this intent, adding the provision that the head trainer/behaviorist, trainer/supervising attendant, or attendant must at all times control the nature and extent of the cetacean interaction with the public during a session, using the trained responses of the program animal.

Inappropriate Behavior

Proposed § 3.111(e)(6) (redesignated as paragraph (e)(7) in this final rule) provided that each SWTD program must limit interaction between cetaceans and humans so that the interaction does not harm the cetaceans, does not remove the element of choice from cetaceans, and does not elicit undesirable responses from cetaceans.

Several commenters requested that the regulations include definitions of

"harm" and "undesirable responses." Another commenter stated that "harm" should include, among other things, any action causing the cetaceans to flee, flinch, spontaneously breach, or exhibit other abrupt behavior.

We are making no changes based on these comments. The definitions set forth in § 1.1 of the regulations apply to all sections of the regulations. Because the term "harm" is already used throughout the regulations and standards, it is beyond the scope of this regulatory action to develop a definition that would apply to all regulated entities and species. The use of the term "harm" in § 3.111 is consistent with use of this term throughout the rest of the regulations. The term "undesirable behaviors" is discussed later in this document. As with the term "harm," because of the number of different animals and activities regulated under the AWA, and the fact that definitions set forth in § 1.1 apply throughout the regulations, we consider it more practicable to address the term "undesirable behavior" in the provisions relating to SWTD programs than to include a definition of the term in the definitions sections. As previously noted, § 3.111(e)(7) and (e)(8) of this final rule clarify what constitutes inappropriate behavior. We are using the terms unsatisfactory, undesirable, or unsafe to describe such behavior.

Proposed § 3.111(e)(6) also provided that SWTD programs must prohibit grasping or holding of the cetacean's body, unless under the direct and explicit instruction of an attendant eliciting a specific cetacean behavior. A small number of commenters addressed this proposed provision as it would apply to "dorsal towing." One commenter opposed any ban on dorsal towing. Another cited studies that the commenter said indicated some cetaceans actually seek certain types of SWTD interactions. The commenter also cited the study commissioned by NMFS that the commenter said indicated dorsal towing is not associated with any type of problematic cetacean-swimmer interaction. One commenter stated the proposed regulations seemed to imply that the decision whether to allow dorsal towing would be left to each facility. The commenter expressed concern that this would give an economic advantage to facilities that allow such towing.

The language used in proposed § 3.111(e)(6) concerning the grasping or holding of any cetacean body part unless under the direct and explicit instruction of the attendant eliciting a specific cetacean behavior was intended to apply to activities such as, but not

limited to, dorsal towing. As indicated in one of the comments, dorsal towing, in and of itself, is not specifically associated with problematic interactive behaviors. However, we consider the restrictions of proposed § 3.111(e)(6) necessary to protect other sensitive body areas on the cetacean, such as the blowhole and the eyes. The behaviors elicited during an interactive session are determined by the head trainer and management, and are reviewed by APHIS under § 3.111(f). With regard to any economic advantage that might be gained from allowing dorsal towing, data available to us regarding current SWTD programs does not indicate a disparity between programs that allow dorsal towing and those that prohibit it.

One commenter stated that because touching of cetaceans in sensitive places has been associated with triggering antagonistic cetacean behavior, human participants who restrain, pull, or grab at cetaceans should immediately be removed from the swim session and not permitted to return. Another commenter stated that the following behaviors by human participants should be considered high-risk: Hitting, chasing, flinching or screaming, slapping of water, grabbing, and a rapid or abrupt approach.

The proposed rule did not include an exhaustive list of specific "high-risk" behaviors by human participants, and we do not consider it appropriate to include such a list in this final rule. Each facility will develop its own list of instructions and rules, which must be submitted to APHIS for review. Grasping or holding the cetacean's body (this would include grabbing, restraining, or pulling, etc.) is prohibited under § 3.111(e)(7). As such, it must appear in the written and oral rules presented to the public. In § 3.111, paragraph (e)(5) requires anyone who violates these rules to be removed by the facility from the session.

Proposed § 3.111(e)(7) (redesignated as paragraph (e)(8) in this final rule) provided that, in cases where cetaceans used in an interactive session exhibit unsatisfactory behaviors, such as charging, biting, mouthing, or sexual contact with humans, either those cetaceans must be removed from the interactive area or the session must be terminated. The regulations as proposed also provided that written criteria must be developed and submitted to APHIS regarding conditions and procedures for the termination of a session when removal of a cetacean is not possible.

A number of commenters addressed these proposed provisions. One commenter requested that the regulations include definitions of

behavior that is "inappropriate, undesirable, unsatisfactory, or harmful" for participating cetaceans and swimmers. Where we proposed to provide examples of undesirable behavior by saying "such as charging, biting, mouthing, or sexual contact with humans," several commenters stated that the "such as" should be replaced by "including but not limited to."

We do not consider it practicable or appropriate to provide an exhaustive list of all exhibited behaviors that might be unsatisfactory, undesirable, or unsafe during an interactive session. Each situation or set of circumstances is unique, and the array of cetacean behaviors is extensive. To clarify that the list of behaviors included in § 3.111(e)(8) of this final rule is not exhaustive, we are adopting the commenter's recommendation to preface the examples provided with the words "including, but not limited to." In addition, we are amending § 3.111(e)(7) and (8) to include the words "unsatisfactory," "undesirable," or "unsafe" to describe such types of behaviors. In the absence of a specific regulatory definition, terms used are considered to have their common meaning in ordinary usage.

Several commenters considered the list of examples of undesirable behaviors to be imprecise and over-inclusive. One commenter stated that "charging" and "mouthing" should be considered unsatisfactory only if done in a manner deemed unsatisfactory in the judgment of the trainers present. One commenter stated that the regulations should distinguish between aggressive mouthing and gentle mouthing, the latter of which the commenter said may be an attempt by a cetacean to be affectionate toward a human swimmer. Another commenter stated that rubbing up against humans by the animals that is not of a sexual nature should be allowed to continue.

Although it is possible that, in some circumstances, mouthing may not be an inappropriate behavior during an interactive session, charging cannot be considered innocuous at any time. For the safety of the humans, and to decrease the risk of retaliatory behavior in the event the human participant provokes the cetacean through responses to these behaviors, these types of behaviors will not be tolerated during an interactive session. Therefore, we are making no further changes to § 3.111(e)(8) of this final rule, other than those changes discussed above. Several commenters recommended expansion of the list of what we would consider "undesirable behavior" on the part of cetaceans to include behaviors likely to

result in harm to a swimmer or indicative of risk to a cetacean. The commenter suggested such things as biting, hitting, ramming, body-slams, forceful pushing, chasing, open-mouth threats, head-jerk threats, jaw clap threats, fleeing, flinching, mounting, thrusting, genital insertion, erection, repetitive genital rubbing, beak-to-genital propulsion, abrupt turning or circling, quick approaches, leaping, and breaching. One commenter suggested that we additionally include "porpoising" and "slapping water."

As stated above, we do not consider it necessary to amend the proposed language other than as noted. The list of "undesirable behaviors" recommended by the commenters is very specific and includes behaviors (such as leaping, breaching, and circling) that, when exhibited under the direction of the trainer/attendant, may not be inappropriate.

One commenter stated that swimmers should be notified of what undesirable behavior on the part of cetaceans is, in case the attendant fails to observe it. Another commenter stated that swimmers should be warned that cetaceans can be aggressive and dangerous, and be instructed to call the local APHIS office if they are injured in an interactive program.

Although we recognize the commenter's rationale for informing the SWTD participants what constitutes undesirable behavior, such a list is extensive, and can be greatly influenced by circumstances. We consider it adequate to include in the pre-encounter instructions the appropriate rules and instructions, as well as restrictions on types of physical contact with the cetaceans (as set forth in § 3.111(f)(1)(iii) of this rule).

We agree that it would be helpful for participants to know how to contact an APHIS office in the case of injuries or complaints, and are adding such information to § 3.111(e)(5) of this final rule. To help ensure that the public knows whom to contact in case of injury, § 3.111(e)(5) of this final rule will require that the oral and written information provided to human participants include telephone and FAX numbers for APHIS, Animal Care, for reporting injuries or complaints.

Several commenters recommended that the regulations require removal of the participating humans, rather than the cetaceans, in cases where cetaceans exhibit unsatisfactory behaviors. One commenter stated that the return of swimmers to the water should be dependent on the decision of the primary behaviorist. Several commenters recommended the removal

of both the human participant and the cetacean in such situations. Two commenters stated that, when removing cetaceans or swimmers, it will be necessary to maintain the swimmer/cetacean ratio at the allowable level.

Under § 3.111(e)(8) of this final rule, the facility must develop, and submit to APHIS for approval, written criteria that address termination and resumption of a session. As noted above, if an incident is the fault of the human participant not adhering to the rules, under § 3.111(e)(5) of this final rule, that participant must be removed. In all cases, the human participant/cetacean ratio specified in § 3.111(e)(4) of this final rule must be observed, which may require removing public members from the session if a cetacean is removed. We consider the language of this final rule to be sufficient to cover these issues. If the cetacean cannot be removed from the interactive area, § 3.111(e)(8) of this final rule requires that the session be terminated.

One commenter stated that mildly aggressive behavior merely demonstrates momentary annoyance on the part of the cetacean, and that extremely aggressive behavior by cetaceans is very rare and occurs only when the human is acting aggressively. The commenter recommended that if a cetacean is repeatedly severely aggressive, or is observed to be severely aggressive without provocation, that animal should be removed from the SWTD program and be returned only at the discretion of the primary attendant. One commenter recommended that cetaceans exhibiting aggressive behavior be removed from the program for at least 24 hours, and also recommended that the conditions under which the animals could be returned be specified in the regulations. Some commenters stated generally that provision should be made for reintroducing the cetaceans to an SWTD program after they are retrained. Several commenters stated that the regulations should require the submission of plans for either retraining and reintroducing the cetaceans to an SWTD program, or transferring the animals to a standard public display facility.

In § 3.111(e)(7) as proposed (redesignated as paragraph (e)(8) in this final rule), we set forth the requirement for a written protocol addressing program animals that exhibit potentially unsafe behaviors, as well as a protocol for ending a session when an animal exhibiting unsatisfactory behaviors cannot be removed from the interactive area. In order to clarify our intent with regard to the issues raised by the commenters, we are adding language to

§ 3.111(e)(8) of this final rule to require that the written protocol address how animals exhibiting potential unsatisfactory, undesirable, or unsafe behaviors will be handled, including, but not limited to, such things as retraining protocols, time off from program, and what the facility will do with animals that can no longer participate safely in the program.

Several commenters recommended that, in addition to being removed from an SWTD session, cetaceans exhibiting undesirable behavior should be permanently banned from SWTD programs and be set free after successfully completing a readaption and release program.

We believe that this final rule provides safeguards on animals that exhibit inappropriate behavior. We are making no changes based on these comments. It is not within the jurisdiction or authority of APHIS to require that animals not usable in an SWTD session be released into the wild.

One commenter recommended that APHIS consult with the professional marine mammal trainer community to determine the following: (1) Conditions under which cetaceans must be permanently removed from SWTD programs; (2) conditions under which cetaceans must be removed temporarily from SWTD programs for retraining; (3) what form retraining will take; and (4) what housing conditions and social environments are appropriate for cetaceans removed temporarily or long-term from SWTD programs.

Because the regulations in this final rule require the facility to develop a plan and submit it to APHIS for the handling of problem animals in the SWTD program, we do not consider it necessary to consult with the International Marine Animal Trainer's Association or a similar organization at this time. If a concern arises regarding a specific protocol submitted, APHIS will determine the acceptability of the protocol.

One commenter stated that criteria for termination of a session should be developed by APHIS, not by the SWTD facility, and that the decision whether to implement the termination procedures should be left to the behaviorist or supervising attendant. Conversely, one commenter stated that protocols for removing cetaceans or terminating sessions should not have to be submitted to APHIS, but rather, should be developed by and be maintained at the facility for review upon request.

We consider the language in § 3.111(e)(8) of this final rule regarding unsatisfactory, undesirable, or unsafe cetacean behavior, discussed above, to

provide for the necessary APHIS oversight on the issue of session termination. Therefore, we are making no changes based on these comments.

Proposed § 3.111(e)(7) (redesignated as paragraph (e)(8) in this final rule) provided that the primary behaviorist shall determine when operations will be terminated, and when they may resume. We proposed, further, that in the absence of the primary behaviorist, these determinations shall be made by the supervising attendant.

One commenter recommended that the decision whether to terminate a session be made by the "experienced head trainer," and that, in cases where SWTD cetaceans exhibit unsatisfactory behaviors during a session, direct contact between participating cetaceans and humans be terminated until the experienced head trainer, experienced qualified trainer, or designated attendant determines that the unsatisfactory behavior has been ameliorated through operant conditioning.

As noted above, the requirements of § 3.111(e)(8) of this rule include submission to APHIS of a written protocol for responding to instances of inappropriate behavior by program animals. This allows the facility to designate the chain of responsibility for making the decision to remove the animal and/or terminate the session. APHIS will be responsible for reviewing and approving all such protocols. However, we consider it to be in the best interest of the animals and the SWTD program to allow only the head trainer/behaviorist to determine when a session may be resumed, and such a provision is included in § 3.111(e)(8) of this final rule.

With regard to the commenter's reference to amelioration of unsatisfactory behavior through "operant conditioning," we have discussed earlier our policy of not requiring any specific training method, as long as the training methods used are not in violation of the AWA.

One commenter expressed concern that the proposed rule did not include requirements governing how long offending cetaceans must be kept out of the program and under what conditions they may be returned.

Because each animal and the circumstances for its removal from the program will be unique, it would not be advisable to mandate one protocol for determining how the behavioral infraction and retraining must be handled. We consider the language as proposed for § 3.111(e)(7) and as modified for § 3.111(e)(8) of this final rule, as discussed above, to be adequate

to address the concerns and issues raised in these comments.

One commenter expressed concern that the requirements in proposed § 3.111(e)(7) did not require separate gated holding area(s) for cetaceans that must be removed, either temporarily or permanently, from swim activities.

The requirements under proposed § 3.111(e)(7) (as amended above as paragraph (e)(8)) include submission of written protocols to APHIS for approval, and termination of a session if the offending cetacean cannot be removed from the interactive area. These provisions will require the facility to determine and to set forth how it will handle an animal that must be removed from the program for an extended period of time, and such protocols will be subject to APHIS approval. We do not consider it necessary or practical to require facilities to maintain a primary enclosure that may never be needed.

Reporting and Recordkeeping

In § 3.111(f) of the proposed rule, we set forth requirements for reporting and recordkeeping that would have to be met by SWTD facilities. Several commenters expressed general opposition to any reporting and recordkeeping requirements that are not applicable to all marine mammals under the regulations. One commenter recommended that the only additional recordkeeping required for SWTD programs should be a log of cetacean/human interaction times and a listing of cetacean participants in the programs.

Due to the nature of the SWTD programs, which may place participating animals at an increased risk of stress and injury compared to other marine mammal exhibits, we consider the recordkeeping requirements specific to SWTD programs to be necessary in enforcing the SWTD regulations and in protecting the well-being of the program animals. In the following paragraphs, we discuss specific proposed recordkeeping requirements as addressed by commenters.

We proposed in § 3.111(f)(1) that prospective SWTD programs must submit to APHIS specified descriptive information about their program at least 30 days prior to the proposed initiation of the program, and that existing facilities must submit such information within 30 days of the effective date of the final rule.

Commenters stated that the regulations should require that descriptions of SWTD programs must be received by APHIS at least 120 days prior to the proposed initiation of a program, rather than 30 days as required

by the proposed rule, so that APHIS can give notice of the request for approval in the **Federal Register** and accept comments on the request. One commenter recommended that APHIS also forward the notice of intent to the Marine Mammal Commission for comment.

We are making no changes based on these comments. Under the AWA, a person meeting the regulations and standards of the AWA will be issued a license. The AWA, and the regulations promulgated under the AWA, do not require publication of a notice in the **Federal Register** prior to the issuance of a license. Such a requirement would be inconsistent with all other licensing procedures under the AWA, and we consider it unnecessary in the licensing of facilities that comply with the regulations and standards.

One commenter requested that the regulations state that a new SWTD program may not begin operations until any deficiencies noted by APHIS in its pre-approval inspection have been corrected. Another commenter stated that the regulations should set forth or cite the processes and procedures for revoking or denying licenses.

New facilities are subject to all licensing requirements promulgated under the AWA, including being in compliance with the AWA during a pre-licensing inspection (§§ 2.1 through 2.11). Currently licensed facilities that wish to add an SWTD program would be subject to the requirements of § 3.111, including APHIS evaluation of the plans and facility prior to the start of the program.

The process for revoking a license is found in the AWA (7 U.S.C. 2149), and we do not consider it necessary to include it in the regulations. Denial of a license is addressed in § 2.11. All facilities must comply with all AWA regulations that apply to their regulated activity.

Several commenters specifically opposed a number of the reporting and recordkeeping requirements in proposed § 3.111(f), and certain of the proposed veterinary requirements in § 3.111(g). The proposed provisions in question, the commenter's concerns and recommendations, and our responses, are as follows.

One commenter opposed the provision in proposed § 3.111(f)(1)(i) that the Administrator could require that a description of program cetaceans include more than each animal's name and/or number, sex, and age.

We consider this provision necessary to allow APHIS to require further identifying information or techniques if more specific and permanent

identification is necessary to trace animals in or between SWTD programs. For example, instances may arise where an animal that shows a pattern of inappropriate behavior changes ownership and location. In such a case, APHIS may require that information be available in order to trace the animal's ownership and history. Therefore, we are retaining the provision in question in this final rule.

One commenter opposed the requirement in proposed § 3.111(f)(1)(ii) for the reporting of the duration of encounters per cetacean per day, stating that, because the regulations require that interaction time not exceed 2 hours per day, the average duration of encounters is not relevant.

We consider the reporting of the duration of interactive periods for each cetacean necessary in enforcing the 2-hour daily interaction limit, and are making no changes based on the comment.

One commenter opposed the requirement for a description of the educational content of interactive sessions, stating that such a requirement was outside the scope of APHIS's regulatory authority. Conversely, several commenters stated that APHIS should conduct a formal, in-depth review of the educational content of proposed programs, with the Administrator retaining the right to deny a permit to a facility whose educational content is misleading or inadequate.

We disagree that requiring a description of educational content is beyond APHIS's authority. Prior to APHIS's being mandated to regulate SWTD programs, NMFS regulated the educational content of SWTD programs under special permit conditions. APHIS was granted sole jurisdiction for SWTD programs in 1994. The educational material presented to participants may directly impact the well-being of the cetaceans, by presenting information regarding what is "acceptable" treatment of cetaceans, both in captivity and in the wild. With regard to denying a permit based on review by APHIS of an educational program, APHIS does not grant permits under the AWA, and, therefore, cannot deny such a permit. As discussed above, we designed this rule to provide protection of the animals under the AWA, without placing an undue burden on licensees. Therefore, if a person applies for a license, is determined to be in compliance with all appropriate regulations and standards under the AWA, and pays the appropriate licensing fee, that person will be licensed. Under § 3.111(f)(2), APHIS will inform the facility of any

deficiencies found in the submitted recordkeeping documents.

With regard to the commenter recommendation that APHIS conduct a "formal, in-depth" review of the educational content of proposed programs, it is not clear to us from the comments exactly what form of review the commenters were recommending. As discussed above, APHIS will officially review the content of each educational program.

As part of the information required to be submitted to APHIS under proposed § 3.111, we proposed under § 3.111(f)(1)(iii) that an SWTD facility must provide APHIS with the content and method of pre-encounter orientation, rules, and instructions, including restrictions on types of physical contact with the cetaceans. One commenter stated that the restrictions on physical contact should be determined by APHIS.

The regulations as proposed and as set forth in this final rule include prohibition of certain forms of contact. However, beyond what is specifically prohibited by the regulations, different facilities may wish to establish additional rules concerning what program content may be safe and appropriate for that facility. For example, whether a facility includes behavior such as kissing or presenting of tail may depend on the level of expertise and training of its staff. APHIS will review each program and may request clarification or justification of a given proposed behavior, and will determine if the proposed program is in accordance with § 3.111(e)(7) of this final rule.

One commenter stated that it would be more appropriate to keep at the facility the information regarding pre-encounter instruction required under § 3.111(f)(1)(iii), than to submit it to APHIS as required under the proposed provisions.

Submission to APHIS of the information in question is necessary to allow the Animal Care Staff Officer responsible for APHIS oversight of SWTD programs, in conjunction with APHIS regional and field personnel, to evaluate as needed the records in question. This oversight is necessary to provide consistent and uniform enforcement.

One commenter objected to the requirement in proposed § 3.111(f)(1)(iv) that a description of the SWTD facility include housing at the facility other than the primary enclosure, stating that such a requirement was outside the scope of the regulations. Another commenter said that the regulations should specify that operations may not

commence until a site visit by APHIS inspectors has confirmed that the description of the program and facility is accurate and that the facility meets all the requirements of the regulations.

It appears from the comments that we should clarify the intent of this requirement. The information that must be submitted under § 3.111(f)(1)(iv) includes a description of the primary enclosure and other housing facilities utilized by SWTD cetaceans. These include, but are not limited to, holding or training enclosures and medical facilities. To clarify this intent, we are requiring at § 3.111(f)(1)(iv) of this rule "a description of the SWTD facility, including the primary enclosure and other SWTD animal housing or holding enclosures at the facility." (The licensee must also comply with any other applicable regulations in subpart E, "Marine Mammals.") All new (previously unlicensed) facilities will, by regulation, be required to undergo the regular preclicensing protocols as set forth in part 2 of the AWA regulations and standards. Currently licensed facilities that may wish to begin an SWTD program will be subject to inspection as deemed necessary by APHIS. This is consistent with APHIS enforcement of the AWA in other areas of animal care.

One commenter opposed the requirement in proposed § 3.111(f)(1)(vi) for a reporting of the *curriculum vitae* of all staff involved in the handling, care, and maintenance of cetaceans in the program, stating that such a requirement was burdensome, unnecessary, and not consistent with other APHIS requirements. The commenter recommended that the regulations require instead only a summary of the background of the licensee, the experienced head trainer, and the experienced qualified trainer.

The proposed language requiring submission of a *curriculum vitae* for all staff involved in the handling, care, and maintenance of the program animals was intended to provide documentation of compliance with § 3.111(c) and to verify that the persons involved in the care of the cetaceans have adequate training and experience. We believe that at least part of the perceived burden of this requirement was due to our use of the term *curriculum vitae*, which to some people implies a rigid, lengthy format. To clarify our intent, we are removing the reference to *curriculum vitae* in § 3.111(f)(1)(vi) and are replacing it with the requirement that a "resume" be submitted for each of the employees in question. In ordinary common usage, a resume allows for a

more flexible format than does a *curriculum vitae*.

One commenter stated that, along with a *curriculum vitae*, the regulations should require a description of how the staff positions were established and filled through the use of validated, professional personnel protocols.

Beyond assuring the use of adequately trained and experienced personnel, we consider it inappropriate to dictate the personnel or resource management practices of private enterprises.

One commenter stated that, in addition to requiring proof of each animal's physical health, the regulations at § 3.111(f)(1)(vii) should require that every cetacean that is a candidate for an SWTD program must first pass a thorough behavioral evaluation conducted by the attending veterinarian.

We are making no changes based on this comment. Although a number of experienced marine mammal veterinarians may have exposure to or experience in the area of marine mammal behavior, we do not consider a behavioral evaluation by an attending veterinarian a necessity. We consider it most appropriate for a trained behaviorist to evaluate the suitability of a cetacean for an SWTD program and to conduct its subsequent training.

One commenter recommended deletion of the proposed requirement in § 3.111(f)(1)(viii) that a written program of veterinary care (APHIS form 7002), including protocols and schedules of professional visits, be submitted to APHIS. The commenter stated that APHIS should apply its standard approach with regard to veterinary care.

The regulations regarding SWTD programs set forth at § 3.111 are designed to address issues and areas where additional requirements or clarification appear necessary to address the special needs of a given program or species. As stated previously in this document, SWTD programs may potentially pose a higher risk of injury and stress to the animals than do standard marine mammal facilities. To address this possibility, more detailed veterinary care requirements are set forth at § 3.111(g). However, after review of the comments received, we have reassessed the need for submission of a written program of veterinary care at all facilities, and have determined that a written protocol is not necessary if the facility employs a full-time veterinarian or consultant. We continue to believe that a written program of veterinary care is necessary at facilities that do not have a full-time attending veterinarian or consultant, and are including language in this final rule to clarify that intent. Therefore, § 3.111(f)(1)(viii) of this final

rule will require the submission of, "for facilities that employ a part-time attending veterinarian or consultant arrangements, a written program of veterinary care (APHIS form 7002), including protocols and schedules of professional visits."

We proposed in § 3.111(f)(1)(ix) to require a detailed description of the monitoring program to be used to detect and identify changes in the behavior and health of SWTD cetaceans. One commenter stated that such a monitoring program should be developed and prescribed by APHIS.

Because each facility will be developing its own program, we do not consider it practical to impose a strict, standardized monitoring system that may be inappropriate for a facility and its personnel. Because documentation of each monitoring program must be submitted to APHIS for evaluation, we will have adequate opportunity to clarify any issues concerning each program and to work with each facility in developing an appropriate program.

One commenter stated that it would be more appropriate to keep the information required in § 3.111(f)(1)(ix) on site for APHIS inspection than to require that it be submitted to APHIS.

As discussed above regarding the need to submit pre-encounter presentation and instruction to APHIS, the intent of § 3.111(f) is to allow APHIS to evaluate in a consistent manner proposed programs for compliance with the regulations. Because this evaluation will be carried out at APHIS Animal Care headquarters, the necessary information must be submitted to APHIS.

We provided in proposed § 3.111(f)(2) that, in the case of a new or existing SWTD program that APHIS finds deficient in any respect, the facility will be notified of the deficiencies and be provided the opportunity to make corrections. One commenter opposed this provision, stating that APHIS should deny or revoke operating licenses if the regulations are not complied with.

The procedures for denying a license and revocation of a license have been previously discussed. However, in order to clarify our intent in the proposed rule, § 3.111(f)(2) of this final rule will require that all SWTD programs comply in all respects with the regulations and standards set forth in parts 2 and 3 of the AWA regulations. Correction dates are only given by APHIS to licensees or registrants to facilitate compliance with the AWA and the regulations and standards. Licensees and registrants are still liable for violations at the time they

are identified by APHIS, even though they may subsequently be corrected.

One commenter recommended that the requirement in proposed § 3.111(f)(3) that individual animal veterinary records be kept at the SWTD site for 5 years be changed to follow what the commenter called "general APHIS requirements"—*i.e.*, retention of records on-site for 1 year, retention of necropsy reports for 3 years, and availability of such records for inspection at the facility.

The potential long-term medical and stress effects of SWTD programs have not been documented to date. In order to assess any chronic problems that may be associated with these programs, medical records of longer than 1 year are necessary. For example, any changes in the reproductive cycle of program animals would require examination of records of more than 1 year. However, after review of comments received, we consider retention of records for 3 years, instead of 5 years, to be sufficient to document long-term effects on program animals. Accordingly, we are amending the requirement for veterinary recordkeeping at § 3.111(f)(3) to require that such records be retained for 3 years and be made available to an APHIS official upon request during inspection. We are also clarifying the recordkeeping requirements at § 3.111(f)(5) and (g)(5) to state that the records that must be kept at the facility regarding participation in the SWTD program and water quality must be made available to an APHIS official upon request during inspection.

One commenter expressed concern that the individual animal veterinary records required under proposed § 3.111(f)(3) would not be required to be submitted to APHIS.

We are making no changes based on this comment. The regulations promulgated under the AWA have never required that medical records, including necropsy records, be submitted to APHIS. Rather, the records are required to be maintained at the regulated facility for APHIS's inspection. We have found this requirement adequate for effective enforcement of the regulations, and do not consider the additional reporting burden of submitting such records to APHIS to be justified. APHIS may acquire copies of these records during an investigation.

Several commenters suggested that complete reports of necropsies conducted on SWTD cetaceans should be submitted to APHIS as a matter of course, rather than only "during facility inspections, or as required by APHIS," as was proposed. One commenter recommended that the regulations

include the name and telephone number of an APHIS contact. Several commenters recommended that the regulations require that a copy of the necropsy results be submitted to NMFS as well as to APHIS.

As noted above, the requirement that necropsy reports be retained at the facility and be made available to APHIS for inspection is consistent with all other species requirements under the AWA regulations. This requirement has been sufficient for APHIS enforcement of those regulations. Therefore, we are making no changes to the final rule based on these comments.

In § 3.111(g)(6) of our proposed rule, we set forth the requirement that, in the event of the death of a cetacean, complete necropsy results, including all appropriate histopathology, must be recorded in the cetacean's individual file and be made available to APHIS officials during facility inspections, or as requested by APHIS. Several commenters recommended that APHIS delineate, comprehensively and in detail, what would be required in a "complete necropsy." Additionally, a commenter recommended that, prior to cetaceans being necropsied, still photographs should be made of the cetaceans, and also that necropsies of cetaceans should be videotaped.

As discussed above, the intent of this rule is not to define or regulate the practice of veterinary medicine. We consider § 3.111(g)(6) of this final rule to be adequate for APHIS enforcement of the regulations.

Several commenters opposed the requirement in proposed § 3.111(f)(5) that a copy of statistical reports regarding participation by cetaceans and humans, and a report of any changes in the SWTD program, be submitted to APHIS on a semi-annual basis. The commenter stated that "general APHIS requirements" should be followed. One commenter recommended that the submission of such reports be required more often than every 6 months. Several commenters recommended that the statistical summary include the number of minutes per day that each cetacean participated in an SWTD session, rather than both that information and the number of hours each week that a program animal participated in an interactive session.

We assume that, by "general APHIS requirements," the commenter was referring to requirements elsewhere in the regulations that the information be kept on hand and available at the facility for inspection by an APHIS official. We agree that maintaining at the facility records of the number of minutes of cetacean interaction per day,

rather than both that information and the number of hours per week, is acceptable with regard to the required statistical analysis. Therefore, this final rule does not require semi-annual submission of records of the number of hours of participation per week. However, it does require that the number of minutes of each animal's participation per day be kept at the facility. Further, we continue to consider it necessary that changes in an SWT D program be documented and submitted to APHIS on a semi-annual basis, in order to allow for APHIS evaluation of the program content. We do not consider semi-annual reporting of program changes to be excessive, and we believe it provides sufficient and necessary oversight of program changes and compliance.

One commenter opposed the requirement at proposed § 3.111(f)(6) for the reporting of all incidents resulting in injury to either cetaceans or humans participating in an interactive session. The commenter recommended that the regulations require instead the reporting only of injurious incidents that result from direct contact between participating animals and humans and that require treatment by either a veterinarian or a physician. The commenter also recommended that APHIS provide a voice mail number and a FAX number to SWT D operators to facilitate compliance with the reporting requirements.

In order to enforce the safe operation of SWT D programs, APHIS needs to be made aware of all injuries resulting from the interactive sessions, both to humans and cetaceans. This information will be used, not only in the enforcement of the current regulations and standards, but as a tool to evaluate the need for regulatory changes to prevent future injuries. There are many types or degrees of injuries that would not require intervention by a veterinarian or physician, but that may be preventable in the future. Therefore, we are retaining the requirement that all incidents involving injury to human or cetacean SWT D participants be reported to APHIS.

Because of the danger of telephone and FAX numbers in the regulations becoming outdated, we do not consider it advisable to publish such information in the Code of Federal Regulations. However, we will provide to each SWT D facility information on available means of communication.

One commenter recommended that the regulations require that, in addition to the reporting of injuries, incidence of disease transmission to cetaceans and/or

humans be reported to APHIS on a timely basis.

Because there has been no reported disease transmission between cetaceans and humans in the U.S. public display industry, there does not appear to be a need to require such reporting. Therefore, we are not making any changes to the final rule based on this comment.

One commenter recommended that the regulations specifically require consistency and thoroughness in both immediate and quarterly reports.

All records will be examined during routine, unannounced inspections by APHIS personnel. Any problems or discrepancies will be addressed at that time. As long as the required information is available in an understandable form, APHIS does not require, at this time, that a specific format be used.

Veterinary Evaluations

Among other things, proposed § 3.111(g) contained the requirements that the attending veterinarian at an SWT D program conduct on-site evaluations of each cetacean at least once a month, observe an interactive swim session at the SWT D site at least once each month, and conduct a complete physical examination of each cetacean at least once every 6 months. One commenter recommended that the regulations require instead that the attending veterinarian conduct an on-site evaluation of each cetacean every 2 weeks, that a fully qualified veterinarian with proven marine mammal competence be physically present pool side during each commercial human/cetacean interaction, and that the attending veterinarian physically examine each cetacean every 3 months instead of every 6 months.

Requiring a physical examination of the program animals by the attending veterinarian every 6 months is consistent with currently accepted practices for marine mammal veterinary medicine.

There is neither historical nor current information to support the recommendation that the attending veterinarian must be on-site during every interactive session. Because most current SWT D facilities employ a part-time veterinarian, such a regulation would place an undue burden on the facilities and the attending veterinarians.

The comments received included no evidence of the advantages of requiring biweekly, rather than monthly, visits to the program by the attending veterinarian. In the absence of data demonstrating the benefits of such a

requirement, relative to the burden and costs it would entail, we do not consider it appropriate or necessary to impose such a requirement.

One commenter objected to the proposed requirement that each cetacean be physically examined every 6 months. The commenter stated that conducting such an examination could potentially harm a cetacean, by making it necessary that it be netted. The commenter stated that netting would be necessary for programs in a natural environment where cetaceans could not be trained to beach themselves for examination. Additionally, the commenter questioned the need for physical examinations of cetaceans that are maintained in a stress-free environment.

Because program animals are required to be trained and under the control of the trainers/attendants during sessions, we do not agree that requiring semi-annual examinations is unreasonable. All animals should be trained in husbandry behaviors that facilitate the required examinations. Regular preventive medicine check-ups represent the current state of accepted and adequate veterinary medical care programs. The goal is to prevent problems, rather than have to deal with emergencies or very sick animals. Additionally, although we can try to reduce unnecessary stress, we are not aware of any stress-free environment. Further, stress is not the only factor that can affect the health and well-being of an animal.

Several commenters stated that requirements relating to veterinary evaluations of the cetaceans participating in SWT D programs should be incorporated into and be consistent with "general" APHIS requirements. Additionally, the commenter took issue with our statement in the explanatory information of the proposed rule that the proposed veterinary monitoring is necessary to help prevent the spread of zoonotic diseases. The commenter stated that APHIS inspections have produced no evidence of such diseases, and that the scientific literature does not contain such evidence. Another commenter stated that the reference in our explanatory information to veterinary standards developed at an NMFS-sponsored workshop refers to temporary standards developed for a specific study.

The nature of the SWT D program, with much more diverse human interaction than other programs of public display of marine mammals, necessitates a focused monitoring of the health and well-being of these animals.

As noted above, we are aware of no scientific documentation demonstrating a risk of zoonotic disease transmission between human and cetaceans. It was not the intent of the proposed rule to imply that such data exists. Perhaps our intent would have been better conveyed by the statement that "this regular monitoring will be a beneficial tool in the prevention of the spread of potentially zoonotic diseases during the program." Therefore, we are making no changes to the final rule based on these comments.

Animals Adversely Affected

One commenter recommended that the regulations should use the wording developed by NMFS to require the following: (1) That animals that respond adversely to encounters be removed from the program until such time as their health is restored and/or their behavior poses no risk to humans involved in the program; (2) that cetaceans be removed from swims with members of the public while on medication for infectious illness or a debilitating condition; and (3) that the program be suspended immediately if a cetacean shows signs of program-related health problems or undesirable behavior as a result of the SWTD program.

The issues of when, behaviorally, an animal must be removed from and may be returned to the interactive program sessions have been addressed above and are set forth in § 3.111(e)(8) of this final rule. We do not consider it necessary to require cessation of a session if the offending animal can be removed from the area. Although we agree there is potential value in including specific language concerning the health status of animals used during a session, we are aware of no medical reason to require the removal of all animals that may be on medication. (Medication for an infectious or chronic illness may be administered well beyond any infectious or dangerous stage.) To clarify our intent, § 3.111(e)(3) of this final rule provides that all cetaceans used in interactive sessions must be in good health, including, but not limited to, not being infectious, and that cetaceans undergoing veterinary treatment may be used in interactive sessions only with the approval of the attending veterinarian.

Several commenters stated that the proposed regulations included no course of action for cetaceans found to be sick or injured. One commenter expressed concern that the proposed regulations did not require isolation pools for sick animals.

Regulations concerning the use of medical or isolation pools for sick

animals are found in the general marine mammal regulations of 9 CFR part 3, subpart E. The regulations in § 3.111 deal with situations and concerns specific to SWTD programs.

Nutritional and Reproductive Status of SWTD Cetaceans

In § 3.111(g)(4) of our proposed rule, we set forth the requirement that the attending veterinarian record the nutritional and reproductive status of each cetacean. One commenter stated that the regulations should specify that the attending veterinarian must determine and record the nutritional and reproductive status of each cetacean every 3 months.

Our intent was that the information required in § 3.111(g)(4) be recorded during each monthly visit to the facility. Therefore, we are rewording proposed § 3.111(g)(4) to clarify this intent. In this final rule, § 3.111(g)(4) will read: "The attending veterinarian, during the monthly site visit, shall record the nutritional and reproductive status of each cetacean (i.e., whether in active breeding program, pregnant, or nursing)."

Health and Safety Precautions

One commenter recommended that the rules of each program require human participants to shower with soap and water before and after interactive sessions. Another commenter stated that each human participant should be informed that facilities for showering with soap and water before and after swim sessions are available, and that showering is recommended.

Because we do not, under the AWA, require trainers and attendants at facilities other than SWTD facilities to shower, we are leaving this decision to the facility and to State and local health ordinances to dictate. Because it would not be in the best interest of facilities to risk the health of their animals, we believe that facilities, through the issuance of their own rules for the program (which are subject to APHIS evaluation) will address these issues in the most appropriate manner for each facility.

One commenter stated that the regulations should require that all human participants in an SWTD session be "disease-free"—i.e., no one should be allowed to swim with cetaceans if he or she has any known conditions. The same commenter stated that SWTD facilities should be used only for recreational swims, not for therapy.

We are making no changes based on this comment. All SWTD activities held at USDA licensed facilities, including therapy sessions, will be subject to this

final rule. It is beyond the scope of this rule to restrict licensed facilities from participating in therapy sessions. We consider it appropriate to allow each facility to establish the health rules that apply to the human participants in the interactive sessions, in accordance with all State, local, and public health ordinances.

One commenter recommended that each SWTD facility be required to develop a contingency plan for storms, to deal with the potential escape of cetaceans. The commenter stated that such a contingency plan should include a strategy for marking each cetacean so that "escaped" cetaceans can be distinguished from wild animals, and therefore be more easily recognized and captured.

The need for contingency plans is addressed in the general marine mammal regulations in § 3.101. Any changes to those provisions will be addressed in future rulemaking.

One commenter expressed concern that the proposed regulations included no provision for or discussion of human safety with regard to an SWTD pool being a swimming pool—e.g., with regard to lifeguard and cardiopulmonary resuscitation training.

Our authority under the AWA extends to the humane handling, care, and treatment of animals covered by that Act. However, the AWA and duly promulgated regulations and standards do not preclude a facility from adhering to all appropriate State and local laws and ordinances. If a facility is located in a community that requires lifeguards, etc., at the facility, it is the responsibility of the facility to comply with such a requirement.

One commenter stated that SWTD program rules should specifically prohibit the feeding of cetaceans by customers.

Under the current regulations, feeding of marine mammals is acceptable under certain conditions (§ 3.105(c)). As discussed above, it is up to the facility, subject to APHIS evaluation of program parameters, to determine which behaviors and activities it will include in its interactive sessions.

One commenter stated that more research regarding human/cetacean interactions should be done before additional SWTD programs are created.

Four NMFS-permitted SWTD programs have already been studied (see footnote 1, above). Further program analysis cannot be done without more programs to study. We consider there to be sufficient historical and study data to conclude that no justifiable reason exists to prohibit the operations of SWTD programs. APHIS does not have

the authority to allow some facilities to operate an SWTD program, while prohibiting others that meet the requirements under the AWA from operating.

One commenter expressed concern that the proposed rule did not restrict the participation of small children in an SWTD program. The commenter stated that the lack of such a restriction would increase the risk of injury to human participants and, as a result, could have an adverse effect on program cetaceans.

At this time, we consider the issue of the age of human participants to be most appropriately left to the facility. While it seems obvious that facilities' whose program involves swimming in deep water must require their customers to be able to swim, facilities that also offer programs for wading or participation from a dock may require the same degree of swimming ability. At this time, no evidence has been presented to us that would support a strict age limit on human participation in these programs. APHIS will reevaluate this position if injury data and/or animal medical records indicate a change is necessary.

Miscellaneous

We are also making nonsubstantive changes in this final rule for conformity and clarity.

Therefore, based on the information set forth in the proposed rule and in this final rule, we are adopting the provisions of the proposal as a final rule with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. The analyses required by Executive Order 12866 and the Regulatory Flexibility Act are set forth below.

We are issuing this rule in accordance with our authority under the Animal Welfare Act (AWA) (7 U.S.C. 2131 *et seq.*). The AWA requires that the Secretary of Agriculture promulgate standards to govern the humane handling, care, treatment and transportation of animals by dealers, exhibitors, research facilities, and carriers and intermediate handlers.

This final rule establishes regulations and standards for the humane handling, care, and treatment of cetaceans used in SWTD programs. These regulations and standards address space requirements, veterinary care, personnel and handling

requirements, and recordkeeping. Until this final rule becomes effective, APHIS does not have in place specific standards that address the special considerations of SWTD programs. The provisions of this final rule are necessary to address those considerations, so that the animals used in the program are treated in a humane manner.

Under this rule, operators of SWTD programs will be required to meet specified standards for those programs. These standards will include requirements for handling, facility design, reporting, and recordkeeping.

Currently, close to 135 exhibitors in the United States are licensed by APHIS to hold marine mammals. Of this number, at least six operate SWTD programs. At least four of these six exhibitors already meet the standards we are establishing in this final rule. The remaining exhibitors may have to make certain design changes and provide for additional training to comply with the standards. The cost of the additional training requirements would be approximately \$15,000 per facility. The estimated costs of materials to complete the design changes would be approximately \$1,000 per facility. Based on information provided by the industry concerning the average annual gross revenue of SWTD programs, the additional costs involved in complying with the standards should not pose a significant economic burden on SWTD exhibitors, all of whom are considered small entities.

Through this final rule, benefits will accrue to society by the public's knowing that animals in future, as well as in existing SWTD programs, will be cared and handled in a humane manner. The value of these social benefits are subject to personal preferences and concerns and cannot be directly compared with the costs to affected entities.

In development of this rule, we examined and rejected the alternative options of (1) foregoing AWA regulations in favor of industry self-regulation, and (2) developing regulations more stringent than those set forth in this rule.

We did not consider it feasible to choose the option of foregoing regulation of SWTD program facilities. The special needs and requirements of these programs are not conducive to self-regulation at this time, because we cannot be sure that all facilities that may become licensed will voluntarily accept the same standards.

Likewise, we did not consider the option of adopting even more stringent requirements to be warranted. Standards

more restrictive than those set forth in this rule would require significant increases in expenses and recordkeeping, without a commensurate increase in the well-being of program animals.

A summary of our analysis of selected specific recommendations addressed in detail in the preamble that we consider to be unnecessarily costly include the following:

Space requirements in excess of those required by this rule: Commenters recommended that each SWTD facility have four areas, rather than three; that the sanctuary and buffer areas be three times the size of the interactive areas; and that space requirements be based on 10–12 times the average adult body length. We do not consider there to be documented benefits to program animals to justify these recommended requirements. Requiring an increase in the size of the enclosure beyond that required in this final rule, or requiring an additional enclosure area would potentially force five of the six currently operating facilities to close or to move and/or build new facilities. Recent pool construction of a new facility with one primary enclosure similar in size to those recommended cost approximately \$10 million. If space were available for existing facilities to expand the size of their cetacean areas, small to medium pool enlargements could cost approximately \$1 million per facility.

Increased personnel requirements: Commenters recommended that the regulations set forth certified job descriptions; that a fully qualified veterinarian with proven marine mammal competence be physically present at poolside during each commercial human/cetacean interaction; and that the attending veterinarian conduct an on-site evaluation of each cetacean every 2 weeks, rather than every month as required by this rule. We consider the regulations in this final rule to be adequate to protect the well-being of program animals and the additional cost that would be imposed by the commenter recommendations to be unnecessary. Creating uniform position descriptions would require meeting and negotiations among current facilities. We estimate such interaction would cost each facility approximately \$10,000 in travel costs and time absent from duties at the facility. To require a full-time veterinarian to be present at all sessions would cost between \$75,000 and \$100,000 per year per facility. Requiring biweekly visits by the attending veterinarian would double the costs for such visits required by this rule, with the chance that some facilities would

not be able to retain their attending veterinarian due to excessive time requirements.

Increased cetacean rest periods: Several commenters recommended that the rest periods for each program animal be increased beyond that required by this rule. We consider the rest periods required by this rule to be adequate for the well-being of the animals, and consider increased rest periods to be unnecessarily costly with no documented benefit to the animals. If the requirements recommended by the commenters were implemented, facilities would either have to add animals to their programs or decrease the number of sessions per facility. Adding animals would require an estimated 25–100 percent increase in animal maintenance costs, in addition to the cost of acquiring the animals and possible increased personnel costs. If the number of allowable sessions per day were decreased by one beyond those allowed under this rule, each facility would suffer the loss of six to nine customers per session. At approximately \$125 per session for each person, each facility would lose from \$750–1,125 per day. Over a period of 350 to 365 operating days per year, the annual loss per facility would total from \$262,500 to \$410,625.

This final rule will require affected entities to comply with reporting and recordkeeping requirements. Each facility operating an SWTD program must submit written copies of the rules and instructions used in the introductory session, the procedures for terminating a session, a description of the SWTD program, and reports regarding participation in the program. Additionally, each facility will be required to maintain veterinary, feeding, and behavioral records for SWTD animals, as well as profile (animal identification) information, nutritional and reproductive status information, and a written assessment by the attending veterinarian. Facilities will be required to report to APHIS injuries sustained by cetaceans or human participants.

The estimated extent of the reporting and recordkeeping requirements is as follows:

Estimate of burden: The public reporting burden for this collection of information is estimated to average .16830 hours per response.

Respondents: Owners and operators of SWTD facilities.

Estimated annual number of respondents: 6.

Estimated annual number of responses: 30,344.

Estimated annual number of responses per respondent: 7,586.

Estimated total annual burden on respondents: 5,170 hours. (Due to rounding, the total annual burden hours may not equal the product of the annual number of responses multiplied by the average reporting burden per response.)

The Department has identified no Federal rules that duplicate, overlap, or conflict with this rule.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the information collection or recordkeeping requirements included in this final rule have been approved by the Office of Management and Budget (OMB) under OMB control numbers 0579–0036 and 0579–0115.

List of Subjects

9 CFR Part 1

Animal welfare, Animal housing, Dealers, Exhibitors, Humane animal handling, Research facilities.

9 CFR Part 3

Animal welfare, Humane animal handling, Pets, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR parts 1 and 3 are amended as follows:

PART 1—DEFINITION OF TERMS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.2(g).

2. In § 1.1, definitions of *buffer area*, *interactive area*, *interactive session*, *sanctuary area*, and *swim-with-the-dolphin (SWTD) program* are added in alphabetical order, to read as follows:

§ 1.1 Definitions.

* * * * *

Buffer area means that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to members of the public and that directly abuts the interactive area.

* * * * *

Interactive area means that area in a primary enclosure for a swim-with-the-dolphin program where an interactive session takes place.

Interactive session means a swim-with-the-dolphin program session where members of the public enter a primary enclosure to interact with cetaceans.

* * * * *

Sanctuary area means that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to the public and that directly abuts the buffer area.

* * * * *

Swim-with-the-dolphin (SWTD) program means any human-cetacean interactive program in which a member of the public enters the primary enclosure in which an SWTD designated cetacean is housed to interact with the animal. This interaction includes, but such inclusions are not limited to, wading, swimming, snorkeling, or scuba diving in the enclosure. This interaction excludes, but such exclusions are not limited to, feeding and petting pools, and the participation of any member(s) of the public audience as a minor segment of an educational presentation or performance of a show.

* * * * *

PART 3—STANDARDS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.2(g).

4. In subpart E, § 3.104, paragraph (b)(4)(ii), footnote 9 is redesignated as footnote 10 and footnote 8 in § 3.104(b)(4)(i) is redesignated as footnote 9.

5. A new § 3.111 is added to read as follows:

§ 3.111 Swim-with-the-dolphin programs.

Swim-with-the-dolphin programs shall comply with the requirements in this section, as well as with all other applicable requirements of the regulations pertaining to marine mammals.

(a) **Space requirements.** The primary enclosure for SWTD cetaceans shall contain an interactive area, a buffer area, and a sanctuary area. None of these

areas shall be made uninviting to the animals. Movement of cetaceans into the buffer or sanctuary area shall not be restricted in any way. Notwithstanding the space requirements set forth in § 3.104, each of the three areas required

for SWTD programs shall meet the following space requirements:

(1) The horizontal dimension for each area must be at least three times the average adult body length of the species of cetacean used in the program;

(2) The minimum surface area required for each area is calculated as follows:

(i) *Up to two cetaceans:*

$$\text{Surface Area (SA)} = \left(\frac{3 \times \text{average adult body length (L)}}{2} \right)^2 \times 3.14$$

(ii) *Three cetaceans:*

$$\text{SA} = \left(\frac{3 \times L}{2} \right)^2 \times 3.14 \times 2$$

(iii) *Additional SA for each animal in excess of three:*

$$\text{SA} = \left(\frac{2 \times L}{2} \right)^2 \times 3.14$$

(3) The average depth for sea pens, lagoons, and similar natural enclosures at low tide shall be at least 9 feet. The average depth for any manmade enclosure or other structure not subject to tidal action shall be at least 9 feet. A portion of each area may be excluded when calculating the average depth, but the excluded portion may not be used in calculating whether the interactive, buffer, and sanctuary area meet the requirements of paragraphs (a)(1), (a)(2), and (a)(4) of this section.

(4) The minimum volume required for each animal is calculated as follows:

$$\text{Volume} = \text{SA} \times 9$$

(b) *Water clarity.* Sufficient water clarity shall be maintained so that attendants are able to observe cetaceans and humans at all times while within the interactive area. If water clarity does not allow these observations, the interactive sessions shall be canceled until the required clarity is provided.

(c) *Employees and attendants.* Each SWTD program shall have, at the minimum, the following personnel, with the following minimum backgrounds (each position shall be held by a separate individual, with a sufficient number of attendants to comply with § 3.111(e)(4)):

(1) Licensee or manager—at least one full-time staff member with at least 6 years experience in a professional or managerial position dealing with captive cetaceans;

(2) Head trainer/behaviorist—at least one full-time staff member with at least 6 years experience in training cetaceans

for SWTD behaviors in the past 10 years, or an equivalent amount of experience involving in-water training of cetaceans, who serves as the head trainer for the SWTD program;

(3) Trainer/supervising attendant—at least one full-time staff member with at least 3 years training and/or handling experience involving human/cetacean interaction programs;

(4) Attendant—an adequate number of staff members who are adequately trained in the care, behavior, and training of the program animals. Attendants shall be designated by the trainer, in consultation with the head trainer/behaviorist and licensee/manager, to conduct and monitor interactive sessions in accordance with § 3.111(e); and

(5) Attending veterinarian—at least one staff or consultant veterinarian who has at least the equivalent of 2 years full-time experience (4,160 or more hours) with cetacean medicine within the past 10 years, and who is licensed to practice veterinary medicine.

(d) *Program animals.* Only cetaceans that meet the requirements of § 3.111(e)(2) and (3) may be used in SWTD programs.

(e) *Handling.* (1) Interaction time (*i.e.*, designated interactive swim sessions) for each cetacean shall not exceed 2 hours per day. Each program cetacean shall have at least one period in each 24 hours of at least 10 continuous hours without public interaction.

(2) All cetaceans used in an interactive session shall be adequately

trained and conditioned in human interaction so that they respond in the session to the attendants with appropriate behavior for safe interaction. The head trainer/behaviorist, trainer/supervising attendant, or attendant shall, at all times, control the nature and extent of the cetacean interaction with the public during a session, using the trained responses of the program animal.

(3) All cetaceans used in interactive sessions shall be in good health, including, but not limited to, not being infectious. Cetaceans undergoing veterinary treatment may be used in interactive sessions only with the approval of the attending veterinarian.

(4) The ratio of human participants to cetaceans shall not exceed 3:1. The ratio of human participants to attendants or other authorized SWTD personnel (*i.e.*, head trainer/behaviorist or trainer/supervising attendant) shall not exceed 3:1.

(5) Prior to participating in an SWTD interactive session, members of the public shall be provided with oral and written rules and instructions for the session, to include the telephone and FAX numbers for APHIS, Animal Care, for reporting injuries or complaints. Members of the public shall agree, in writing, to abide by the rules and instructions before being allowed to participate in the session. Any participant who fails to follow the rules or instructions shall be removed from the session by the facility.

(6) All interactive sessions shall have at least two attendants or other authorized SWTD personnel (i.e., head trainer/behaviorist or trainer/supervising attendant). At least one attendant shall be positioned out of the water. One or more attendants or other authorized SWTD personnel may be positioned in the water. If a facility has more than two incidents during interactive sessions within a year's time span that have been dangerous or harmful to either a cetacean or a human, APHIS, in consultation with the head trainer/behaviorist, will determine if changes in attendant positions are needed.

(7) All SWTD programs shall limit interaction between cetaceans and humans so that the interaction does not harm the cetaceans, does not remove the element of choice from the cetaceans by actions such as, but not limited to, recalling the animal from the sanctuary area, and does not elicit unsatisfactory, undesirable, or unsafe behaviors from the cetaceans. All SWTD programs shall prohibit grasping or holding of the cetacean's body, unless under the direct and explicit instruction of an attendant eliciting a specific cetacean behavior, and shall prevent the chasing or other harassment of the cetaceans.

(8) In cases where cetaceans used in an interactive session exhibit unsatisfactory, undesirable, or unsafe behaviors, including, but not limited to, charging, biting, mouthing, or sexual contact with humans, such cetaceans shall either be removed from the interactive area or the session shall be terminated. Written criteria shall be developed by each SWTD program, and shall be submitted to and approved by APHIS¹¹ regarding conditions and procedures for maintaining compliance with paragraph (e)(4) of this section; for the termination of a session when removal of a cetacean is not possible; and regarding criteria and protocols for handling program animal(s) exhibiting unsatisfactory, undesirable, or unsafe behaviors, including retraining time and techniques, and removal from the program and/or facility, if appropriate. The head trainer/behaviorist shall determine when operations will be terminated, and when they may resume. In the absence of the head trainer/behaviorist, the determination to terminate a session shall be made by the trainer/supervising attendant. Only the head trainer/behaviorist may determine when a session may be resumed.

¹¹ Send to Administrator, c/o Animal and Plant Health Inspection Service, Animal Care, 4700 River Road Unit 84, Riverdale, Maryland 20737-1234.

(f) *Recordkeeping.* (1) Each facility shall provide APHIS¹² with a description of its program at least 30 days prior to initiation of the program, or in the case of any program in place before September 4, 1998, not later than October 5, 1998. The description shall include at least the following:

(i) Identification of each cetacean in the program, by means of name and/or number, sex, age, and any other means the Administrator determines to be necessary to adequately identify the cetacean;

(ii) A description of the educational content and agenda of planned interactive sessions, and the anticipated average and maximum frequency and duration of encounters per cetacean per day;

(iii) The content and method of pre-encounter orientation, rules, and instructions, including restrictions on types of physical contact with the cetaceans;

(iv) A description of the SWTD facility, including the primary enclosure and other SWTD animal housing or holding enclosures at the facility;

(v) A description of the training, including actual or expected number of hours each cetacean has undergone or will undergo prior to participation in the program;

(vi) The resume of the licensee and/or manager, the head trainer/behaviorist, the trainer/supervising attendant, any other attendants, and the attending veterinarian;

(vii) The current behavior patterns and health of each cetacean, to be assessed and submitted by the attending veterinarian;

(viii) For facilities that employ a part-time attending veterinarian or consultant arrangements, a written program of veterinary care (APHIS form 7002), including protocols and schedules of professional visits; and

(ix) A detailed description of the monitoring program to be used to detect and identify changes in the behavior and health of the cetaceans.

(2) All SWTD programs shall comply in all respects with the regulations and standards set forth in parts 2 and 3 of this subchapter.

(3) Individual animal veterinary records, including all examinations, laboratory reports, treatments, and necropsy reports shall be kept at the SWTD site for at least 3 years and shall be made available to an APHIS official upon request during inspection.

(4) The following records shall be kept at the SWTD site for at least 3 years

and shall be made available to an APHIS official upon request during inspection:

(i) Individual cetacean feeding records; and

(ii) Individual cetacean behavioral records.

(5) The following reports shall be kept at the SWTD site for at least 3 years and shall be made available to an APHIS official upon request during inspection:

(i) Statistical summaries of the number of minutes per day that each animal participated in an interactive session;

(ii) A statistical summary of the number of human participants per month in the SWTD program; and

(6) A description of any changes made in the SWTD program, which shall be submitted to APHIS¹³ on a semi-annual basis.

(7) All incidents resulting in injury to either cetaceans or humans participating in an interactive session, which shall be reported to APHIS within 24 hours of the incident.¹⁴ Within 7 days of any such incident, a written report shall be submitted to the Administrator.¹⁵ The report shall provide a detailed description of the incident and shall establish a plan of action for the prevention of further occurrences.

(g) *Veterinary care.* (1) The attending veterinarian shall conduct on-site evaluations of each cetacean at least once a month. The evaluation shall include a visual inspection of the animal; examination of the behavioral, feeding, and medical records of the animal; and a discussion of each animal with an animal care staff member familiar with the animal.

(2) The attending veterinarian shall observe an interactive swim session at the SWTD site at least once each month.

(3) The attending veterinarian shall conduct a complete physical examination of each cetacean at least once every 6 months. The examination shall include a profile of the cetacean, including the cetacean's identification (name and/or number, sex, and age), weight,¹⁶ length, axillary girth, appetite, and behavior. The attending veterinarian shall also conduct a general examination to evaluate body condition, skin, eyes, mouth, blow hole and cardio-

¹³ See footnote 11 in § 3.111(e)(8).

¹⁴ Telephone numbers for APHIS, Animal Care, regional offices can be found in local telephone books.

¹⁵ See footnote 11 in § 3.111(e)(8).

¹⁶ Weight may be measured either by scale or calculated using the following formulae:

Females: Natural log of body mass = $-8.44 + 1.34(\text{natural log of girth}) + 1.28(\text{natural log of standard length})$.

Males: Natural log of body mass = $-10.3 + 1.62(\text{natural log of girth}) + 1.38(\text{natural log of standard length})$.

¹² See footnote 11 in § 3.111(e)(8).

respiratory system, genitalia, and feces (gastrointestinal status). The examination shall also include a complete blood count and serum chemistry analysis. Fecal and blow hole smears shall be obtained for cytology and parasite evaluation.

(4) The attending veterinarian, during the monthly site visit, shall record the nutritional and reproductive status of each cetacean (*i.e.*, whether in an active breeding program, pregnant, or nursing).

(5) The attending veterinarian shall examine water quality records and provide a written assessment, to remain at the SWTD site for at least 3 years, of the overall water quality during the preceding month. Such records shall be made available to an APHIS official upon request during inspection.

(6) In the event that a cetacean dies, complete necropsy results, including all appropriate histopathology, shall be recorded in the cetacean's individual file and shall be made available to APHIS officials during facility inspections, or as requested by APHIS. The necropsy shall be performed within 48 hours of the cetacean's death, by a veterinarian experienced in marine mammal necropsies. If the necropsy is not to be performed within 3 hours of the discovery of the cetacean's death, the cetacean shall be refrigerated until necropsy. Written results of the necropsy shall be available in the cetacean's individual file within 7 days after death for gross pathology and within 45 days after death for histopathology.

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0115)

Done in Washington, DC, this 31st day of August 1998.

Joan M. Arnoldi,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 98-23789 Filed 9-3-98; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ASW-35]

Revision of Class D Airspace; San Antonio, Kelly AFB, TX

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

ACTION: Direct final rule, confirmation of effective date.

SUMMARY: This notice confirms the effective date of a direct final rule which

revises Class D airspace at San Antonio, Kelly AFB, TX.

EFFECTIVE DATE: The direct final rule published at 63 FR 36838 is effective 0901 UTC, October 8, 1998.

FOR FURTHER INFORMATION CONTACT:

Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone: 817-222-5593.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on July 8, 1998 (63 FR 36838). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on October 8, 1998. No adverse comments were received, and thus this action confirms that this direct final rule will be effective on that date.

Issued in Fort Worth, TX, on August 27, 1998.

JoEllen Casilio,

Acting Manager, Air Traffic Division, Southwest Region.

[FR Doc. 98-23783 Filed 9-3-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ASW-33]

Establishment of Class E Airspace; Johnson City, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This notice confirms the effective date of a direct final rule which establishes Class E airspace at Johnson City, TX.

EFFECTIVE DATE: The direct final rule published at 63 FR 36845 is effective 0901 UTC, October 8, 1998.

FOR FURTHER INFORMATION CONTACT:

Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone: 817-222-5593.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on July 8, 1998 (63 FR 36845). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on October 8, 1998. No adverse comments were received, and thus this action confirms that this direct final rule will be effective on that date.

Issued in Fort Worth, TX, on August 27, 1998.

JoEllen Casilio,

Acting Manager, Air Traffic Division, Southwest Region.

[FR Doc. 98-23785 Filed 9-3-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ASW-34]

Revision of Class E Airspace; Refugio, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This notice confirms the effective date of a direct final rule which revises Class E airspace at Refugio, TX.

EFFECTIVE DATE: The direct final rule published at 63 FR 36844 is effective 0901 UTC, October 8, 1998.

FOR FURTHER INFORMATION CONTACT:

Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone: 817-222-5593.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on July 8, 1998 (63 FR 36844).

The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. The direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a