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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 01–093–3]

Mediterranean Fruit Fly; Removal of Quarantined Area

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the Mediterranean fruit fly regulations by removing a portion of Los Angeles County, CA, from the list of quarantined areas. The interim rule was necessary to relieve the restrictions that were no longer needed to prevent the spread of Mediterranean fruit fly to noninfested areas of the United States. As a result of the interim rule, there are no longer any areas in the continental United States quarantined because of the Mediterranean fruit fly.

EFFECTIVE DATE: The interim rule became effective on June 27, 2002.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen A Knight, Senior Staff Officer, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–8247.

SUPPLEMENTARY INFORMATION:

Background

The Mediterranean fruit fly (Medfly) regulations contained in 7 CFR 301.78 through 301.78–10 (referred to below as the regulations) restrict the interstate movement of regulated articles from quarantined areas to prevent the spread of Medfly to noninfested areas of the United States.

In an interim rule effective June 27, 2002, and published in the **Federal Register** on July 3, 2002 (67 FR 44523–44524, Docket No. 01–093–2), we amended the regulations by removing a portion of Los Angeles County, CA, from the list of quarantined areas in § 301.78–3(c). The interim rule was necessary to relieve restrictions that were no longer needed to prevent the spread of Medfly to noninfested areas of the United States. As a result of that action, there are no longer any areas in the continental United States quarantined because of the Medfly.

Comments on the interim rule were required to be received on or before September 3, 2002. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rule concerning Executive Orders 12866, 12372, and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

Regulatory Flexibility Act

This action affirms an interim rule that amended the Medfly regulations by removing a portion of Los Angeles County, CA, from the list of quarantined areas. The interim rule was necessary to relieve restrictions on interstate movement of regulated articles from that area.

The entities most likely to be affected are fruit sellers, nurseries, growers, packinghouses, certified farmers markets, and swapmeets. The area that we removed from the list of quarantined areas is a predominantly residential area with many apartment buildings. Available information indicates that there are no entities in the area that sell, process, handle, or move regulated articles interstate.

In the interim rule, we solicited comments, particularly those pertaining to the number and kind of small entities that may incur benefits or costs as a result of the action. We received no comments.

We therefore expect the effect of the interim rule on any affected entities should be minimally positive, as they will no longer be required to treat regulated articles to be moved interstate for Medfly.

For this reason, the termination of the quarantine on that portion of Los Angeles County, CA, should have only a minimal economic effect on any affected entities operating in this area. We anticipate that the economic effect of lifting the quarantine, though positive, will be no more significant than was the minimal effect of its imposition.

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

List of Subjects in 7 CFR Part 301

Agricultural commodities, 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 67 FR 44523–44524 on July 3, 2002.

Authority: 7 U.S.C. 166, 7711, 7712, 7714, 7731, 7735, 7751, 7752, 7753, and 7754; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

Done in Washington, DC, this 1st day of November 2002.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 02–28348 Filed 11–6–02; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Parts 201 and 204

[Regulations A and D; Docket Nos. R–1123 and R–1134]

Extensions of Credit by Federal Reserve Banks; Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; technical amendment.

SUMMARY: The Board of Governors is publishing final amendments to

Regulation A that replace the existing adjustment and extended credit programs with programs called primary and secondary credit and also reorganize and streamline existing provisions of Regulation A. The final rule leaves the existing seasonal credit program essentially unchanged. The final rule is intended to improve the functioning of the discount window and does not indicate a change in the stance of monetary policy.

The Board also is amending the penalty provision of Regulation D, which is calculated based on the discount rate, to conform the calculation of penalties for reserve deficiencies to the new discount rate framework.

DATES: This final rule will become effective on January 9, 2003.

FOR FURTHER INFORMATION CONTACT: Brian Madigan, Deputy Director (202/452–3828) or William Nelson, Senior Economist (202/452–3579), Division of Monetary Affairs; or Stephanie Martin, Assistant General Counsel (202/452–3198) or Adrianne Threatt, Counsel (202/452–3554), Legal Division; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION:

Background

Existing Regulation A and the Board's Proposed Rule

Under existing Regulation A, three credit programs are available to depository institutions: (1) Adjustment credit, which is available for short periods of time, usually overnight, when a depository institution has exhausted other sources of funds; (2) extended credit, which is available for somewhat longer periods when assistance is not available from other sources; and (3) seasonal credit, which is available largely to small banks with a pronounced seasonal funding need. Over the past decade, the interest rate on adjustment credit has been 25 to 50 basis points below the federal funds rate, which is the rate that applies to uncollateralized overnight loans in the interbank market. The rates for extended and seasonal credit are set by formulas based on market interest rates and typically have been at or above the basic discount rate.

The below-market rate for adjustment credit creates incentives for an institution to borrow at the discount window to exploit the spread between the discount rate and the higher market rate for short-term funds. The current regulation therefore requires that an institution first exhaust other available sources of funds and explain its need for adjustment credit. The regulation also prohibits the use of discount window credit to finance the sale of federal funds. Because of these restrictions, a Reserve Bank must evaluate the financial situation of each borrower to determine that both the reason for borrowing at the discount window and the depository institution's use of borrowed funds are appropriate.

Reserve Bank administration of adjustment credit tends to create uncertainty among depository institutions about their access to discount window credit. In addition, institutions that have borrowed at the discount window after advertising their need for funds in the market have expressed concern that borrowing at the window signals weakness and is a source of stigma. Concerns such as these in some cases have deterred depository institutions from borrowing at the discount window during very tight money markets when doing so would have been appropriate. This in turn has hampered the ability of the discount window to buffer shocks to the money markets.

To improve the operation of the discount window, the Board proposed to replace the existing adjustment and extended credit programs with primary and secondary credit programs (67 FR 36544, May 24, 2002). The Board proposed that primary credit be available to generally sound institutions on a very short-term basis, usually overnight, with little or no administrative burden on the borrower and that borrowers of primary credit not be required to exhaust other sources of funds before obtaining short-term primary credit. The Board also proposed that primary credit be available for periods of up to a few weeks to generally sound institutions that cannot reasonably obtain such funding in the market. The Board proposed no restrictions on the purposes for which the borrower could use primary credit. The proposal contemplated that Reserve Banks would establish a System-wide set of criteria, based on supervisory and other relevant information, which would be used to determine whether an institution was in generally sound financial condition and thus eligible for primary credit. The Board proposed that primary credit normally be available at a rate above the target federal funds rate of the Federal Open Market Committee (FOMC) and that the initial primary credit rate be 100 basis points above the target federal funds rate.

Under the proposed rule, institutions not eligible for primary credit would be permitted to borrow secondary credit to meet temporary funding needs, consistent with the institution's timely return to a reliance on market funds. A Reserve Bank also could extend secondary credit to facilitate the resolution of serious financial difficulties of an institution. The Board proposed that the initial rate be set by formula 50 basis points above the primary credit rate. The Board's proposal contemplated that the secondary credit program would require more Reserve Bank administration than the primary credit program.

The proposed regulation retained the existing seasonal credit program without substantive change, although the Board specifically requested comment regarding whether that program was still necessary and, if so, what the applicable interest rate should be.

Overview of Comments Received

The Board received 61 comments on the proposed rule from depository institutions of various sizes, trade associations that represent depository institutions, individuals, and Reserve Banks. This section presents an overview of the main points contained in the comments received. The section-by-section analysis of the final rule, set forth below, discusses the comments in greater detail and responds to the major concerns expressed by commenters.

Support for the Proposal

Of the 30 letters that addressed the primary and secondary credit programs, approximately 14 generally supported moving to an above-market discount window framework. These commenters indicated that replacing the existing below-market discount window facility with an above-market framework would provide more easily accessible funding on more predictable and transparent terms with less burden on borrowers and would remove incentives to borrow in order to exploit interest rate spreads. Owing to the removal of the requirements that a borrower exhaust other funding sources and prove its need for credit and the addition of the requirement that primary credit borrowers be in generally sound financial condition, some supporters of the proposal thought that the stigma associated with discount borrowing would decrease. Commenters also indicated that an above-market framework would provide depository institutions with an incentive to manage their liquidity more prudently under normal market conditions in order to avoid paying the penalty rate but would make it easier for banks to obtain overnight funding during periods of very tight money markets. Supporters

also stated that an above-market lending facility would be more akin to the lending facilities of other central banks.

Questions About the Need for Proposed Changes

Some commenters questioned the underlying reasons the Board gave for proposing an above-market framework. Several commenters questioned the Board's statement that some depository institutions were deterred from coming to the discount window because of perceptions that discount window borrowing indicated financial weakness. One commenter asserted that, because of limits on lending to undercapitalized institutions, borrowing at the window was more likely to indicate strength than weakness, while others asserted that market participants did not view borrowing as an important factor when assessing financial strength.[1] Still another commenter argued that the current low volume of borrowing did not indicate reluctance to borrow, but rather indicated that depository institutions were using the window appropriately as a backup rather than primary source of liquidity.[2] Other commenters questioned the need for an above-market rate for purposes of limiting volatility in the federal funds market because they thought that the existing controls and incentives adequately limited volatility.

Concerns About the Proposal

Sixteen commenters, eight of whom opposed the proposal, expressed various concerns about the proposal. Commenters' concerns focused mainly on the proposed 100-basis-point spread between the target federal funds and primary credit rates. Other commenters expressed concern that lending funds at an above-market rate inappropriately would introduce a profit motive into actions related to monetary policy, thereby creating a conflict of interest for the Federal Reserve System.[3]

Many commenters expressed concern that the proposal either would not address or would exacerbate the problems that the Board identified as reasons for changing to an above-market framework. Although some critics of the proposal thought that the new framework would prevent extreme spikes in the federal funds rate, many commenters thought that volatility, especially intraday volatility, would increase rather than decrease. Other commenters thought that depository institutions would be at least as reluctant as they are currently to seek discount window credit because stigma would remain or because the above-market rate would deter borrowing. Still other commenters asserted that the Board's proposal would not be less burdensome for borrowers. Suggested Alternatives to and Suggestions Regarding the Board's Proposal.

Some commenters who expressed general concern about the proposed above-market structure suggested that the Board modify or consider alternatives to its proposal. One commenter suggested that the problems with the current discount window programs were not burden and stigma, but rather were uncertainty about the programs and inconsistent requirements and expectations throughout the System. This commenter suggested leaving the current discount window programs in place but clarifying the Reserve Banks' credit policies, expectations, and requirements and applying those criteria more consistently throughout the Federal Reserve System.[4] Another commenter proposed that the Board try to cap the federal funds rate through late-day open market operations rather than change its credit programs. Other commenters thought that the Federal Reserve should make credit available continuously and at market rates.[5] Comments Regarding Seasonal Credit.

Over half the comments the Board received were in response to the Board's solicitation for comment about the continued need for the seasonal credit program. Forty-five commenters addressed the seasonal credit program, with 39 in favor of retaining and six in favor of eliminating the program. These comments are discussed in detail below in the section on seasonal credit.

Summary of Final Rule

For the reasons discussed in detail below in the section-by-section analysis, the Board's final amendments to Regulation A substantively are nearly identical to the rule the Board proposed in May 2002. Most notably, the final rule replaces the existing adjustment and extended credit programs with primary and secondary credit programs, and the Reserve Banks will offer these new types of credit at rates that exceed the FOMC's target federal funds rate. The Board has included in the final rule a section under which the primary credit rate could be lowered in a financial emergency in the absence of a quorum of the Board. The Board is retaining the seasonal credit program with only minor technical changes.

Section-by-Section Analysis

The Above-Market Lending Framework—§§ 201.4 and 201.51.

The Above Market Framework Generally and Market Volatility

A number of commenters argued that moving to an above-market discount window framework generally would increase volatility, especially in light of the proposed 100-basis-point initial spread of the primary credit rate over the target federal funds rate, and therefore would not accomplish one of the Board's stated goals.[6]

It is possible that certain measures of volatility of the federal funds rate—particularly those that give some weight to small deviations from the target, such as the intraday standard deviation of the federal funds rate—will increase under the above-market framework. However, the Board believes that an above-market framework will reduce the potential for more extreme, unintended movements in the funds rate. These extreme movements arguably are more problematic than smaller ones because they tend to occur in the context of, and can exacerbate, conditions of market stress. Most depository institutions will not have an incentive to borrow from the window until the federal funds rate rises to the primary credit rate, at which point institutions likely will view the window as an attractive alternative. The presence of the discount window as a funding option should ensure that the federal funds rate will not rise significantly above the primary credit

[1] One commenter argued that the manner in which discount window borrowing is reported makes it difficult to identify individual borrowers. Others thought that discount window activity was at best a secondary indicator of financial strength because market participants rely on other sources when determining an institution's soundness.

[2] The Board believes that a number of factors, including improved account management by depository institutions, contribute to the relatively low level of borrowing at recent spreads of the federal funds rate over the discount rate. However, the Board also believes that the current framework of below-market lending, with its attendant need to administer lending heavily, remains a potential deterrent to appropriate borrowing, especially during periods when the overall condition of the financial sector is weak.

[3] Another commenter argued that if a depository institution were to deteriorate as a result of reselling funds obtained through the primary credit program, the public might blame the Federal Reserve.

[4] The Board notes that the Federal Reserve System has taken steps over the past decade that have been intended to clarify requirements and decrease stigma.

[5] The Board notes that this approach would be inconsistent with operation of primary and secondary credit facilities as backup sources of liquidity and reserves for depository institutions.

[6] These commenters generally thought that an above-market structure would allow sellers routinely to increase the federal funds rate all the way up to the ceiling established by the discount rate, thereby increasing the cost of funds generally.

rate, so the primary credit rate effectively will serve as a cap on and limit potential volatility in the federal funds rate.

Some commenters stated that an above-market discount window framework would place an upper limit on the federal funds rate but argued that the Board should not establish a ceiling on the federal funds rate without also establishing a floor, noting that net sellers of federal funds are disadvantaged by declines in the federal funds rate. The most effective means of establishing a floor would be for the Federal Reserve to pay interest on excess reserve account balances, because a depository institution would have no incentive to lend or sell reserves at a lower rate than the rate of interest those reserve balances could earn. However, the Federal Reserve does not have explicit statutory authority to pay interest on reserve balances at this time.

Although it might be desirable to limit both upward and downward volatility, those limits need not be implemented simultaneously in order to produce beneficial results. The potential advantages of the proposed discount window changes are considerable even in the absence of a rate floor, and delaying implementation of the above-market framework would unnecessarily defer those advantages without any countervailing benefit. The Board therefore has determined that implementation of the above-market framework should proceed without delay.

Primary Credit

Reserve Banks will extend primary credit at a rate above the target federal funds rate on a very short-term basis (typically overnight) to depository institutions that the Reserve Banks judge to be in generally sound financial condition. Reserve Banks will determine eligibility for primary credit according to a set of criteria that is uniform throughout the Federal Reserve System and based mainly on examination ratings and capitalization, although supplementary information, including market-based information when available, also could be used. An institution that is eligible to receive primary credit need not exhaust other sources of funds before coming to the discount window, nor will it be prohibited from using primary credit to finance sales of federal funds. However, in view of the above-market price of primary credit, the Board expects that a depository institution will continue to use the discount window as a backup source of liquidity, which is the intended purpose of a central bank lending facility, rather than as a routine one. Reserve Banks will extend primary credit on an overnight basis with minimal administrative requirements, unless an aspect of the request for funds suggests that the credit extension would not meet the conditions of primary credit. Reserve Banks also may extend primary credit to eligible institutions for periods of up to several weeks if such funding is not available from other sources. However, longer-term extensions of primary credit will be subject to greater administration than are overnight loans. The text of § 201.4(a) is essentially the same as that of the Board's proposal, although the final rule includes language highlighting the backup nature of the primary credit facility.

1. Interest Rates for Primary Credit

Several commenters supported the Board's proposal that the initial primary credit rate be 100 basis points above the target federal funds rate. These commenters thought that a 100-basis-point spread generally was appropriate and would encourage most financial institutions first to seek credit elsewhere. One commenter thought the proposed spread was acceptable because the Federal Reserve does a good job of keeping the federal funds rate near the target.

The Board received numerous comments, however, that expressed specific concern about the proposed initial primary credit rate. Many commenters, even those that generally supported the proposal, argued that the 100-basis-point spread the Board proposed was too wide and would undermine the Board's articulated goals for the primary credit program. These commenters thought that a discount rate of the target federal rate plus 100 basis points was too high because it was overly punitive, would deter institutions from borrowing at the discount window, and would allow sellers of federal funds to bid the federal funds rate up during periods of limited trading, low reserve volume, or late-day trading. Other commenters thought that a 100-basis-point spread between the target federal funds and discount rates would thwart the Board's efforts to remove the stigma associated with discount window borrowing and to encourage depository institutions and industry analysts to view the window as a normal liquidity source for sound institutions.

Several commenters liked the idea of setting the primary credit rate at rate above the target federal funds rate but suggested that a spread of as few as 25 to as many as 50 basis points would be preferable to the 100-basis-point initial spread the Board proposed.[7] Other commenters suggested alternative mechanisms for setting the rate, such as setting the rate at a certain percentage, rather than a certain number of basis points, above the target federal funds rate.[8]

The Board notes that an appreciable spread between the primary credit and target federal funds rate is necessary for the success of the above-market discount window programs. Given the large number of financial institutions in the United States and the tremendous variation in their sizes and other characteristics, the availability and price of market funding sources available to U.S. financial institutions also vary widely. If the primary credit rate were not at least as high as the highest rate on sources of comparable funding in the market, then some depository institutions frequently would find the primary credit program, rather than the open market, to be the most attractive source of funds. If routine use of the window occurred, the Federal Reserve still would need to administer the discount window heavily to deter institutions from making undue use of primary credit.

Although it is difficult to determine the appropriate rate at which to extend primary credit to ensure that it remains a backup funding source, empirical evidence from several sources suggests that 100 points above the target federal funds rate is an appropriate initial rate. These data cast doubt on whether a lesser spread would accomplish this goal of ensuring that the discount window remains a backup source of liquidity.

Experience with the Special Liquidity Facility (SLF) that the Federal Reserve System established to address unusual liquidity strains that arose during the months surrounding the date change on January 1, 2000, is instructive. The SLF was similar to the primary credit program in many ways because

[7] Although most commenters who suggested a particular rate did not explain their rationale, one commenter argued that a 50-basis-point spread would be appropriate because the commenter asserted that approximately half the large spikes in the federal funds rate were at about that level. Another commenter indicated that a 50- to 60-basis-point spread would be appropriate because that would ensure that the central bank rate was slightly higher than the market rate but would keep the market rate from becoming excessive.

[8] One of these commenters suggested that the amount of the spread should depend on the level of the target federal funds rate, such that the lower the federal funds rate, the lower the spread and vice versa. Another suggested tying the primary credit rate to the collateralized repo rate rather than the federal funds rate.

eligibility was limited to financially sound institutions, administration of the facility intentionally was quite limited, and funding was available at a fixed spread of 150 basis points above the federal funds rate. Despite the penalty rate, there were 42 instances in which institutions borrowed from the SLF for a period of two to ten consecutive days and 14 instances in which institutions borrowed for periods of more than ten consecutive days. This suggests that the SLF was an attractive source of longer-term, rather than overnight, funding for some institutions despite the 150-basis-point spread above market rates, which in turn suggests that those financially sound institutions might not have had access to cheaper funding in the open market.

In addition, Federal Reserve staff conversations with representatives of correspondent banks and other depository institutions found that the overnight funding options for banks without access to the national money markets were priced from 3/16 to 1 percentage point over the federal funds rate, with the largest spread being charged by an institution that preferred that its customers first exhaust other sources of short-term funding.

Moreover, a spread on the order of 100 basis points has been used by some, but not all, foreign central banks on their Lombard discount window facilities. Perhaps most notably, the European Central Bank generally has employed a spread of 100 basis points. Conversations with staff of some of these central banks indicate that the experience with spreads of this size generally has been positive and has been consistent with achieving those central banks' goals.

In view of the foregoing evidence, the Board believes that an initial spread of 100 basis points is appropriate and anticipates that a primary credit rate consistent with such a spread will be established as of January 9, 2003. The Board notes, however, that this is only the initial rate. The Reserve Banks are required to establish the primary credit rate, subject to the review and determination of the Board, at least every two weeks or more often if the Board deems necessary. The System therefore can set a primary credit rate at a lesser, or greater, spread above the federal funds rate as needed in light of actual experience with the primary credit program.[9]

Because a change in the stance of monetary policy between now and the recommended initiation of the new programs on January 9, 2003, cannot be ruled out, it is uncertain at this point what level of the primary credit rate will correspond with a spread of 100 basis points on that date. Section 201.51(a), which describes the primary credit rate, therefore at this time simply will state that the primary credit rate is a rate above the target federal funds rate of the FOMC. When the Reserve Banks establish and the Board determines the rate to be in effect on January 9, 2003, the Board will amend § 201.51(a) to indicate the initial primary credit rate for each Reserve Bank. The Board's amendment will be effective on January 9, 2003.

2. Eligibility Criteria

The Board proposed that eligibility for primary credit be determined mainly by a depository institution's supervisory ratings and capitalization, although supplementary information, when available, also could be used. Under the Board's proposed rule, institutions that were rated CAMELS 1 or 2 or SOSA 1 and at least adequately capitalized almost certainly would be eligible for primary credit, while institutions rated CAMELS 4 or 5 almost certainly would not be eligible. Institutions rated CAMELS 3 or SOSA 2 that are at least adequately capitalized might be eligible, depending on supplementary information.[10] The Board noted that this recommendation aligned very closely with the categorization of institutions for purposes of determining access to daylight credit.

Several commenters specifically addressed the eligibility criteria for primary credit. Most of these commenters thought that the proposed criteria generally were appropriate, although some suggested changes. Several commenters argued that the criteria should rely more heavily on examination ratings and minimize reliance on other types of information in determining eligibility for primary credit. One commenter thought that the guidelines would be more clear, concise, and uniform if the Federal Reserve only took supervisory ratings into account and did not allow supplementary information if a depository institutions were rated CAMELS 1 or 2.[11] Another commenter suggested that institutions that are rated CAMELS 5 or that are critically undercapitalized either should be precluded from obtaining credit or should be charged a much higher penalty rate than the Board proposed. In contrast, other commenters expressed concern that the proposed eligibility criteria relied too heavily on supervisory data. These commenters expressed concern that reliance on an institution's soundness was not appropriate in a system of secured lending and suggested that the Federal Reserve instead should base its lending programs and credit decisions on the type of collateral an institution offers.

The Board believes that, in order to ensure uniformity of credit eligibility throughout the Federal Reserve System, the criteria must rely heavily on objective supervisory data, which reflect determinations made by an institution's primary regulator after an extensive review process. However, the Board also recognizes that an institution could experience significant changes in its financial strength between examinations, in which case the institution's supervisory ratings might not reflect its current soundness and creditworthiness. To protect the Reserve Banks from the risks and to avoid the allocative distortions that could be involved in lending to such an institution, the Board believes that the eligibility criteria must allow for the use of some amount of supplementary information, including market-based information when available, to confirm that an institution's most recent supervisory data accurately reflect the institution's current condition.

Under the final rule, the Board anticipates that the Reserve Banks will initially adopt criteria that are substantially similar to those articulated in the Board's proposal with some additional elements that will make the eligibility criteria identical to those for daylight credit. The classification scheme used by Reserve Banks for determining access to daylight credit is well developed and provides a good measure of the general soundness of depository institutions. Reserve Banks and depository institutions already have extensive experience with these criteria,

[9] One commenter expressed concern that the Reserve Banks would establish and the Board determine the spread between the federal funds and primary credit rates, rather than setting the actual rate. The Board notes that the primary credit rate will not be determined by establishing a fixed spread above the federal funds rate or by using any other formula. Rather, the Reserve Banks will establish the actual primary credit rate, subject to the review and determination of the Board.

[10] CAMELS (Capital, Assets, Management, Earnings, Liquidity, and Sensitivity to market risk) ratings, applicable to domestically chartered institutions, are set on a scale of 1 through 5, with 5 representing the highest degree of supervisory concern. SOSA (Strength of Support Assessment) ratings, applicable to foreign banking organizations, are set on a scale of 1 through 3, with 3 indicating the highest degree of supervisory concern.

[11] This commenter argued that the other information the Board proposed to take into account was irrelevant to a Reserve Bank's risk regarding secured overnight loans and that considering such information would lead to uncertainty about borrowing privileges.

and using them to determine eligibility for both the daylight credit and primary credit programs generally should be straightforward for the Reserve Banks and should be more transparent for borrowers. Using a single set of criteria for both programs also should simplify explanations of Reserve Bank credit programs to depository institutions and the public.

Under the criteria that would be applied at the outset of the program, institutions' eligibility would be based on CAMELS (or SOSA and ROCA) ratings, capitalization, and, at the Reserve Bank's discretion, supplementary information.[12] More specifically, institutions that are at least adequately capitalized and rated CAMELS 1 or 2 (or SOSA 1 and ROCA 1, 2, or 3) would almost certainly be eligible for primary credit. Institutions that are at least adequately capitalized and rated CAMELS 3 (or SOSA 2 and ROCA 1, 2, or 3) generally would be eligible. Institutions that are at least adequately capitalized and rated CAMELS 4 (or SOSA 1 or 2 and ROCA 4 or 5) would be eligible only if an ongoing examination indicated a substantial improvement in condition. Institutions that are not at least adequately capitalized, or that are rated CAMELS 5 (or SOSA 3 regardless of the ROCA rating), would not be eligible for daylight or primary credit.

In summary, eligibility for primary credit will be restricted to institutions that are in generally sound financial condition. The Reserve Banks will be responsible for determining the general soundness of the institutions in their districts. At the outset of the program, the Reserve Banks will use the criteria that are already used for determining eligibility for daylight credit.

3. Reduction of Burden and Stigma

Some commenters disagreed that the proposed revisions would reduce the stigma of borrowing at the discount window and in particular noted that analysts and counterparties might infer that the bank could not obtain funds at market rates and therefore might be in financial difficulty if there were evidence that the bank were paying a premium for funds. [13]

The Board believes that the Federal Reserve can reasonably expect to achieve, over time, some reduction in stigma as a result of the primary credit program. Only generally sound institutions will be eligible to borrow primary credit, and the Board expects that most institutions will be eligible for primary credit. Market participants would have no reasonable basis for inferring that an institution believed to have borrowed primary credit was unsound.[14] Also, with credit no longer offered at a subsidy rate, the Federal Reserve will no longer require a borrowing institution first to exhaust other funding sources. As a result, borrowers will not have to make their funding needs known to the market, which should eliminate a key source of stigma cited by depository institutions. Depository institutions and persons attempting to assess the strength of those institutions also should have no concerns that financial regulators will view occasional use of primary credit as a potential indication of difficulties. In addition, the borrowings of those institutions that are believed to be lending the proceeds of discount window credit into the federal funds market clearly will indicate nothing adverse about their financial condition. Finally, reflecting the incentives created by an above-market framework, a significant proportion of primary credit borrowing is likely to occur when the overall money market has tightened significantly. Because occasions of tightening markets are well known to all money market participants and analysts, it will be easy for them to recognize that borrowing at such times reflects a general market situation rather than conditions particular to a single institution.

Secondary Credit

The Reserve Banks will offer secondary credit to institutions that do not qualify for primary credit. As with primary credit, secondary credit will be available as a backup source of liquidity on a very short-term basis, provided that the loan is consistent with a timely return to a reliance on market sources of funds. Longer-term secondary credit would be available if necessary for the orderly resolution of a troubled institution, although any such loan would have to comply with the limitations of § 201.5 regarding lending to undercapitalized and critically undercapitalized institutions. Unlike the primary credit program, secondary credit will not be a minimal administration facility because the Reserve Banks will need to obtain sufficient information about a borrower's financial situation to ensure that an extension of credit complies with the conditions of the program. The description of secondary credit at § 201.4(b) closely tracks the language of the Board's proposed rule but states that short-term secondary credit is a backup funding source.

The rate for secondary credit will be set by formula and will be above the primary credit rate. Initially, the spread between the primary and secondary credit rates will be 50 basis points.[15] Less sound borrowers are riskier and might have an incentive to use discount window borrowings to expand their balance sheets in a manner that likely would distort resource allocation, and the higher rate on secondary credit is designed to reduce this incentive. Even with the higher rate, some institutions might tend to rely routinely on secondary credit, so administration of secondary credit remains necessary. If experience eventually suggests that a 50-basis-point spread above the primary credit rate is either too high or too low to achieve the objectives of the secondary credit program, the Federal Reserve could adopt a different formula.

Seasonal Credit

The Board's proposed rule left the seasonal credit intact with two technical revisions. The Board proposed removing the requirement that a potential borrower first demonstrate that it has exhausted special industry lenders as a funding source, because in practice the Reserve Banks have not used this criterion for some time. In addition, the Board proposed eliminating the requirement that the seasonal credit rate

[12] ROCA (Risk management, Operation controls, Compliance, and Asset quality) ratings apply to the U.S. operations of a foreign banking organization. They are set on a scale of 1 to 5; as with CAMELS ratings, higher numbers indicate increased supervisory concern.

[13] Several commenters thought that stigma would remain until senior bank management, equity analysts, investors, rating agencies, and other market participants consider the discount window to be a ''normal'' source of liquidity. Some of these commenters suggested that only an intensive education campaign by the Federal Reserve targeted at those whose opinions influence perception of the discount window would achieve this result. Other commenters thought that financially sound institutions would not borrow at the window because the market would not be able to tell whether they obtained primary or secondary credit.

[14] Although the Federal Reserve System does not publish information on individual banks' use of the discount window, it is required by law to publish a weekly balance sheet for each Reserve Bank. The Federal Reserve also publishes weekly data on the aggregate amount the Federal Reserve System has lent under each discount window program.

[15] Although the Board received few comments specifically about the secondary credit program, those commenters that did reference the program generally thought that the proposed rate of 50 basis points above the primary credit rate was appropriate. However, one commenter suggested that a higher secondary credit rate should not reflect a risk premium, because all secondary credit would be collateralized fully. This commenter suggested that the higher rate was justified only by its ''incentive effect.'' Presumably this commenter was referring to the incentive a higher rate provides to less-sound institutions not to use discount window funding to expand their balance sheets inappropriately.

be at or above the basic discount rate, because that requirement would not be consistent with the pricing of primary credit. The Board specifically solicited comment on whether the seasonal credit program is still needed and, if so, whether the current formula for determining the rate remains appropriate. The majority of the comments that the Board received responded to this request.

Six commenters favored eliminating the seasonal credit program, arguing that small banks with seasonal needs had adequate access to other sources of liquidity and that the seasonal credit program was unnecessary. These commenters thought that the proposed primary and secondary credit programs could meet the needs of small banks. One commenter indicated that, if the Board kept the seasonal credit program, it should be available only to banks with less than $100 million in assets.

The Board received 39 comments from depository institutions, trade associations that represent small banks, and a Federal Reserve Bank urging the Board to retain the seasonal credit program, and most of these commenters also recommended retaining the existing rate formula.[16] The depository institutions argued that they continue to experience seasonal demand for which they have relatively few alternative funding sources. Some commenters indicated that they have no or very limited access to short-term capital markets and national money markets or that they can obtain credit through these channels only on unfavorable terms. Some small banks stated that they did not have access to the Federal Home Loan Banks (FHLBs), and some commenters with FHLB access stated that FHLB loans are for longer terms than needed to meet seasonal demand. Although many small banks indicated that their deposits generally have increased because of the recent decline in the equity markets, they expected that the availability of deposit funding would decrease as other investment options became more attractive. Some depository institutions also stated that obtaining liquidity by competing for additional deposits either was too expensive or was impossible because of a lack of core deposits in the community.

Several commenters indicated that eliminating the seasonal credit program would be harmful in other ways. Many institutions expressed concern that, without that program, the FHLBs would become their only viable alternative liquidity source and that they would be overly exposed to the FHLBs. Other depository institutions argued that if they could not obtain funding on terms comparable with those of the seasonal credit program, they in turn would not be able to compete effectively with other lenders, including the Farm Credit System, for agricultural loans.

Section 201.4(c) of the final rule leaves the seasonal credit unchanged, except for technical revisions contained in the Board's proposal.

Lowering the Primary Credit Rate in a Financial Emergency

In a financial emergency, lowering the discount rate would help to prevent an undue tightening of money markets, even if the Federal Reserve's ability to provide reserves through open market operations were constrained by the timing or effects of the conditions giving rise to the financial emergency. Especially in light of the events of September 11, 2001, when the System needed to make monetary policy and lending decisions quickly, the Board believes that it is desirable to ensure that the primary credit rate is lowered expeditiously in response to a financial emergency.

Section 201.51(d)(2) of the Board's rule defines a financial emergency as a significant disruption to the U.S. money markets resulting from an act of war, military or terrorist attack, natural disaster, or other catastrophic event. Ideally, a quorum of the Board would be present to review and determine the primary credit rate at the time a financial emergency occurred. However, to ensure that the Board's determination to lower the rate in response to a financial emergency could take effect even in the absence of a quorum, § 201.51(d) of the Board's final rule provides that the primary credit rate is reduced to the FOMC's target federal funds rate if in a financial emergency a Reserve Bank has requested that the primary credit rate be established at the target federal funds rate and the Chairman of the Board (or, in the absence of the Chairman, his designee) certifies at the time of the financial emergency that a quorum of the Board is not available. If the primary credit rate were lowered as a result of this provision, the primary credit rate then would float with the target federal funds rate, which the FOMC would continue to set. This provision of Regulation A implements the Board's decision that lowering the primary credit rate to the target federal funds rate in a financial emergency is the appropriate course of action. The Federal Reserve Banks are establishing analogous internal procedures to address the possibility that their boards of directors or other duly authorized officials might be unavailable or otherwise unable to communicate a rate request to the Board in a timely manner during a financial emergency.

Reorganization of and Changes to Other Provisions of Regulation A

Section 201.1 Authority, Purpose and Scope

The Board's final rule amends this section to include as sources of authority sections 11(i)–11(j) and 14(d) of the Federal Reserve Act, which respectively provide the Board with rulemaking authority and general supervisory authority over the Reserve Banks and authorize the Reserve Banks, subject to the review and determination of the Board, to establish discount rates. This section also gathers all existing provisions concerning the scope of Regulation A into one section by incorporating language from existing § 201.7(a) regarding the circumstances under which U.S. branches and agencies of foreign banks are subject to the regulation.

Section 201.2 Definitions

This section remains unchanged except for the deletion of five definitions. The definition of ''eligible institution'' (existing § 201.2(j)) is unnecessary because it related only to the SLF that was established for use during the months surrounding the January 1, 2000, date change. The definition of ''targeted federal funds rate'' (existing § 201.2(k)) also originally was used only in connection with the SLF. Although the new emergency rate procedure provision also refers to the target federal funds rate, that provision

[16] Commenters offered various suggestions regarding the seasonal credit program. Some thought that the seasonal credit rate should be even lower than the existing rate formula provides, and one asked that the Reserve Banks offer borrowers a choice of fixed or variable rates. Another commenter opined that the Reserve Banks should accept a broader range of assets as collateral, consider a ''blanket pledging agreement'' such as that used by the FHLBs, and stop demanding to take physical possession of the collateral. (The Board notes that in fact only a small fraction of collateral is held physically by the Reserve Banks. Most collateral is held by the pledging institution or pledged electronically.) One commenter suggested that Reserve Banks should allow depository institutions to borrow up to the entire amount of the assets they pledge as collateral (in other words, with no ''haircut''). Some commenters indicated that the Federal Reserve should not require banks to demonstrate that their seasonal needs were for four consecutive weeks and should not vary an institution's seasonal credit line from month to month. Other commenters suggested that the Federal Reserve simplify both the eligibility criteria and the information requirements in connection with seasonal credit and requested that the Reserve Banks do more to promote awareness of the seasonal credit program.

explains precisely what the term means. The Board therefore believes that there is no need to define the term ''targeted federal funds rate'' in the definition section.

The Board also is deleting the terms ''liquidation loss,'' ''increased loss,'' and ''excess loss,'' (existing § 201.2(d)–(f), respectively). Liquidation loss and increased loss are used to derive the term excess loss, which is the amount the Board would owe the Federal Deposit Insurance Corporation (FDIC) under section 10B(b) of the Federal Reserve Act if outstanding Reserve Bank advances to a critically undercapitalized depository institution increased the FDIC's cost of liquidating that institution. Since the enactment of section 10B(b) in 1991, section 10B(b)'s payment provision has not been used. The Board continues to believe that the three definitions describe accurately and in detail the calculations required by section 10B(b) and, should it become necessary in the future, the Board would calculate the amount that it owed to the FDIC in accordance with the methods described in these three definitions. However, because the definitions only describe what the statute already requires, the Board believes that the regulation would be less cumbersome but no less accurate if § 201.5 of the final rule (regarding lending to undercapitalized and critically undercapitalized institutions) simply cross-referenced section 10B(b) of the Federal Reserve Act.

One commenter suggested that the Board amend its definition of ''depository institution'' to include bankers'' banks, which specifically are excluded from the definition under existing Regulation A. The Board previously has determined that the discount window is an appropriate source of liquidity for depository institutions that are subject to reserve requirements, and the definition of the term ''depository institution'' in Regulation A therefore is based on the provisions in section 19 of the Federal Reserve Act and in the Board's Regulation D regarding those institutions that must maintain reserves. Those provisions specifically exempt bankers' banks from maintaining reserves, and because bankers' banks generally avail themselves of that exemption the Board continues to believe that bankers' banks also generally should not have access to the discount window. The Board therefore is not changing its definition of ''depository institution'' for purposes of Regulation A. However, the Board notes that bankers' banks are free to choose to be subject to the reserve requirements of section 19 of the Federal Reserve Act and Regulation D. The Board previously has allowed Reserve Banks to grant discount window access to a bankers' bank that voluntarily maintain reserves, and the Board expects that practice to continue under this final rule.

Section 201.3 General Requirements Governing Extensions of Credit

The Board is adopting § 201.3 as it appeared in the proposed rule. This section prescribes the Board's general rules governing a Federal Reserve Bank's extension of credit and combines in one place all the existing provisions of Regulation A that relate to the Reserve Bank's authority to extend credit, how credit is extended, and the requirements that apply to extensions of credit. This section states that credit to depository institutions generally will take the form of an advance but preserves a Reserve Bank's discretion to lend through discounting eligible paper if the Reserve Bank determines that a discount would be more appropriate for a particular depository institution. Section 201.3 cross-references the Reserve Banks' authority under section 13A of the Federal Reserve Act to lend to an institution that is part of the farm credit system, and accordingly the Board is deleting existing § 201.8 that deals with that topic.

Section 201.3 preserves existing text of Regulation A stating that a Reserve Bank has no obligation to make, increase, renew, or extend any advance or discount to a depository institution, and that any extension of credit the Reserve Bank chooses to make must be secured to the satisfaction of the Reserve Bank. The collateral policies of the Reserve Banks, as described in the Reserve Banks' Operating Circular No. 8, will remain unchanged. Section 201.3 contains existing text from § 201.4(d) providing that a Reserve Bank should ascertain whether an institution is undercapitalized or critically undercapitalized before extending credit to that institution and includes new text stating that if a Reserve Bank extends credit to such an institution then the Reserve Bank must follow special lending procedures.

Regarding the rules that apply to a borrower's use of central bank credit, § 201.3(d) contains new language that explicitly permits an institution that receives primary credit to use that credit to fund sales of federal funds without Reserve Bank permission. Recipients of secondary or seasonal credit would continue to need Reserve Bank permission to use Reserve Bank credit to fund sales of federal funds. The Board is deleting existing § 201.6(a), which provides that a depository institution may not use Federal Reserve credit as a substitute for capital, because the Board believes that other provisions of the statutes and regulations that it administers adequately address this issue. Section 201.5 Limitations on Availability and Assessments.

This section is unchanged from the proposed rule and describes the limitations on advances to an undercapitalized or critically undercapitalized depository institution set forth in section 10B(b) of the Federal Reserve Act and also applies those limitations to discounts for such institutions. In addition, § 201.5 discusses section 10B(b)'s requirement that the Board pay a specified amount to the FDIC if a Reserve Bank advance to a critically undercapitalized depository institution increases the loss the FDIC incurs when liquidating that institution. The existing regulation explains in detail through the definitions of ''liquidation loss,'' ''increased loss,'' and ''excess loss'' how the Board would calculate that amount. As discussed above, the proposed rule would delete these three definitions and simply provide that the Board will assess the Federal Reserve Banks for any amount the Board pays to the FDIC in accordance with section 10B(b) of the Federal Reserve Act.

Technical Amendment to Regulation D

In connection with its amendments to Regulation A, the Board is adopting a conforming amendment to § 204.7 of Regulation D. This section currently provides that the penalty charge for reserve deficiencies shall be 2 percentage points per year above the lowest rate (generally the adjustment credit rate) in effect for borrowings from the Federal Reserve Bank. In the recent past, the adjustment credit rate has consistently been set 50 basis points below the target federal funds rate, and the reserve deficiency charge therefore has been 150 basis points above the target federal funds rate.

The amendment to § 204.7 will base the charges for reserve deficiencies on the new primary credit rate in Regulation A and will authorize the Reserve Banks to assess charges for reserve deficiencies at a rate of 1 percentage point above the average primary credit rate. Under the revised formula, when the primary credit rate is 100 basis points above the target federal funds rate the reserve deficiency charge will be 200 basis points above the target federal funds rate. The conforming amendment will maintain approximate uniformity between the current and new levels of the deficiency charge.

The Board does not believe the slight difference between the current and new deficiency charge formulas is significant given the infrequency of reserve deficiency charges, the ability of the Reserve Banks to waive the charges under certain circumstances, and the future potential for variations in the spread between the target federal funds rate and the primary credit rate.

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b), relating to notice and public participation, were not followed in connection with the adoption of the technical amendment to Regulation D because this change merely adjusts the penalty charged for reserve deficiencies to conform with the amended borrowing rates of Regulation A, while approximating the current level of the reserve deficiency charge. The Board for good cause finds that delaying the change in the penalty charge for reserve deficiencies in order to allow notice and public comment on the change is unnecessary.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the amendments to Regulation A will not have a significantly adverse economic impact on a substantial number of small entities.

Regulation A establishes rules under which Federal Reserve Banks may extend credit to depository institutions as a backup source of liquidity. The final rule replaces the existing adjustment and extended credit programs with primary and secondary credit programs. Like the existing regulation, the final rule does not require an institution to use those programs. The vast majority of institutions that choose to borrow under the new programs will be eligible for primary credit, which has fewer conditions, requirements, and administrative costs than the adjustment credit program that it replaces. The final rule does not materially alter the existing seasonal credit program, which is available to small depository institutions with pronounced seasonal funding needs, except to remove a prerequisite to borrowing that the Reserve Banks in practice have not used for some time.

Based on 2001 call report data, there are approximately 16,250 depository institutions in the United States that have assets of $150 million or less and thus are considered small entities for purposes of the Regulatory Flexibility Act. In 2001, approximately 161 small depository institutions received adjustment credit, none received extended credit, and approximately 156 received seasonal credit.[17] Although the Board solicited comment on the impact that the proposed rule would have on small depository institutions, no commenters specifically addressed that subject. However, the Board anticipates that the few small depository institutions that make use of the existing discount window programs will find the new programs to be comparatively more accessible and less burdensome, which should enable more efficient use of the discount window.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget. The final rule contains no new collections of information and proposes no substantive changes to existing collections of information pursuant to the Paperwork Reduction Act.

List of Subjects in 12 CFR Parts 201 and 204

Banks, Banking, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

1. The authority citation for part 201 is revised to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

2. Sections 201.1 through 201.5 are revised to read as follows:

§ 201.1 Authority, purpose and scope.

(a) *Authority.* This part is issued under the authority of sections 10A, 10B, 11(i), 11(j), 13, 13A, 14(d), and 19 of the Federal Reserve Act (12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461).

(b) *Purpose and scope.* This part establishes rules under which a Federal Reserve Bank may extend credit to depository institutions and others. Except as otherwise provided, this part applies to United States branches and agencies of foreign banks that are subject to reserve requirements under Regulation D (12 CFR part 204) in the same manner and to the same extent as this part applies to depository institutions. The Federal Reserve System extends credit with due regard to the basic objectives of monetary policy and the maintenance of a sound and orderly financial system.

§ 201.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Appropriate federal banking agency* has the same meaning as in section 3 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(q)).

(b) *Critically undercapitalized insured depository institution* means any insured depository institution as defined in section 3 of the FDI Act (12 U.S.C. 1813(c)(2)) that is deemed to be critically undercapitalized under section 38 of the FDI Act (12 U.S.C. 1831o(b)(1)(E)) and its implementing regulations.

(c)(1) *Depository institution* means an institution that maintains reservable transaction accounts or nonpersonal time deposits and is:

(i) An *insured bank* as defined in section 3 of the FDI Act (12 U.S.C. 1813(h)) or a bank that is eligible to make application to become an insured bank under section 5 of such act (12 U.S.C. 1815);

(ii) A *mutual savings bank* as defined in section 3 of the FDI Act (12 U.S.C. 1813(f)) or a bank that is eligible to make application to become an insured bank under section 5 of such act (12 U.S.C. 1815);

(iii) A *savings bank* as defined in section 3 of the FDI Act (12 U.S.C. 1813(g)) or a bank that is eligible to make application to become an insured bank under section 5 of such act (12 U.S.C. 1815);

(iv) An *insured credit union* as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752(7)) or a credit union that is eligible to make application to become an insured credit union pursuant to section 201 of such act (12 U.S.C. 1781);

(v) A *member* as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422(4)); or

(vi) A *savings association* as defined in section 3 of the FDI Act (12 U.S.C. 1813(b)) that is an insured depository institution as defined in section 3 of the act (12 U.S.C. 1813(c)(2)) or is eligible to apply to become an insured depository institution under section 5 of the act (12 U.S.C. 15(a)).

(2) The term *depository institution* does not include a financial institution

[17] The Board notes that the volume for seasonal credit in 2001 was below average.

that is not required to maintain reserves under § 204.1(c)(4) of Regulation D (12 CFR 204.1(c)(4)) because it is organized solely to do business with other financial institutions, is owned primarily by the financial institutions with which it does business, and does not do business with the general public.

(d) *Transaction account* and *nonpersonal time deposit* have the meanings specified in Regulation D (12 CFR part 204).

(e) *Undercapitalized insured depository institution* means any insured depository institution as defined in section 3 of the FDI Act (12 U.S.C. 1813(c)(2)) that:

(1) Is not a critically undercapitalized insured depository institution; and

(2)(i) Is deemed to be undercapitalized under section 38 of the FDI Act (12 U.S.C. 1831o(b)(1)(C)) and its implementing regulations; or

(ii) Has received from its appropriate federal banking agency a composite CAMELS rating of 5 under the Uniform Financial Institutions Rating System (or an equivalent rating by its appropriate federal banking agency under a comparable rating system) as of the most recent examination of such institution.

(f) *Viable,* with respect to a depository institution, means that the Board of Governors or the appropriate federal banking agency has determined, giving due regard to the economic conditions and circumstances in the market in which the institution operates, that the institution is not critically undercapitalized, is not expected to become critically undercapitalized, and is not expected to be placed in conservatorship or receivership. Although there are a number of criteria that may be used to determine viability, the Board of Governors believes that ordinarily an undercapitalized insured depository institution is viable if the appropriate federal banking agency has accepted a capital restoration plan for the depository institution under 12 U.S.C. 1831o(e)(2) and the depository institution is complying with that plan.

§ 201.3 Extensions of credit generally.

(a) *Advances to and discounts for a depository institution.* (1) A Federal Reserve Bank may lend to a depository institution either by making an advance secured by acceptable collateral under § 201.4 of this part or by discounting certain types of paper. A Federal Reserve Bank generally extends credit by making an advance.

(2) An advance to a depository institution must be secured to the satisfaction of the Federal Reserve Bank that makes the advance. Satisfactory collateral generally includes United States government and federal-agency securities, and, if of acceptable quality, mortgage notes covering one-to four-family residences, state and local government securities, and business, consumer, and other customer notes.

(3) If a Federal Reserve Bank concludes that a discount would meet the needs of a depository institution or an institution described in section 13A of the Federal Reserve Act (12 U.S.C. 349) more effectively, the Reserve Bank may discount any paper indorsed by the institution, provided the paper meets the requirements specified in the Federal Reserve Act.

(b) *No obligation to make advances or discounts.* A Federal Reserve Bank shall have no obligation to make, increase, renew, or extend any advance or discount to any depository institution.

(c) *Information requirements.* (1) Before extending credit to a depository institution, a Federal Reserve Bank should determine if the institution is an undercapitalized insured depository institution or a critically undercapitalized insured depository institution and, if so, follow the lending procedures specified in § 201.5.

(2) Each Federal Reserve Bank shall require any information it believes appropriate or desirable to ensure that assets tendered as collateral for advances or for discount are acceptable and that the borrower uses the credit provided in a manner consistent with this part.

(3) Each Federal Reserve Bank shall:

(i) Keep itself informed of the general character and amount of the loans and investments of a depository institution as provided in section 4(8) of the Federal Reserve Act (12 U.S.C. 301); and

(ii) Consider such information in determining whether to extend credit.

(d) *Indirect credit for others.* Except for depository institutions that receive primary credit as described in § 201.4(a), no depository institution shall act as the medium or agent of another depository institution in receiving Federal Reserve credit except with the permission of the Federal Reserve Bank extending credit.

§ 201.4 Availability and terms of credit.

(a) *Primary credit.* A Federal Reserve Bank may extend primary credit on a very short-term basis, usually overnight, as a backup source of funding to a depository institution that is in generally sound financial condition in the judgment of the Reserve Bank. Such primary credit ordinarily is extended with minimal administrative burden on the borrower. A Federal Reserve Bank also may extend primary credit with maturities up to a few weeks as a backup source of funding to a depository institution if, in the judgment of the Reserve Bank, the depository institution is in generally sound financial condition and cannot obtain such credit in the market on reasonable terms. Credit extended under the primary credit program is granted at the primary credit rate.

(b) *Secondary credit.* A Federal Reserve Bank may extend secondary credit on a very short-term basis, usually overnight, as a backup source of funding to a depository institution that is not eligible for primary credit if, in the judgment of the Reserve Bank, such a credit extension would be consistent with a timely return to a reliance on market funding sources. A Federal Reserve Bank also may extend longer-term secondary credit if the Reserve Bank determines that such credit would facilitate the orderly resolution of serious financial difficulties of a depository institution. Credit extended under the secondary credit program is granted at a rate above the primary credit rate.

(c) *Seasonal credit.* A Federal Reserve Bank may extend seasonal credit for periods longer than those permitted under primary credit to assist a smaller depository institution in meeting regular needs for funds arising from expected patterns of movement in its deposits and loans. An interest rate that varies with the level of short-term market interest rates is applied to seasonal credit.

(1) A Federal Reserve Bank may extend seasonal credit only if:

(i) The depository institution's seasonal needs exceed a threshold that the institution is expected to meet from other sources of liquidity (this threshold is calculated as a certain percentage, established by the Board of Governors, of the institution's average total deposits in the preceding calendar year); and

(ii) The Federal Reserve Bank is satisfied that the institution's qualifying need for funds is seasonal and will persist for at least four weeks.

(2) The Board may establish special terms for seasonal credit when depository institutions are experiencing unusual seasonal demands for credit in a period of liquidity strain.

(d) *Emergency credit for others.* In unusual and exigent circumstances and after consultation with the Board of Governors, a Federal Reserve Bank may extend credit to an individual, partnership, or corporation that is not a depository institution if, in the judgment of the Federal Reserve Bank, credit is not available from other sources and failure to obtain such credit would adversely affect the economy. If

the collateral used to secure emergency credit consists of assets other than obligations of, or fully guaranteed as to principal and interest by, the United States or an agency thereof, credit must be in the form of a discount and five or more members of the Board of Governors must affirmatively vote to authorize the discount prior to the extension of credit. Emergency credit will be extended at a rate above the highest rate in effect for advances to depository institutions.

§ 201.5 Limitations on availability and assessments.

(a) *Lending to undercapitalized insured depository institutions.* A Federal Reserve Bank may make or have outstanding advances to or discounts for a depository institution that it knows to be an undercapitalized insured depository institution, only:

(1) If, in any 120-day period, advances or discounts from any Federal Reserve Bank to that depository institution are not outstanding for more than 60 days during which the institution is an undercapitalized insured depository institution; or

(2) During the 60 calendar days after the receipt of a written certification from the chairman of the Board of Governors or the head of the appropriate federal banking agency that the borrowing depository institution is viable; or

(3) After consultation with the Board of Governors. In unusual circumstances, when prior consultation with the Board is not possible, a Federal Reserve Bank should consult with the Board as soon as possible after extending credit that requires consultation under this paragraph (a)(3).

(b) *Lending to critically undercapitalized insured depository institutions.* A Federal Reserve Bank may make or have outstanding advances to or discounts for a depository institution that it knows to be a critically undercapitalized insured depository institution only:

(1) During the 5-day period beginning on the date the institution became a critically undercapitalized insured depository institution; or

(2) After consultation with the Board of Governors. In unusual circumstances, when prior consultation with the Board is not possible, a Federal Reserve Bank should consult with the Board as soon as possible after extending credit that requires consultation under this paragraph (b)(2).

(c) *Assessments.* The Board of Governors will assess the Federal Reserve Banks for any amount that the Board pays to the FDIC due to any excess loss in accordance with section 10B(b) of the Federal Reserve Act. Each Federal Reserve Bank shall be assessed that portion of the amount that the Board of Governors pays to the FDIC that is attributable to an extension of credit by that Federal Reserve Bank, up to 1 percent of its capital as reported at the beginning of the calendar year in which the assessment is made. The Board of Governors will assess all of the Federal Reserve Banks for the remainder of the amount it pays to the FDIC in the ratio that the capital of each Federal Reserve Bank bears to the total capital of all Federal Reserve Banks at the beginning of the calendar year in which the assessment is made, provided, however, that if any assessment exceeds 50 percent of the total capital and surplus of all Federal Reserve Banks, whether to distribute the excess over such 50 percent shall be made at the discretion of the Board of Governors.

§§ 201.6–201.9 [Removed]

3. Sections 201.6, 201.7, 201.8, and 201.9 are removed.

4. Section 201.51 is revised to read as follows:

§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.

(a) *Primary credit.* The rate for primary credit provided to depository institutions under § 201.4(a) is a rate above the target federal funds rate of the Federal Open Market Committee.

(b) *Secondary credit.* The rate for secondary credit extended to depository institutions under § 201.4(c) is a rate above the primary credit rate.

(c) *Seasonal credit.* The rate for seasonal credit extended to depository institutions under § 201.4(b) is a flexible rate that takes into account rates on market sources of funds.

(d) *Primary credit rate in a financial emergency.* (1) The primary credit rate at a Federal Reserve Bank is the target federal funds rate of the Federal Open Market Committee if:

(i) In a financial emergency the Reserve Bank has established the primary credit rate at that rate; and

(ii) The Chairman of the Board of Governors (or, in the Chairman's absence, his authorized designee) certifies that a quorum of the Board is not available to act on the Reserve Bank's rate establishment.

(2) For purposes of this paragraph (d), a financial emergency is a significant disruption to the U.S. money markets resulting from an act of war, military or terrorist attack, natural disaster, or other catastrophic event.

§ 201.52 [Removed]

5. Section 201.52 is removed.

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

2. Amend § 204.7 by revising the second sentence of paragraph (a)(1) to read as follows:

§ 204.7 Penalties.

(a) * * *

(1) * * * Federal Reserve Banks are authorized to assess charges for deficiencies in required reserves at a rate of 1 percentage point per year above the primary credit rate, as provided in § 201.51(a) of this chapter, in effect for borrowings from the Federal Reserve Bank on the first day of the calendar month in which the deficiencies occurred. * * *

* * * * *

By order of the Board of Governors of the Federal Reserve System, October 31, 2002.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 02–28115 Filed 11–6–02; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2002–13624; Airspace Docket No. 02–AEA–17]

RIN 2120–AA66

Revocation of Restricted Area R–5207, Romulus, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Restricted Area R–5207 (R–5207), Romulus, NY. The FAA is taking this action in response to the Department of the Army's notification that the military no longer has an operational need for the restricted area.

EFFECTIVE DATE: 0901 UTC, January 23, 2003.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

The Department of the Army's position on special use airspace is that it will efficiently utilize only that airspace necessary to accomplish its mission. In keeping with that policy, since the Army has closed the Seneca Army Depot there is no longer a requirement for R–5207 and the Army has requested that the FAA take action to remove the restricted area.

The Rule

This action amends 14 CFR part 73 by removing R–5207, Romulus, NY. The FAA is taking this action at the request of the Department of the Army. This action returns this airspace for public use.

Since this action only involves removal of restricted airspace, the solicitation of comments would only delay the return of airspace to public use without offering any meaningful right or benefit to any segment of the public. Therefore, I find that notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this action: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Section 73.52 of 14 CFR part 73 was republished in FAA Order 7400.8K, dated September 26, 2002.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts,'' and the National Environmental Policy Act of 1969. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.52 [Amended]

2. § 73.52 is amended as follows:

* * * * *

R–5207 Romulus, NY [Removed]

* * * * *

Issued in Washington, DC, on October 31, 2002.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 02–28364 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2002–13525; Airspace Docket No. 02–AWP–08]

RIN 2120–AA66

Amendment to Using Agency for Restricted Area 2301W Ajo West, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the using agency of R–2301W, Ajo West, AZ. On August 12, 2002, the United States Air Force (USAF) and United States Marine Corps (USMC) requested that the FAA change the using agency for R–2301W from ''U.S. Air Force, 58th Fighter Wing Luke AFB, AZ,'' to ''Commanding Officer, USMC Air Station, Yuma, AZ,'' to reflect an administrative change of responsibility for the restricted area. This action responds to this request and does not change the boundaries; designated altitudes; time of designation; or activities conducted within the affected restricted area.

EFFECTIVE DATE: 0901 UTC, January 23, 2003.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

The Rule

This action amends title 14 Code of Federal Regulations (CFR) part 73 by changing the using agency of R–2301W, Ajo West, AZ. On August 12, 2002, the USAF and USMC requested that the FAA change the using agency for R–2301W from, ''U.S. Air Force, 58th Fighter Wing Luke AFB, AZ,'' to ''Commanding Officer, USMC Air Station, Yuma, AZ,'' to reflect an administrative change of responsibility for the restricted area. This action is an administrative change and does not affect the current boundaries; designated altitudes; time of designation; or activities conducted within the affected restricted area. Therefore, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The coordinates for this airspace docket are based on North American Datum 83. Section 73.22 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8J, dated September 20, 2001.

Environmental Review

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

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.23 [Amended]

2. § 73.23 is amended as follows:

* * * * *

R–2301W [Amended]

By removing the words ''Using agency. U.S. Air Force, 58th Fighter Wing Luke AFB, AZ,'' and inserting the words ''Using agency. Commanding Officer, USMC Air Station, Yuma, AZ.''

* * * * *

Issued in Washington, DC, October 29, 2002.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 02–28365 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 874

[Docket No. 02P–0241]

Medical Devices; Ear, Nose, and Throat Devices; Classification of the Transcutaneous Air Conduction Hearing Aid System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the transcutaneous air conduction hearing aid system (TACHAS) into class II (special controls). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device. The agency is taking this action in response to a petition submitted under the Federal Food, Drug, and Cosmetic Act (the act) as amended by the Medical Device Amendments of 1976 (the amendments), the Safe Medical Devices Act of 1990, and the Food and Drug Administration Modernization Act of 1997 (FDAMA). The agency is classifying this device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

DATES: This rule is effective November 7, 2002.

FOR FURTHER INFORMATION CONTACT: Eric Mann, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2080.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the act (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the amendments, generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously marketed devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of the FDA regulations. Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after issuing an order classifying the device, FDA must publish a document in the **Federal Register** announcing the classification.

On June 21, 2002, FDA received a petition submitted under section 513(f)(2) of the act by Auric Hearing Systems Inc., seeking an evaluation of the automatic class III designation of its RetroX device. This device is intended to compensate for impaired hearing without occluding the ear canal. In accordance with section 513(f)(1) of the act, FDA issued an order automatically classifying the RetroX device in class III because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device that was subsequently reclassified into class I or II. After reviewing information submitted in the petition, FDA determined that the RetroX device and substantially equivalent devices can be classified in class II with the establishment of special controls. FDA believes that class II special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

FDA has identified the following risks to health associated specifically with this type of device: (1) Infection /local inflammation, (2) injury to the ear canal, and (3) ineffective amplification.

Therefore, in addition to the general controls of the act, the device is subject to a special control guidance document entitled ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System (TACHAS); Guidance for Industry and FDA.''

FDA believes the following controls identified in the class II special controls guidance document for a TACHAS device, when combined with the general controls of the act, will provide reasonable assurance of the safety and effectiveness of this type device: (1) Electro-acoustic testing, (2) fatigue testing, (3) strength test validation, (4) biocompatibility, (5) sterility, (6) clinical information, and (7) labeling to include prescription labeling in accordance with 21 CFR 801.109.

FDA believes that adherence to the class II special controls addresses the risks to health identified previously in this section of this document and provides a reasonable assurance of the safety and effectiveness of the device.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirement under section 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of safety and effectiveness and, therefore, the device is not exempt from the premarket notification requirements. The device is used as a wearable sound-amplifying device intended to compensate for impaired hearing without occluding the ear canal. FDA review of key design

features, data sets from bench studies and clinical trials, other relevant performance data, and labeling will ensure that acceptable levels of performance for both safety and effectiveness are addressed before marketing clearance. Thus, persons who intend to market this device type must submit to FDA a premarket notification submission containing information on the TACHAS they intend to market prior to marketing the device.

On August 20, 2002, FDA issued an order classifying the RetroX device and substantially equivalent devices of this generic type into class II under the generic name, transcutaneous air conduction hearing aid system. FDA identifies this generic type of device as:

A wearable sound-amplifying device intended to compensate for impaired hearing without occluding the ear canal. The device consists of an air conduction hearing aid attached to a surgically fitted tube system, which is placed through soft tissue between the post auricular region and the outer ear canal.

The order also identifies a special control applicable to this device a guidance document entitled ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System (TACHAS); Guidance for Industry and FDA.'' Any firm submitting a 510(k) premarket notification for the device would need to address the issues covered in the special control guidance. However, the firm would need to show only that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

FDA is now codifying the classification and the special control by adding new § 874.3950. For the convenience of the reader, FDA is also adding a new § 874.1(e) to inform the reader where to find guidance documents referenced in 21 CFR part 874.

II. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the final rule is not a significant regulatory action as defined by the Executive order and so it is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. FDA knows of only one manufacturer of this type of device. Classification of these devices from class III to class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs. The agency, therefore, certifies that the final rule will not have a significant impact on a substantial number of small entities. In addition, this final rule will not impose costs of $100 million or more on either the private sector or State, local, and tribal governments in the aggregate and, therefore, a summary statement of analysis under section 202(a) of the Unfunded Mandates Reform Act is not required.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

V. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

List of Subjects in 21 CFR Part 874

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 874 is amended as follows:

PART 874—EAR, NOSE, AND THROAT DEVICES

1. The authority citation for 21 CFR part 874 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 874.1 is amended by adding paragraph (e) to read as follows:

§ 874.1 Scope.

* * * * *

(e) Guidance documents referenced in this part are available on the Internet at http://www.fda.gov/cdrh/guidance.html

3. Section 874.3950 is added to subpart D to read as follows:

§ 874.3950 Transcutaneous air conduction hearing aid system.

(a) *Identification.* A transcutaneous air conduction hearing aid system is a wearable sound-amplifying device intended to compensate for impaired hearing without occluding the ear canal. The device consists of an air conduction hearing aid attached to a surgically fitted tube system, which is placed through soft tissue between the post auricular region and the outer ear canal.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's guidance document entitled ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System (TACHAS); Guidance for Industry and FDA.'' See § 874.1 for the availability of this guidance document.

Dated: October 28, 2002.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 02–28398 Filed 11–6–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Interim rule with request for comment.

SUMMARY: The U.S. Parole Commission is amending its procedures governing the mandatory release of military prisoners confined in federal civilian prisons. Such mandatory release is earned through good time credits. The amendment implements a Department of Defense Instruction that permits the U.S. Parole Commission to place a military prisoner who is released from a federal civilian prison under ''mandatory supervision as if on parole'' until the expiration of the sentence imposed, if the Commission determines that such supervision is necessary for the orderly transition of the offender back into community.

DATES: *Effective Date:* These rule amendments are effective December 9, 2002.

Comment Date: Comments must be received by December 23, 2002.

ADDRESSES: Send comments to the Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.

FOR FURTHER INFORMATION CONTACT: Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492–5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: Former Department of Defense regulations did not permit any military prisoner who was released by operation of law due to good time credits to be subject to supervision in the community for the remainder of the imposed sentence. This was in contrast to the requirement that applies to federal civilian prisoners who are eligible for but denied parole. Prisoners sentenced by military courts martial and then transferred to a federal institution come under the exclusive jurisdiction of the U.S. Parole Commission for parole purposes pursuant to 10 U.S.C. 858. Thus, in the absence of any rule authorizing post-release supervision for military mandatory releasees, there was a gap in the Commission's authority to require post-release supervision for military prisoners mandatorily released on good time from institutions operated by the Federal Bureau of Prisons. (The Bureau of Prisons considered former 18 U.S.C. 4164—which authorizes mandatory release supervision for federal civilian prisoners eligible for parole—to be inapplicable to military prisoners who committed their crimes on or after November 1, 1987.) Thus, if the Commission denied parole and continued a military prisoner to the expiration of his sentence, the Commission was not able to supervise the offender. However, if the Commission paroled the military prisoner prior to the mandatory release date, the Commission could supervise the military offender just as any other parolee to the expiration of the prisoner's sentence.

At the request of the Attorney General of the United States, the Department of Defense has amended its regulations regarding the mandatory release of military prisoners, including prisoners in the custody of the Bureau of Prisons. *See* DoD Instruction 1325.7, ''Administration of Military Correctional Facilities and Clemency and Parole Authority,'' July 17, 2001. These regulations generally allow for the supervision of military prisoners mandatorily released with good time deductions.[1] In the regulations, the Department of Defense adopted a policy to use mandatory supervision in all cases except where the Service Clemency and Parole Boards find it inappropriate. The regulations also permit the Parole Commission to place military prisoners who are in federal civilian custody on ''mandatory supervision'' after they are mandatorily released, if the Commission finds that such supervision is appropriate ''to provide an orderly transition to civilian life for released prisoners and to protect the communities into which the prisoners are released.'' *See* DoD Instruction 1325.7 (6.20.8). However, the DoD Instruction is silent as to whether the Commission should, as the Department of Defense has done, adopt a general presumption that mandatory supervision is appropriate. Additionally, the new DoD instruction may be applied only to offenders who committed their crimes 30 days or more after the rule change. Therefore, under the terms of the DoD instruction, the Commission can only require supervision if the prisoner committed his crime on or after August 16, 2001.

The Commission is adopting a paragraph at the end of 28 CFR 2.35 so that the Commission's rules will conform to the Department of Defense regulations and policy regarding the mandatory release of military prisoners. Pursuant to the DoD Instruction, the amended rule states that when the Commission orders a military offender continued to expiration, the military prisoner will be placed on ''mandatory supervision'' until the expiration of his sentence if the Commission finds that the DoD criteria are met. The Commission is adopting this rule in order to give military offenders incarcerated in federal civilian prisons notice that, if the Commission denies the prisoner parole and continues the prisoner to the expiration of the prisoner's sentence, the prisoner may be required to serve a period of mandatory supervision after the prisoner's release. Although the Commission already has the authority under Department of Defense regulations to order mandatory supervision for military prisoners who committed their offenses on or after August 16, 2001, this rule further clarifies the Commission's authority and explains the Commission's general statement of policy regarding mandatory supervision.

The amended rule also includes the presumption that supervision is appropriate for all military mandatory releasees unless case-specific factors indicate that supervision is not appropriate. *See* DoD Instruction 1325.7 (6.20.1). The Commission is adopting this presumption for several reasons. First, the presumption in favor of supervision conforms with the presumption in the DoD Instruction. The inclusion of the presumption in favor of supervision after mandatory release will thus result in a uniform application of the Instruction among military offenders released from military and civilian institutions. Most importantly, the Commission agrees with the Department of Defense's general assessment that supervision in the community is, for the majority of cases, a highly effective technique to provide for a transition into the community and to protect the communities into which the prisoners are released. Therefore, the rule states that mandatory supervision shall be presumed unless the Commission finds case-specific factors illustrating that such supervision is inappropriate.

Finally, the rule makes it clear that, a prisoner on ''mandatory supervision'' will be subject to the conditions of parole at 28 CFR 2.40 and will be eligible for early termination of the supervision under 28 CFR 2.43. Thus, under the rule, military prisoners released on mandatory supervision will be subject to the same conditions and will have the same prospect for early termination of their supervision as federal offenders under parole or mandatory supervision.

[1] Mandatory supervision for military offenders differs from mandatory release for ''old law'' U.S. Code offenders under 18 U.S.C. 4164 since such supervision runs to the full term without the 180 -day reduction that applies to civilian, ''old law'' mandatory releasees.

Implementation

This interim rule will be implemented for any military offender mandatorily released on good time deductions from a federal civilian prison if the offender committed his offense after August 15, 2001.

Regulatory Assessment Requirements

The U.S. Parole Commission has determined that this interim rule does not constitute a significant rule within the meaning of Executive Order 12866. The interim rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b), and is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to Section 804(3)(c) of the Congressional Review Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

The Amended Rule

Accordingly, the U.S. Parole Commission is adopting the following amendments to 28 CFR Part 2.

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read as follows:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

Subpart A—United States Code Prisoners and Parolees

2. Section 2.35 is amended by adding the following paragraph (d):

§ 2.35 Mandatory release in the absence of parole.

* * * * *

(d) If the Commission orders a military prisoner who is under the Commission's jurisdiction for an offense committed after August 15, 2001 continued to the expiration of his sentence (or otherwise does not grant parole), the Commission shall place such prisoner on mandatory supervision after release if the Commission determines that such supervision is appropriate to provide an orderly transition to civilian life for the prisoner and to protect the community into which such prisoner is released. The Commission shall presume that mandatory supervision is appropriate for all such prisoners unless case-specific factors indicate that supervision is inappropriate. A prisoner who is placed on mandatory supervision shall be deemed to be released as if on parole, and shall be subject to the conditions of release at § 2.40 until the expiration of the maximum term for which he was sentenced, unless the Commission terminates the supervision early under § 2.43.

Dated: October 31, 2002.

Edward F. Reilly, Jr.,

Chairman, U.S. Parole Commission.

[FR Doc. 02–28318 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–31–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AL20

Service Connection by Presumption of Aggravation of a Chronic Preexisting Disease

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning presumptive service connection to reflect a statutory presumption that a chronic disease that preexisted the veteran's entry into military service but was first manifest to a 10-percent degree of disability within a specified period after service was aggravated by the veteran's military service. This amendment is necessary to make the regulations conform with the statute and the Court's decision.

DATES: *Effective Date:* November 7, 2002.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–7213.

SUPPLEMENTARY INFORMATION: Section 1112(a), 38 U.S.C., states that, ''a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service * * * shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.''

In the VA General Counsel Precedent Opinion 14–98 (VAOPGCPREC 14–98 (October 2, 1998)), the General Counsel held that Section 1112(a) of title 38, United States Code, does not establish a presumption of aggravation for a chronic disease that existed prior to service but first became manifest to a compensable degree within the presumptive period following service.

In *Splane* v. *West*, 216 F. 3d 1058 (2000), the United States Court of Appeals for the Federal Circuit concluded, among other things, that the General Counsel's interpretation of 38 U.S.C. 1112(a) was not in accordance with law and was therefore in excess of statutory authority. The Court held that 38 U.S.C. 1112(a) establishes not only a presumption of service incurrence for chronic diseases first manifest after service, but also a presumption of aggravation for chronic diseases that existed prior to service but first became manifest to a degree of disability of 10 percent or more within the presumption period after service. The Court vacated that portion of the General Counsel Precedent Opinion which interpreted 38 U.S.C. 1112(a).

VA regulations currently prohibit establishing service connection for aggravation of a preexisting chronic disease that first becomes manifest to a degree of 10 percent or more following discharge from military service. This prohibition is inconsistent with the statute as interpreted by the United States Court of Appeals for the Federal Circuit. Therefore, we are amending 38 CFR 3.307(a), (c), (d), and 3.309(a), to conform to the plain language of the statute and the conclusions of the Court.

Presently, 38 CFR 3.307(a), (c), and (d) provide only for a presumption of service incurrence. Accordingly, it is necessary to revise those paragraphs to include a presumption of aggravation.

38 CFR 3.307(d) currently states the factors to be considered in determining whether the presumption of service incurrence has been rebutted. The current regulation is based on the invalid conclusion that the presumption is one of service incurrence only. This provision is inconsistent with *Splane* because *Splane* establishes that 38 U.S.C. 1112(a) includes a presumption of aggravation of pre-existing diseases that were not incurred in service. Accordingly, it is necessary to revise 38 CFR 3.307(d) to state separately the criteria for rebutting the presumption of service incurrence (in cases where the chronic disease did not exist prior to service) and the criteria for rebutting the presumption of aggravation (in cases where the chronic disease did exist prior to service).

A current VA regulation, 38 CFR 3.306(a), provides that a presumption of aggravation based on an increase in the severity of a preexisting condition during service may be rebutted by evidence that the increase was due to

the natural progress of the disease. Additionally, section 1113(a) of title 38, United States Code, indicates that a presumption of service connection based on manifestations of disability subsequent to service may be rebutted by affirmative evidence to the contrary or evidence to establish that such disability is due to an intercurrent disease or injury suffered after separation from service. We are revising § 3.307(d) to reflect these principles. Although *Splane* did not discuss the criteria for rebutting the presumption of aggravation, we believe that inclusion of these rebuttal standards is necessary to the implementation of that decision.

Administrative Procedure Act

Changes made by this final rule merely reflect the statutory requirements or the decision of the United States Court of Appeals for the Federal Circuit. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This amendment would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: September 9, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Section 3.307 is amended by:

A. In paragraph (a) introductory text, removing ''incurred in'' and adding, in its place, ''incurred in or aggravated by''.

B. In paragraph (c), removing the last sentence ''The consideration of service incurrence provided for chronic diseases will not be interpreted to permit any presumption as to aggravation of a preservice disease or injury after discharge.''.

C. Revising paragraph (d) and the authority citation at the end of the section.

The revision reads as follows:

§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

* * * * *

(d) *Rebuttal of service incurrence or aggravation.* (1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in § 3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression ''affirmative evidence to the contrary'' will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not incurred in service. As to tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under § 3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition.

(Authority: 38 U.S.C 1113 and 1153)

§ 3.309 [Amended]

3. Section 3.309(a) is amended by removing ''incurred in'' and adding, in its place, ''incurred in or aggravated by''.

[FR Doc. 02–28267 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 021031262–2262–01; I.D. 103002A]

RIN 0648–AQ56

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Temporary rule; request for comments.

SUMMARY: NMFS issues this temporary authorization to allow the use of limited tow times by shrimp trawlers as an alternative to the use of Turtle Excluder Devices (TEDs) in certain waters off Louisiana and Alabama. The exempted area in Louisiana consists of all the Louisiana state waters east of 92° 20′ W. long. (approximately at Fresh Water Bayou in Vermilion Parish, Louisiana); Federal waters are not included. The

exempted area in Alabama consists of the inshore waters (inshore waters are landward of the COLREGS demarcation line) of Bon Secour Bay, Mobile Bay, and Mississippi Sound, south of the Intracoastal Waterway. This exemption will be in effect for 30 days and is necessary to relieve the economic hardship on shrimpers while ensuring adequate protection of threatened and endangered sea turtles.

DATES: This action is effective from November 1, 2002 through December 2, 2002. Comments on this action are requested, and must be received by December 2, 2002.

ADDRESSES: Comments on this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Bob Hoffman, 727–570–5312, or Barbara A. Schroeder, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take and mortality of sea turtles as a result of trawling activities have been documented in the Gulf of Mexico and along the Atlantic Ocean seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 223.206 and 50 CFR 224.104. The regulations require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic Area, Gulf Area, and Summer flounder fishery-sea turtle protection area, all as defined in 50 CFR 222.102) to have a NMFS-approved TED installed in each net that is rigged for fishing to provide for the escape of sea turtles. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, two types of special hard TEDs (the flounder TED and the Jones TED), and one type of soft TED (the Parker soft TED).

The TEDs incorporate an escape opening, usually covered by a webbing flap, that allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be at least 97 percent effective in excluding sea turtles during experimental TED testing (50 CFR 223.207(e)). The TED must meet generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape. In the Atlantic Area, these requirements are currently ≥35 inches (≥89 cm) in width and ≥12 inches (≥30 cm) in height. In the Gulf Area, the requirements are ≥32 inches (≥81 cm) in width and ≥10 inches (≥25 cm) in height.

The regulations governing sea turtle take prohibitions and exemptions provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. For example, debris can clog a TED which renders the TED ineffective at catching shrimp as well as excluding turtles. The provisions of 50 CFR 223.206 (d)(3)(ii) specify that the NOAA Assistant Administrator for Fisheries (AA) may authorize compliance with tow time restrictions as an alternative to the TED requirement for up to 30 days, if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow-time limits are authorized as an alternative to the use of TEDs. The tow times may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31 as measured from the time that the trawl doors enter the water until they are removed from the water. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

Recent Events

On October 10 and 23, 2002, the NMFS Southeast Regional Administrator received requests from the Secretary of the Louisiana Department of Wildlife and Fisheries (LADWF) and the Director of the Alabama Department of Conservation and Natural Resources' (ALDCNR) Marine Resources Division, respectively, to allow the use of tow times as an alternative to turtle excluder devices (TEDs) in state waters because of excessive storm-related debris on the fishing grounds. The increase in debris on the shrimping grounds was the result of Tropical Storm Isidore and Hurricane Lili. After an investigation, the LADWF and ALDCNR determined that this debris is affecting the fishermen's ability to use TEDs effectively. Both Louisiana and Alabama have stated that their marine enforcement agencies will enforce the tow time restrictions.

NMFS gear technicians interviewed fishermen and surveyed parts of the affected areas in Louisiana and Alabama on October 23 and 24, 2002. The interviews and surveys conducted by the gear technicians and phone conversations between NMFS Southeast Region Protected Resources staff and state resource agency staffs confirmed that there are problems with debris in Louisiana from the Mississippi/Louisiana border around the mouth of the Mississippi River to approximately Fresh Water Bayou in Vermilion Parish, Louisiana and in Alabama from Bon Secour Bay to the Alabama/Mississippi border between the Intracoastal Waterway and the barrier islands.

Special Environmental Conditions And Alternative to Required Use of TEDs

The AA finds that debris washed into portions of state waters of Louisiana and Alabama from Tropical Storm Isidore and Hurricane Lili have created special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to authorize the use of restricted tow times as an alternative to the use of TEDs in the state waters of Louisiana (no Federal waters are included with this authorization) from east of 92° 20′ W. long. (approximately at Fresh Water Bayou, in Vermilion Parish, Louisiana) and in Alabama inshore waters (inside the COLREGS demarcation line) including Bon Secour Bay, Mobile Bay, and Mississippi Sound south of the Intracoastal Waterway. This authorization will be in effect for a period of 30 days, unless terminated earlier. Instead of the required use of TEDs, shrimp trawlers may opt to comply with the sea turtle conservation regulations found at 50 CFR 223.206(d)(3)(i) by using restricted tow times. A shrimp trawler utilizing this authorization must limit tow times to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

The ALDCNR and LADWF are continuing to monitor the situation and will cooperate with NMFS in determining the ongoing extent of the debris problem in these areas. Moreover, the marine enforcement agencies of

these states have stated that they will enforce the restricted tow times. Ensuring compliance with tow time restrictions is critical to effective sea turtle protection, and the commitment from these agencies to enforce tow time restrictions is an important factor enabling NMFS to issue this authorization. NMFS and the respective state marine enforcement agencies will monitor the situation to ensure there is adequate protection for sea turtles in these areas and to determine whether debris in these areas continues to make TED use impracticable.

Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if possible, even though they are authorized under this action to use restricted tow times. NMFS studies have shown that the problem of clogging by seagrass, algae or by other debris is not unique to TED-equipped nets. When fishermen trawl in problem areas, they may experience clogging with or without TEDs. A particular concern of fishermen, however, is that clogging in a TED-equipped net may hold open the turtle escape opening and increase the risk of shrimp loss. On the other hand, TEDs also help exclude certain types of debris and allow shrimpers to conduct longer tows.

NMFS' gear experts have provided several general operational recommendations to fishermen to maximize the debris exclusion ability of TEDs that may allow some fishermen to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can result in debris clogging the bars of the TED; NMFS recommends an installation angle of 45°51′, relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: the webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft direction to facilitate the exclusion of debris. The use of the leatherback modification or the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas. This action does not authorize any other departure from the TED requirements, nor does it authorize use of any TED modified in such a manner that it no longer meets the requirements for any of the TEDs approved pursuant to 50 CFR 223.207. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

Alternative to Required Use of TEDs; Termination

The AA, at any time, may modify the alternative conservation measures through publication in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times or synchronized tow times, if the AA determines that the alternative authorized by this temporary rule is not sufficiently protecting turtles, as evidenced by observed lethal takes of turtles aboard shrimp trawlers, elevated sea turtle strandings, or insufficient compliance with the authorized alternative. The AA may also terminate this authorization for these same reasons, or if compliance cannot be monitored effectively, or if conditions do not make trawling with TEDs impracticable. A document will be published in the **Federal Register** announcing any additional sea turtle conservation measures or the termination of the tow time option in the affected areas. This authorization will expire automatically on December 2, 2002, unless it is explicitly extended through another notification published in the **Federal Register**.

Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

The AA has determined that this action is necessary to respond to an emergency situation to allow more efficient fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and applicable regulations.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule, because it is impracticable. The AA finds that unusually high amounts of debris are creating special environmental conditions that make trawling with TED-equipped nets impracticable. The AA has determined that the use of limited tow times for the described area and time would not result in a significant impact to sea turtles. Notice and opportunity to comment are impracticable in this instance because providing notice and comment would prevent the agency from providing relief soon enough to provide the intended benefit. The public was provided with notice and an opportunity to comment on 50 CFR 223.206(d)(3)(ii) which authorizes the use of this emergency exemption.

Pursuant to 5 U.S.C. 553(d)(3), for the same reasons the AA determined that there was good cause to waive prior notice and opportunity to comment, the AA finds good cause to waive the 30–day delay in effective date. NMFS is making the rule effective November 1, 2002 through December 2, 2002.

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for this rule. Copies of the EA are available (see **ADDRESSES**).

Dated: November 1, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 02–28281 Filed 11–01–02; 4:23 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 021030260–2260–01; I.D. 102502A]

RIN 0648–AQ52

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Temporary rule; request for comments.

SUMMARY: NMFS issues this temporary action to allow the use of limited tow times by shrimp trawlers as an

alternative to the use of Turtle Excluder Devices (TEDs) in the waters off Mississippi in an area from the coastline of Mississippi at its intersection with the line of longitude 89° 30' W., thence southward to its intersection with the line of latitude 30° 10′ N., thence eastward to the line of longitude 89° 05.5′ W. (approximately even with the southern tip of Cat Island), thence northward to the line of latitude 30° 13.8′ N. (approximately even with the western tip of Cat Island), thence westward to the line of longitude 89° 10' W., thence northward to its intersection with the coastline of Mississippi, thence continuing along the coastline to the original point. This action would remain in effect for a period of 20 days and is necessary to relieve the economic hardship on shrimpers while ensuring adequate protection of threatened and endangered sea turtles.

DATES: This action is effective from November 1, 2002 through November 21, 2002. Comments on this action are requested, and must be received by November 21, 2002.

ADDRESSES: Comments on this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Bob Hoffman, 727–570–5312, or Barbara A. Schroeder, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take and mortality of sea turtles as a result of trawling activities have been documented in the Gulf of Mexico and along the Atlantic Ocean seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 223.206 and 50 CFR 224.104. The regulations require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic Area, Gulf Area, and Summer flounder fishery-sea turtle protection area, all as defined in 50 CFR 222.102) to have a NMFS-approved TED installed in each net that is rigged for fishing to provide for the escape of sea turtles. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, two types of special hard TEDs (the flounder TED and the Jones TED), and one type of soft TED (the Parker soft TED).

The TEDs incorporate an escape opening, usually covered by a webbing flap, that allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be at least 97 percent effective in excluding sea turtles during experimental TED testing (50 CFR 223.207(e)). The TED must meet generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape. In the Atlantic Area, these requirements are currently ≥35 inches (≥89 cm) in width and ≥12 inches (≥30 cm) in height. In the Gulf Area, the requirements are ≥32 inches (≥81 cm) in width and ≥10 inches (≥25 cm) in height.

The regulations provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. For example, debris can clog a TED which renders the TED ineffective at catching shrimp as well as excluding turtles. The provisions of 50 CFR 223.206 (d)(3)(ii) specify that the Assistant Administrator for Fisheries, NOAA (AA), may authorize compliance with tow time restrictions as an alternative to the TED requirement, if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow-time limits are authorized as an alternative to the use of TEDs. The tow times may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

Recent Events

On October 16, 2002, the NMFS Southeast Regional Administrator received a request from the Mississippi Director of Marine Resources to allow the use of tow times as an alternative to TEDs in Mississippi state waters because of excessive storm related debris on the fishing grounds. After an investigation, the Mississippi Department of Marine Resources (DMR) has determined that this debris is affecting the fishermen's ability to use TEDs effectively. As part of the request, the DMR sent photo documentation of the debris. Mississippi's Marine Patrol director has also sent NMFS a letter dated October 21, 2002, stating that the Mississippi Marine Patrol will enforce the tow time restrictions.

NMFS gear technicians surveyed the western and central portion of Mississippi Sound on October 8 and 9, 2002. They focused their survey on areas where vessels were actively fishing in concentrated groups. Some areas that fishermen indicated were untrawlable were not able to be surveyed because no trawlers were working those areas. The survey found that there were larger than normal amounts of grass on the tickler chains of the trawls but no large debris was observed in any of the nets in any of the surveyed areas and most of the boats seemed to be satisfied with the shrimp catch, despite excessive grass. During a phone conversation between NMFS Southeast Regional Office Protected Resources staff and DMR staff, DMR staff indicated that their investigation showed that the majority of the problems and the complaints from fishermen were concentrated west of the Cat Island Channel which was not in the area surveyed by NMFS gear technicians. The boundaries for the use of tow times encompass the areas indicated by the DMR as having problems with excessive debris, and include the western extreme of Mississippi Sound and Cat Island Channel.

The duration for this authorization will be set initially for 20 days. Although regulations at 50 CFR 223.206 (d)(3)(v) allow such authorizations to be valid for up to 30 days, the levels of debris documented by DMR and NMFS are not extreme and several weeks have already passed since the storms. Therefore, NMFS believes that a shorter authorization will be sufficient.

NMFS and the DMR Marine Patrol will monitor the situation to ensure there is adequate protection for sea turtles in this area and to determine whether debris in these areas continues to make TED use impracticable. The intent of this action is to relieve the economic hardship on shrimpers while ensuring adequate protection of threatened and endangered sea turtles.

Special Environmental Conditions And Alternative to Required Use of TEDs

The AA finds that debris washed into portions of Mississippi sound from Tropical Storm Isidore and Hurricane Lili have created special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to authorize the use of restricted tow times as an alternative to the use of TEDs in the waters off Mississippi in an area from the coastline of Mississippi at its intersection with the line of longitude 89° 30' W., thence southward to its intersection with the line of latitude 30 10' N., thence eastward to the line of longitude 89° 05.5' W. (approximately even with the southern tip of Cat Island), thence northward to the line of latitude 30° 13.8' N. (approximately even with the western tip of Cat Island), thence westward to the line of longitude 89° 10' W., thence northward to its intersection with the coastline of Mississippi, thence continuing along the coastline to the original point. This authorization will remain in effect for a period of 20 days. Instead of the required use of TEDs, shrimp trawlers may opt to comply with the sea turtle conservation regulations found at 50 CFR 223.206(d)(3)(i) by using restricted tow times. Through October 31, 2002, a shrimp trawler utilizing this authorization must limit tow times to no more than 55 minutes, measured from the time trawl doors enter the water until they are retrieved from the water. Starting November 1, 2002, tow times must be limited to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

DMR Marine Patrol is continuing to monitor the situation and will cooperate with NMFS in determining the ongoing extent of the debris problem in this portion of Mississippi Sound. Moreover, the DMR Director of the Marine Patrol has stated that the DMR Marine Patrol will enforce the restricted tow times. Ensuring compliance with tow time restrictions is critical to effective sea turtle protection, and the commitment from the DMR Director of the Marine Patrol to enforce tow time restrictions is an important factor enabling NMFS to issue this authorization.

Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if they can be used effectively, even though they are authorized under this action to use restricted tow times. NMFS studies have shown that the problem of clogging by seagrass, algae or by other debris is not unique to TED-equipped nets. When fishermen trawl in problem areas, they may experience clogging with or without TEDs. A particular concern of fishermen, however, is that clogging in a TED-equipped net may hold open the turtle escape opening and increase the risk of shrimp loss. On the other hand, TEDs also help exclude certain types of debris and allow shrimpers to conduct longer tows.

NMFS' gear experts have provided several general operational recommendations to fishermen to maximize the debris exclusion ability of TEDs that may allow some fishermen to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can result in debris clogging the bars of the TED; NMFS recommends an installation angle of 45°, relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: the webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft direction to facilitate the exclusion of debris. The use of the leatherback modification or the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas of Mississippi Sound. This action does not authorize any other departure from the TED requirements, nor does it authorize the use of any TED modified in such a manner that it no longer meets the requirements for any of the TEDs approved pursuant to 50 CFR 223.207. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

Alternative to Required Use of TEDs; Termination

The AA, at any time, may modify the alternative conservation measures through publication in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times or synchronized tow times, if the AA determines that the alternative authorized by this temporary rule is not sufficiently protecting turtles, as evidenced by observed lethal takes of turtles aboard shrimp trawlers, elevated sea turtle strandings, or insufficient compliance with the authorized alternative. The AA may also terminate this authorization for these same reasons, or if compliance cannot be monitored effectively, or if conditions do not make trawling with TEDs impracticable. A document will be published in the **Federal Register** announcing any additional sea turtle conservation measures or the termination of the tow time option in Mississippi Sound. This authorization will expire automatically on November 21, 2002, unless it is explicitly extended through another notification published in the **Federal Register**.

Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

The AA has determined that this action is necessary to respond to an emergency situation to allow more efficient fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and other applicable law.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule, because it is impracticable. The AA finds that unusually high amounts of debris are creating special environmental conditions that may make trawling with TED-equipped nets impracticable. The AA has determined that the use of limited tow times for the described area and time would not result in a significant impact to sea turtles. Notice and comment are impracticable in this instance because providing notice and comment would prevent the agency from providing relief soon enough to provide the intended benefit. The public was provided with notice and an opportunity to comment on 50 CFR 223.206(d)(3)(ii).

Pursuant to 5 U.S.C. 553(d)(3), for the same reasons the AA determined that there was good cause to waive prior notice and opportunity to comment, the AA finds good cause to waive the 30–day delay in effective date. NMFS is

making the rule effective November 1, 2002 through November 21, 2002.

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for this action. Copies of the EA are available (see **ADDRESSES**).

Dated: November 1, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 02–28280 Filed 11–01–02; 4:23 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 011218304–1304–01; I.D. 103102A]

Fisheries of the Exclusive Economic Zone Off Alaska; Trawl Gear in the Gulf of Alaska

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

ACTION: Modification of a closure.

SUMMARY: NMFS is opening directed fishing by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary to fully use the 2002 halibut bycatch allowance for trawl gear in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 6, 2002, until 1200 hrs, A.l.t., November 10, 2002.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery by vessels using trawl gear in the GOA pursuant to § 679.21(d)(7)(i) on October 13, 2002 (67 FR 64066, October 17, 2002). As of October 24, 2002, 67 metric tons of halibut remain in the trawl halibut bycatch allowance in the GOA. Therefore, NMFS is terminating the previous closure and is opening directed fishing by vessels using trawl gear in the GOA from 1200 hrs, A.l.t., November 6, 2002, until 1200 hrs, A.l.t., November 10, 2002.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is contrary to the public interest. This requirement is contrary to the public interest as it would delay the opening of the fishery, prevent the full use of the 2002 halibut bycatch allowance specified for trawl gear in the GOA, and therefore reduce the public's ability to use and enjoy the fishery resource.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: November 1, 2002.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–28336 Filed 11–4–02; 1:11 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 67, No. 216
Thursday, November 7, 2002

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 300 and 319

[Docket No. 02–026–2]

Importation of Fruits and Vegetables; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule; correction.

SUMMARY: We are correcting errors in the preamble to a proposed rule that would amend the fruits and vegetables regulations. This proposed rule was published in the **Federal Register** on October 1, 2002 (67 FR 61547–61564, Docket No. 02–026–1).

DATES: We invite you to comment on the proposed rule (Docket No. 02–026–1), as corrected by this document. We will consider all comments that we receive on or before December 2, 2002.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 02–026–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 02–026–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 02–026–2'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. Gadh, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

SUPPLEMENTARY INFORMATION: We published a proposed rule in the **Federal Register** on October 1, 2002 (67 FR 61547–61564, Docket No. 02–026–1) to amend the fruits and vegetables regulations to, among other things, provide for the importation of certain commodities from specified regions and recognize areas in several countries as free from certain fruit flies.

This document corrects errors in the **SUPPLEMENTARY INFORMATION** section of the proposed rule. Under the headings *Tomatoes From Spain* (page 61552, first column) and *Peppers From Spain* (page 61553, second column), we incorrectly stated that the Government of Spain provided APHIS with data that demonstrate that certain areas meet the criteria of the regulations and International Standards for Phytosanitary Measures (ISPM) No. 4 for freedom from *Ceratitis capitata* (Medfly). Medfly is present in Spain, and the phytosanitary measures contained in the regulations for peppers and tomatoes from Spain are designed to mitigate the risk of the tomatoes and peppers introducing Medfly.

In addition, under the heading *Persimmons From the Republic of Korea* (page 61553, third column), we incorrectly stated that the Government of the Republic of Korea had provided APHIS with data that demonstrate that the orchards where persimmons are grown are free of the pests of concern in accordance with the regulations and ISPM No. 4. While the information received from the Republic of Korea indicates that the pests of concern are not known to occur in the orchards, the orchards are not considered pest-free areas in accordance with the regulations and ISPM No. 4. As stated in the proposal, we believe that the proposed inspection, phytosanitary certificate, and labeling requirements are adequate to prevent the introduction of quarantine pests into the United States with persimmons imported from the Republic of Korea.

Therefore, this document corrects the **SUPPLEMENTARY INFORMATION** section of the proposal as follows:

SUPPLEMENTARY INFORMATION—(CORRECTED)

1. On page 61552, column 2, the last paragraph, beginning with the words ''The Government of Spain,'' is corrected to read as follows:

The Government of Spain has stated that pink or red tomatoes from the Murcia Province and the municipalities of Albuñol and Carchuna in the Granada Province of Spain would be produced, packed, and shipped in accordance with the systems approach described above. We believe that these measures would ensure that tomatoes from those areas would be free of Medfly. Therefore, we propose to amend §§ 319.56–2t and 319.56–2dd(a)(1) and (a)(7) to allow the importation of pink or red tomatoes grown in greenhouses in the Murcia Province and the municipalities of Albuñol and Carchuna in the Province of Granada in Spain.

2. On page 61553, column 2, the first paragraph under the heading *Peppers From Spain,* is corrected by removing the second sentence beginning with the word ''Data''.

3. On page 61554, column 1, line 5, is corrected by removing the sentence beginning with the word ''Data'' and adding in its place the sentence ''The information received from the Republic of Korea indicates that the pests of concern are not known to occur in the orchards.''

Done in Washington, DC, this 1st day of November 2002.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 02–28349 Filed 11–6–02; 8:45 am]

BILLING CODE 3410–34–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–79]

Lawrence T. Christian, et. al.; Receipt of Petition for Rulemaking; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt; correction.

SUMMARY: On November 1, 2002 (67 FR 66588), the U.S. Nuclear Regulatory Commission (NRC) published for public comment a notice of receipt of a petition for rulemaking, dated September 4, 2002, which was filed with the Commission by Lawrence T. Christian, et. al. The petition was docketed by the NRC on September 23, 2002, and has been assigned Docket No. PRM–50–79. The petition requests that the NRC amend its regulations regarding offsite emergency plans for nuclear power plants to insure that all day care centers and nursery schools in the vicinity of nuclear power facilities are properly protected in the event of a radiological emergency. This action corrects an erroneous Agencywide Documents Access and Management System (ADAMS) accession number cited for the petition under the **ADDRESSES** heading in the notice of receipt. This action also corrects two typographical errors in the body of the notice.

DATES: Submit comments by January 15, 2003.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: 301–415–7163 or Toll-free: 1–800–368–5642. E-mail: *MTL@nrc.gov*.

SUPPLEMENTARY INFORMATION: In FR Doc. 02–27861, published on November 1, 2002 (67 FR 66588), the following corrections are made.

On page 66589, in the first column, in the second full paragraph, the final sentence is corrected to read as follows:

The ADAMS accession number for the petition is ML022630462.

On page 66590, in the second column, in the sixth full paragraph, the final sentence is corrected to read as follows:

The petitioners' stated reasons for requesting that the NRC amend its rules to mandate these emergency planning measures are as follows:

On page 66591, in the first column, in the third full paragraph, the second sentence is corrected to read as follows:

Since the ingestion of KI protects against this damage, the petitioners contend that KI should be stocked by daycare centers and nursery schools in the evacuation zone for distribution to the children in their charge in case of radiological emergency.

Dated at Rockville, Maryland, this 4th day of November, 2002.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Federal Register Liaison Officer.

[FR Doc. 02–28360 Filed 11–6–02; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2002–13247; Airspace Docket No. 02–AAL–5]

Proposed Modification and Revocation of Federal Airways; AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to revise jet route 133 (J–133), and revoke jet route 711 (J–711), in Alaska. The FAA is proposing to realign J–133 from Biorka Island, AK, to Sitka, AK, which would overfly the LAIRE intersection. The proposed realignment of J–133 would eliminate the need for J–711. This proposed action would enhance aircraft operations and improve system efficiency in Alaska.

DATES: Comments must be received on or before December 23, 2002.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2001–13247/Airspace Docket No. 02–AAL–5, at the beginning of your comments.

You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 222 West 7th Avenue, #14, Anchorage, AK 99533.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers and be submitted to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2002–13247/Airspace Docket No. 02–AAL–05.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule.

The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW.,

Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should call the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (CFR) part 71 to revise J–133, and revoke J–711, in Alaska. The FAA is proposing this action to realign J–133 from Biorka Island, AK, to Sitka, AK, which would overfly the LAIRE intersection. The proposed realignment of J–133 would eliminate the need for J–711. This proposed action would enhance aircraft operations and improve system efficiency in Alaska.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Jet routes are published in paragraph 2004, of FAA Order 7400.9K dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR 71.1. The jet routes listed in this document would be published subsequently in the order.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9K, Airspace Designations and Reporting Points, dated August 30, 2002, and effective September 16, 2002, is amended as follows:

Paragraph 2004—Jet Routes

* * * * *

J–133 [Revised]

From Sitka, AK, NDB; INT Hinchinbrook, AK, NDB 117° and Yakutat, AK 213° radial; to Hinchinbrook, AK, NDB; Johnstone Point, AK; Anchorage, AK; Galena, AK.

* * * * *

J–711 [Revoke]

* * * * *

Issued in Washington, DC, October 29, 2002.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 02–28366 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2002–13524; Airspace Docket No. 02–AWP–07]

Proposed Revision of VOR Federal Airway 257

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to revise VOR Federal Airway 257 (V–257) between the Phoenix, AZ, Very High Frequency Omnidirectional Radio Range and Tactical Air Navigation Aids (VORTAC) and the Drake, AZ, VORTAC. This proposed change is part of the FAA's National Airspace Redesign effort and is intended to improve the management of aircraft operations near the Phoenix, AZ, terminal area.

DATES: Comments must be received on or before December 9, 2002.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW.,Washington, DC 20590–0001. You must identify the docket number FAA–2002–13524/Airspace Docket No. 02–AWP–07, at the beginning of your comments.

You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal; any comments received; and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 15000 Aviation Boulevard, Hawthorne, CA 90261.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers and be submitted to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2002–13524/Airspace Docket No. 02–AWP–07.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before

taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov* or the Superintendent of Document's web page at *http://www.access.gpo.gov/nara*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should call the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, notice of proposed rulemaking distribution system, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to title 14 Code of Federal Regulations (CFR) part 71 to revise V–257 between the Phoenix, AZ, VORTAC, and the Drake, AZ, VORTAC. This proposed change is part of the FAA's National Airspace Redesign effort and is intended to improve the management of aircraft operations near the Phoenix, AZ, terminal area. Although the change will slightly increase the length of the route, the proposed action will coincide with revisions made to V–105, and align this route to facilitate Air Traffic Management operations in the Phoenix Terminal Area.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Domestic VOR Federal airways are published in paragraph 6010(a), of FAA Order 7400.9K dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airway listed in this document would be published subsequently in the order.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9K, Airspace Designations and Reporting Points, dated August 30, 2002, and effective September 16, 2002, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways

* * * * *

V–257 [Revised]

From Phoenix, AZ; INT Phoenix 333° (321°M) and Drake, AZ, 182° (168° M) radials; Drake; INT Drake 003° and Grand Canyon, AZ, 211° radials; Grand Canyon; 38 miles 12 AGL, 24 miles 125 MSL, 16 miles 95 MSL, 26 miles 12 AGL, Bryce Canyon, UT; INT Bryce Canyon 338° and Delta, UT, 186° radials, Delta; 39 miles, 105 MSL INT Delta 004° and Malad City, ID, 179° radials; 20 miles, 118 MSL, Malad City; Pocatello, ID; DuBois, ID; Dillon, MT; Coppertown, MT; INT Coppertown 002° and Helena, MT, 272° radials; INT Helena 272° and Great Falls, MT, 222° radials; Great Falls; 73 miles, 56 MSL, Havre, MT. The airspace within Restricted Area R–6403 is excluded.

* * * * *

Issued in Washington, DC, on October 29, 2002.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 02–28367 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–209116–89]

RIN 1545–AN40

Requirement of Making Quarterly Payments of the Railroad Unemployment Repayment Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws the notice of proposed rulemaking relating to the time and manner of making payments of the railroad unemployment repayment tax. The proposed regulations were published in the **Federal Register** on May 13, 1993. The railroad unemployment repayment tax provisions are no longer operative; therefore, these proposed regulations are obsolete.

FOR FURTHER INFORMATION CONTACT: Kyle Finizio at (202) 622–6040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 13, 1993, the IRS published a notice of proposed rulemaking (EE–79–89) in the **Federal Register** (58 FR 28374) that proposed amendments to the Employment Tax Regulations under sections 6011, 6157, and 6302 of the Internal Revenue Code (Code) of 1986. These proposed regulations stated the time and manner of making payments of the railroad unemployment repayment tax (sections 3321–3322 of the Code). Section 3321(c) of the Code provides for the termination of the tax when certain loans to the railroad unemployment fund are repaid. Because this repayment occurred on June 29, 1993, the railroad unemployment repayment tax provisions are no longer operative. Thus, no railroad unemployment repayment taxes are payable with respect to rail wages paid after July 1, 1993. See Announcement 93–128

(1993–30 I.R.B. 88). Therefore, proposed regulations §§ 31.6011(a)–3A, 31.6157–1 and 31.6302(c)–2A are hereby withdrawn.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805 and 26 U.S.C. 6302, proposed regulations §§ 31.6011(a)–3A, 31.6157–1, and 31.6302(c)–2A published in the **Federal Register** on May 13, 1993 (58 FR 28374) are withdrawn.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 02–28401 Filed 11–6–02; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF67

Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule To Remove the Northern Populations of the Tidewater Goby From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), withdraw the proposed rule, published in the **Federal Register** on June 24, 1999, to remove the northern populations of tidewater goby (*Eucyclogobius newberryi*) from the list of endangered and threatened wildlife and the concurrent proposal to keep listed as endangered a distinct population segment (DPS) of tidewater goby in Orange and San Diego Counties, CA. The tidewater goby will remain listed throughout its range as an endangered species under the Endangered Species Act of 1973, as amended (Act). Our withdrawal is based on comments and additional information received from the public, the scientific community, industry, other concerned governmental agencies, and other parties interested in the proposed delisting rule. We are convinced by the information provided by the scientific community that our assessment of the importance of new tidewater goby populations and the recolonization ability of the tidewater goby in the proposed delisting rule were premature. We agree with a number of the commenters that it is prudent to wait and assess the persistence of these populations for a longer period of time. Withdrawing the delisting proposal for the northern populations of the tidewater goby makes the retention of a southern California DPS as endangered unnecessary, and therefore, we also withdraw our proposal to retain as listed a southern California DPS.

DATES: This action is made on December 9, 2002.

ADDRESSES: The supporting record for this withdrawal is available for inspection, by appointment, during normal business hours at our Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

FOR FURTHER INFORMATION CONTACT: Carl Benz at the above address (telephone: 805–644–1766).

SUPPLEMENTARY INFORMATION:

Background

The tidewater goby (*Eucyclogobius newberryi*) is the only member of the genus *Eucyclogobius* in the family Gobiidae. The species was first described as *Gobius newberryi* by Girard in 1857. Gill (1862) studied Girard's specimens and created the genus *Eucyclogobius* for this fish species. The majority of scientists have accepted this classification (*e.g.*, Bailey *et al.* 1970, Miller and Lea 1972, Hubbs *et al.* 1979, Eschmeyer *et al.* 1983, Robins *et al.* 1991). A few older works and Ginsburg (1945) placed the tidewater goby and the eight related eastern Pacific species into the genus *Lepidogobius.* This classification included the currently recognized genera *Lepidogobius, Clevelandia, Ilypnus, Quietula,* and *Eucycloglobius.*

Crabtree's (1985) allozyme (enzyme) work on tidewater gobies from 12 localities throughout the range identified fixed allelic (genetic) differences at the extreme northern and southern ends of the range, with the more centrally distributed populations more similar to one another. The results suggest a low level of gene movement between populations in the northern, central and southern parts of the range. However, the sites Crabtree sampled were widely separated geographically, and his results may not indicate gene flow on more local levels, as noted by Lafferty *et al.* (1999, cited in proposed delisting as in prep.).

More recently, David Jacobs (Department of Organismic Biology, Ecology and Evolution, University of California, Los Angeles, *in litt.,* 1998; Dawson *et al.* 2001) conducted an analysis of mitochondrial DNA (mtDNA) from tidewater goby populations ranging from Humboldt to San Diego Counties. Results suggested that San Diego tidewater gobies (*i.e.*, the southernmost tidewater goby populations) began diverging from the remainder of tidewater gobies more than 100,000 years ago and are therefore genetically distinct from individuals across the rest of the range.

The tidewater goby is a small elongate fish seldom exceeding 50 millimeters (mm), about 2 inches (in), standard length. This goby is characterized by large, dusky pectoral fins and a ventral sucker-like disk formed by the complete fusion of the pelvic fins. It is nearly transparent, with a mottled brownish upper surface, and often with spots or bars on dusky dorsal and anal fins. The mouth is large and oblique with the upper jaw extending nearly to the rear edge of the eye. The eyes are widely spaced. The tidewater goby is a short-lived species, apparently having an annual life cycle (Eschmeyer *et al.* 1983, Irwin and Soltz 1984, Swift *et al.* 1997).

The tidewater goby is endemic to California and restricted to coastal brackish water habitats. This species historically ranged from Tillas Slough (mouth of the Smith River, Del Norte County) near the Oregon border to Agua Hedionda Lagoon (northern San Diego County). Within this range, shallow brackish water habitats occur in two relatively distinct situations: (1) The upper edge of tidal bays, such as Tomales, Bolinas, and San Francisco Bays near the entrance of freshwater tributaries, and (2) the coastal lagoons formed at the mouths of small to large coastal rivers, streams, or seasonally wet canyons along the coast of California. Overall, the tidewater goby occupies a very small portion of the California coast (probably less than 5 percent) (C. Swift, Emeritus, Section of Fishes, Natural History Museum of Los Angeles County, CA, *in litt.* 1999).

Tidewater gobies can tolerate a wide range of salinities (from 0 to 60 parts per thousand (ppt)) and are frequently found throughout lagoons (Swift *et al.* 1989, 1997; Worcester 1992; Worcester and Lea 1996). However, tidewater gobies are often found in waters of low salinities (about 10 ppt) in the uppermost brackish zone of larger estuaries and coastal lagoons. In some cases, tidewater gobies may also be found in habitats that are essentially fresh with little or no tidal influence

(*e.g.*, San Mateo Creek, Arroyo Laguna) (D. Holland, University of Southwestern Louisiana, Lafayette, *in litt.* 1999). Few well documented records of this species are known from marine environments outside of coastal lagoons and estuaries, but specimens have been collected from salinities up to 42 ppt (Swift *et al.* 1989) and 55 ppt (Swift and Holland 1998 as cited in D. Holland, *in litt.* 1999). Ocean seawater salinity is about 32 ppt. This goby can tolerate salinities up to 60 ppt for varying time periods (Swift *et al.* 1989, Worcester and Lea 1996).

Tidewater gobies usually are collected from water depths of less than 1 meter (m) (3 feet (ft)) and many localities are no deeper than this (Wang 1982, Irwin and Soltz 1984, Swenson 1995). They have been found, however, at water depths greater than 1 m (3 ft) (Worcester 1992, Lafferty and Altstatt 1995, Swift *et al.* 1997, Smith 1998). The lack of collections of tidewater gobies from depths greater than 1 m (3 ft) in lagoons and estuaries with deeper water may be due to the inadequacy of the sampling methods used, rather than the absence of tidewater gobies (Worcester 1992, Smith 1998).

Tidewater gobies may be preyed upon by native species, such as steelhead (*Oncorhynchus mykiss*) (Swift *et al.* 1989), and are documented prey items of prickly sculpin (*Cottus asper*), staghorn sculpin (*Leptocottus armatus*), and starry flounder (*Platichthys californicus*) (Swift *et al.* 1997). However, tidewater gobies were found in stomachs of only 6 percent of nearly 120 of the latter three species examined and comprised less that 20 percent by volume of the prey. Predation by the Sacramento perch (*Archoplites interruptus*) and tule perch (*Hysterocarpus traski*) may have prevented tidewater gobies from inhabiting the Sacramento-San Joaquin River delta (Swift *et al.* 1989). Nonnative predators, such as striped bass (*Morone saxatilis*), may have also contributed to the absence of tidewater gobies in the San Francisco Bay area (Swift *et al.* 1989, 1990). Although direct documentation of this is lacking, Shapalov and Taft (1954) and Wang (1982) noted predation by striped bass on tidewater goby.

Tidewater gobies may also be preyed upon by nonnative species other than striped bass, such as the African clawed frog (*Xenopus laevis*) (Lafferty and Page 1997), shimofuri goby (*Tridentiger bifasciatus*) (Swenson and Matern 1995), chameleon goby (*Tridentiger trigonocephalus*) (D. Holland, *in litt.* 1999), yellowfin goby (*Acanthogobius flavimanus*) (Wang 1984), centrarchid fish (Swift *et al.* 1989, 1997), mosquitofish (*Gambusia affinis*) (D. Holland, *in litt.* 1999), and rainwater killifish (*Lucania parva*) (C. Swift, *in litt.* 1999). Chameleon and yellowfin gobies may also compete with tidewater gobies. Some of these fish, such as sunfish and black bass (*Centrarchidae*) are relatively widespread (M. Capelli, University of California, Santa Barbara, *in litt.* 1999). Predation and competition by nonnative species is further discussed in Factors C and E of the Summary of Factors Affecting the Species below.

Distinct Population Segments

Prior to publishing the proposed rule to delist the northern populations of the tidewater goby, we analyzed tidewater goby populations based on the joint National Marine Fisheries Service and U.S. Fish and Wildlife Service Policy Regarding the Recognition of Distinct Vertebrate Populations (61 FR 4722). Concurrently with the proposed delisting of the northern tidewater goby populations, we proposed a distinct population segment for the southern California portion of the tidewater goby range.

When determining whether a distinct vertebrate population segment could be treated as threatened or endangered under the Act, we consider three elements: discreteness, significance, and conservation status in relation to the standards for listing. Discreteness refers to the isolation of a population from other members of the species and is based on two criteria: (1) Marked separation from other populations of the same taxon resulting from physical, physiological, ecological, or behavioral factors, including genetic discontinuity, or (2) populations delimited by international boundaries. Significance is determined by the importance or contribution, or both, of a discrete population to the species throughout its range. The policy (61 FR 4722) lists four examples of factors that may be used to determine significance:

(1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon;

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon;

(3) Evidence that the discrete population segment represents the only known surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; and

(4) Evidence that the discrete population segment differs markedly from other populations of the taxon in genetic characteristics.

If we determine that a population segment is both discrete and significant, we evaluate it for endangered or threatened status based on the Act's standards.

For the tidewater goby, we determined that the southern California portion of the range met the discreteness criterion based on (1) allozyme and mtDNA differences between the northern and southern portions of the tidewater goby range (Crabtree 1985; D. Jacobs, *in litt.* 1998) and (2) the geographic distance between the southern California tidewater gobies and the closest extant populations to the north (129 kilometers (km), 80 miles (mi)). Further, we determined that the southern California portion of the range was significant because it constitutes the most genetically divergent tidewater goby group (D. Jacobs, *in litt.* 1998). Its loss would result both in loss of a genetically unique tidewater goby group and in a reduction in range of tidewater gobies of approximately 129 km (80 mi). Upon analyzing the status of the tidewater goby in southern California, based on the Act's standards, we determined that it was appropriate to propose that the southern portion of the range remain listed as an endangered distinct population segment. Some of our rationale regarding status of the southern California populations is discussed further below in the Summary of Factors Affecting the Species. Our rationale for withdrawing the proposal to retain as listed a southern California DPS of tidewater goby is discussed below in the Summary of Comments and Recommendations and in the Finding and Withdrawal section.

Previous Federal Action

We first classified the tidewater goby as a Category 2 candidate species in 1982 (47 FR 58454). Category 2 candidate species were species for which information then in our possession indicated that proposing to list the species as endangered or threatened was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support proposed rules. We reclassified the tidewater goby as a Category 1 species in 1991 (56 FR 58804). Category 1 candidate species were species for which we had sufficient information on biological vulnerability and threats to support preparation of listing proposals. On October 24, 1990, we received a petition to list the tidewater goby as endangered. Our finding (signed March 22, 1991) that the requested action might be warranted was published in a proposal to list the tidewater goby as

endangered on December 11, 1992 (57 FR 58770). We determined endangered status for the tidewater goby throughout its entire range on February 4, 1994 (59 FR 5494). At that time, we found that critical habitat was not determinable because we lacked sufficient information to perform the economic analysis.

On June 24, 1999, we proposed to remove all of the tidewater goby populations north of Orange County, CA (64 FR 33816) from protection under the Act. Because we felt the southern portion of the range met the definition of a DPS and was subject to continuing threats, we concurrently proposed that it be retained as an endangered DPS when the northern portion of the range was delisted. We invited public comments and suggestions to this proposal in three comment periods. The first comment period ended August 23, 1999. Late in that comment period, we received new information on the potential marine dispersal of tidewater gobies, with additional information provided after the comment period closed. On February 15, 2000, we reopened the comment period (65 FR 7483) from February 15 to March 31, 2000, to request additional review of our proposal and to solicit the interpretations of appropriate and independent specialists and the public on the new information. On January 3, 2001 (66 FR 345), we reopened the comment period for a second time. We requested additional public and peer review comment from January 3 to February 2, 2001, on: (1) Our assertion that the original listing rule exaggerated the risk of extinction by overestimating the rate of local population extinction; (2) any information either supporting or contradicting the information in the proposed delisting rule that suggested the tidewater goby was not, in 1994 when it was listed, nor was currently, in danger of extinction due to a high rate of local extinctions; and (3) any new information that suggested a reasonable causal link between any of the threats, or combination of threats, and a high risk of extinction of the tidewater goby.

In addition to our proposal to delist the tidewater goby and the three public comment periods during 1999 to 2001, we designated critical habitat for the tidewater goby in 2000. The Natural Resources Defense Council, Inc., filed a lawsuit on September 18, 1998, in the United States District Court for the Central District of California, against the Service for our failure to designate critical habitat for the tidewater goby. The court ordered, on April 5, 1999, that we ''publish a proposed critical habitat designation for the tidewater goby in 120 days' (*Natural Resources Defense Council, Inc.* v. *U.S. Department of the Interior et al.*, CV 98–7596, C.D. Cal.). We proposed critical habitat for the tidewater goby on August 3, 1999 (64 FR 42250). The final rule designating critical habitat for the tidewater goby was published on November 20, 2000 (65 FR 69693). It includes 10 coastal stream segments in Orange and San Diego Counties, CA, totaling about 14.5 linear km (9 linear miles) of streams, including the stream channels and their associated wetlands, floodplains, and estuaries.

Tidewater Goby Proposed Delisting

In our proposed rule to delist the northern populations of the tidewater goby, we identified three major reasons for our proposed action: (1) There are more populations in the north than were known at the time of listing, (2) threats to those populations are less severe than previously believed, and (3) the tidewater goby has a greater ability than was known to recolonize sites from which it is temporarily absent. We believed that a number of populations had been recolonized following the end of the drought of the late 1980s and early 1990s and that the original listing of the tidewater goby was in error (66 FR 345). Commenters seriously disagreed with all three premises, but the most compelling information and arguments addressed premises 1 and 3. These commenters included a number of scientists with extensive experience with tidewater goby. The commenters' opinions and analyses and additional information received during the comment periods form the basis of this withdrawal. They are discussed in detail below in the Summary of Comments and Recommendations and the Summary of Factors Affecting the Species.

Summary of Comments and Recommendations

We received a total of 45 written responses from individuals, agencies, or other entities during three public comment periods: June 24 to August 23, 1999 (64 FR 33816), February 15 to March 31, 2000 (65 FR 7483), and January 3 to February 2, 2001 (66 FR 345). Of those 45 written responses, 38 opposed delisting; two supported delisting all northern and southern populations; one supported delisting the northern populations; three requested the Service first delist all populations of the tidewater goby before proposing, if warranted, establishment of a southern distinct population segment; and, one commenter provided new information on the collection of two tidewater gobies near Diablo Cove, south of Morro Bay, CA. Several commenters submitted multiple responses.

Peer Review

During the second and third comment periods, we requested peer review from independent scientists in compliance with our peer review policy (59 FR 34270; July 1, 1994). During the second comment period, one peer reviewer responded and supported the delisting. During the third comment period, we asked two fish biologists familiar with fish ecology, genetics, and the evolution of fish to review the proposed tidewater goby delisting and the designation of a southern California DPS. Both reviewers recommended that we keep the species listed as endangered and provided suggestions for our future review of this species' population dynamics and population genetics. One concluded that the tidewater goby data used and our interpretations were insufficient to support the delisting. Their responses are included in the totals above, and their specific comments are addressed below along with the public comments.

We grouped comments of a similar nature into a single issue for response. Where applicable, we have revised this notice based on factual information provided by the commenters.

Issue 1: Procedural and Legal Compliance

The following comments and responses deal with compliance with the Act and other laws, regulations, and policies, and the public involvement in the delisting process.

Comment 1: One commenter felt that we had improperly proposed the tidewater goby DPS in the south. The commenter felt that the species must be delisted before a DPS may be designated. In addition, the commenter felt we violated the notice provisions of the Administrative Procedure Act (APA) by failing to give adequate notice of the listing of a DPS, suggesting that the proposal to retain the southern California portion of the range as a DPS was not adequately noticed for public comment.

Our Response: We believe we followed proper procedure in proposing the southern California tidewater goby DPS. Typical rulemaking procedures dictate that we propose an action, provide the public an opportunity to comment on the proposed action, and then make a final determination. The public was given the opportunity to comment on the proposed actions during three separate comment periods. Based on comments received from the public and from peer reviewers, we

have decided to withdraw the proposal to delist the northern populations of the tidewater goby and the concurrent proposal to retain the southern populations as a DPS.

Comment 2: One commenter referred to the designation of critical habitat for the tidewater goby and felt we violated section 4 of the Act by preceding a listing determination with a critical habitat designation. The commenter felt the outcome of this proposed delisting rule was predetermined by the critical habitat designation, violating the APA and the Endangered Species Act.

Our Response: The critical habitat designation the commenter refers to (65 FR 69693) is not a designation of critical habitat for a southern California DPS of the tidewater goby. The critical habitat designation is for the tidewater goby throughout its range. At the time of the designation, we believed the only areas essential to the conservation of the tidewater goby were in southern California. Therefore, we only designated critical habitat in southern California. We issued this designation of critical habitat as the result of a court order.

Comment 3: One commenter felt the proposed action was based on unpublished data which was not made available to the public for review.

Our Response: The commenter did not identify specific data that he felt were not available for public review. The proposed action was the subject of three public comment periods. All the supporting documentation, including comments received, were available for inspection at the Ventura Fish and Wildlife Office.

Comment 4: One commenter stated that we must establish objective recovery criteria before a species can be delisted. Several commenters suggested that we ignored the draft tidewater goby recovery plan in the formulation of the delisting proposal and that, in so doing, we contradicted the recommendations and recovery criteria of the draft plan. Others recommended retaining the endangered status of the tidewater goby and focusing our efforts on finalizing and implementing the draft tidewater goby recovery plan.

Our Response: Species can be delisted for any one of three reasons: (1) The species is extinct; (2) the species has recovered; or (3) the original data for listing, or the interpretation of those data, are in error (50 CFR 424.11(d)). In the first and third cases, we would not necessarily have recovery criteria by which to gauge delisting. Our delisting proposal for the tidewater goby was published because we felt that the original data or their interpretation were in error (*see also* the notice reopening the comment period for the third time, 66 FR 345).

We wish to clarify that, while a preliminary draft recovery plan for the tidewater goby has been circulated among tidewater goby experts, we have not approved a draft recovery plan. The preliminary draft plan was never published and made available to the public for comment. Because they have not yet been published in an official draft recovery plan available for public comment, the recommendations and recovery criteria in the preliminary draft recovery plan are not our official guidance. We agree that the most appropriate course of action, given our withdrawal of this proposed delisting, is to proceed with the recovery planning process for the tidewater goby.

Comment 5: One commenter felt that monitoring for the tidewater goby is required if it is delisted.

Our Response: According to the Act, monitoring is required for a delisted species only if the species was delisted due to recovery. We had proposed delisting of the northern populations of the tidewater goby based on new information, not recovery. Furthermore, we have decided to withdrawal the proposal to delist the northern populations.

Comment 6: One commenter suggested that the proposed delisting rule violates both the APA and the fifth amendment of the U.S. Constitution, by selectively imposing the regulatory burdens of the Endangered Species Act on certain landowners, without legal or scientific authority.

Our Response: We believe we were in compliance with the APA (*see also* responses to comments 1 through 3) throughout this rulemaking process. Furthermore, the regulations governing listing and delisting (50 CFR 424.11(b)) state that listing and delisting of a species as threatened or endangered are made ''*solely* (emphasis added) on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such a determination.''

Had we decided to finalize the proposal to retain a southern DPS as listed, the regulatory situation for landowners in southern California would not have changed because tidewater goby was already listed as endangered in southern California. However, we are withdrawing the proposal to retain a southern California DPS as listed, along with the withdrawal of the proposal to delist the northern populations.

Issue 2: Data Adequacy, Data Interpretation and Biological Concerns

The following comments and responses deal with issues related to the adequacy of the scientific information used for proposing the delisting and establishing the southern California distinct vertebrate population segment. We received comments that challenged our assessment of the available information at the time we proposed delisting the northern populations of the tidewater goby, and we received comments that introduced new information on the species. Comments were received on issues such as: the genetics of the northern and southern portions of the tidewater goby's range (including the determination that southern California constitutes a DPS), the number of known tidewater goby populations and its relevance, metapopulation theory and population dynamics, natural recolonization by marine dispersal of tidewater goby larvae, salinity tolerance, and alternative interpretations of the data.

General Comments

Comment 7: A number of commenters suggested that (1) additional data or analyses are needed on some aspects of tidewater goby biology or threats (*e.g.*, 4 years of population data, encompassing only one dry-wet climate cycle, were collected since the listing), (2) we had misinterpreted or omitted existing scientific data (*e.g.*, misinterpretation of stringency of habitat requirements), (3) we failed to provide data, citations, or references to support numerous statements, (4) we relied on unpublished and unreviewed sources, and (5) we had ignored the professional opinions of tidewater goby experts. Most suggested that the entire species should remain listed. One commenter felt that the entire species should be delisted, in part because of Congress's charge that we list species ''sparingly.''

Our Response: We agree that additional data and analysis would be valuable, that there are alternate interpretations of the available data, and that additional supporting documentation (*i.e.*, references) would have strengthened our proposal. The arguments the commenters presented regarding the need for additional analysis, their presentation of alternative interpretations, and their call for additional documentation and reliance on published or peer reviewed sources have led us to withdraw the proposed rule to delist the northern populations of the tidewater goby. Withdrawing the proposed delisting makes retention of a southern DPS as

endangered unnecessary; therefore, we are also withdrawing the proposal to retain as listed the southern California portion of the range as an endangered DPS. Details of the commenters' arguments are presented throughout the remainder of the Summary of Comments and Recommendations and in the Summary of Factors Affecting the Species.

Comment 8: One peer reviewer felt that the information presented in our proposal to delist the tidewater goby populations north of Orange and San Diego Counties was thorough and well documented and that the conclusion to delist the northern populations appears justified.

Our Response: The bulk of the argument we received during the comment periods and the valid concerns raised regarding the meaning of the increased population levels identified indicates that withdrawing the proposal is appropriate at this time. Our reasoning is provided throughout the remainder of the Summary of Comments and Recommendations and in the Summary of Factors Affecting the Species.

Genetic Data and DPS Determination

Comment 9: A number of commenters questioned the adequacy of the available genetic data, suggesting that (1) Crabtree's (1985) allozyme work had various limitations, including geographically sporadic sampling and low sample sizes, and is not a thorough population genetic analysis, (2) at the time of the proposed delisting rule, the mtDNA analysis was incomplete, preliminary, and had not yet been published or peer reviewed, (3) the sample sizes of the mtDNA analysis were small (based on 2 to 4 fish per population), and (4) more study would be warranted. They were concerned that the best available genetic data for tidewater goby did not provide a credible scientific foundation for determining that the southern portion of the range constitutes a DPS. They suggested more study would allow analysis of larger sample sizes, additional tidewater goby populations and different genetic markers. One commenter was concerned by the use of mtDNA, which is maternally inherited; he advocated the use of biparentally inherited or paternally inherited markers. He also commented extensively on the use of mtDNA variation in these sorts of decision-making processes.

Our Response: We are required to use the best available scientific and commercial data in making our decisions. We used the best genetic data that were available at the time of the proposed delisting rule. We have relied upon comments from scientists and the public to help us evaluate the sufficiency of these data, and based on their comments, we have decided to withdraw the proposal to delist the northern populations of the tidewater goby and the proposal to retain a southern California DPS.

Comment 10: A number of commenters questioned our interpretation of the recent genetic data of Jacobs (cited as D. Jacobs, *in litt.* 1998 in the proposed delisting). These commenters suggested that the data do not support a simple bifurcation into northern and southern portions of the range. The commenters felt we did not consider the differentiation Jacobs identified within the northern portion of the range, which suggests there are also genetically isolated units on a more local level. One commenter indicated that the tidewater goby is the ''most genetically subdivided vertebrate with marine dispersal on the West Coast'' and that its local genetic subdivision exceeds that which has been used to differentiate steelhead DPSs along coastal California. He felt the genetic evidence supports division of the tidewater goby's northern populations into four or five distinct populations segments. Another commenter suggested that Crabtree's (1985) older results also indicated significant levels of genetic differentiation in tidewater goby.

Our Response: In our proposal to delist the northern portion of the tidewater goby range and retain the listing of the southern portion as a DPS, we did not include an attempt to identify all possible distinct population segments. We felt, at the time of the proposal, that the threats to the northern portion of the tidewater goby range did not warrant its continued listing and that genetic differences exhibited by tidewater gobies between the northern and southern portions of the range were large enough, along with the geographic gap in the range, to allow its distinction as a DPS. We did not intend to imply that the tidewater gobies in the northern portion of the range were genetically uniform. We understand that more complete genetic data have been published recently that underscore genetic differences within the northern portion of the range. Based on comments questioning our interpretation of the population data and our assumptions regarding recolonization we have decided to withdraw the proposal.

Comment 11: One commenter asked whether it is adequate to use only molecular genetics data to designate a tidewater goby DPS. He felt that, while Jacobs mtDNA data (cited as D. Jacobs, *in litt.* 1998 in the proposed delisting) showed different haplotypes in the north than in the south, they give no indication that the divergence is of evolutionary significance. He suggested we have no actual evidence that the data reflect meaningful adaptive differentiation or the populations are ''evolutionarily significant,'' noting that such judgements are subjective. He felt the data do not warrant a DPS determination and, instead of a DPS, he suggested the southern populations could simply be considered a management unit. Such a management unit could then be the subject of a management plan to maintain existing southern tidewater goby populations, precluding the need to list the tidewater goby.

Our Response: While we would like to have specific data reflecting adaptive differentiation and evolutionary significance of various portions of the tidewater goby range, we can only use information available when making our decisions. Based on our DPS policy, published on February 7, 1996 (61 FR 4722), we must evaluate whether the segment under consideration is discrete and significant. Genetic data can be used for either determination. However, genetic data are only one kind of data that are typically used; we also evaluate physical, physiological, ecological, or behavioral factors in making a determination. In the case of the tidewater goby, we used the best available genetic data (in this case, mtDNA data), along with information on the geographic distribution of the species (*i.e.*, we identified a 126 km (80 mi) geographic gap between the southern California tidewater gobies and the next closest extant population) to determine whether the southern portion of the range might constitute a DPS. However, given the comments of many scientists on the sufficiency of the available data and on our interpretation of them, we have decided to withdraw the proposal to delist the northern portion of the range and the proposal to retain as listed a southern California DPS. Because the species will remain listed, we cannot consider the southern portion of the range as a management unit that might preclude listing.

Comment 12: Several commenters suggested it was inappropriate to propose southern California as a DPS. One felt that, because all tidewater goby populations are characterized by some degree of reproductive isolation and because extensive natural gaps in its distribution occur, each population can

be viewed as discrete and significant under our DPS policy. Identification of only southern California as discrete and significant is inherently subjective and arbitrary. Another felt that we recognized, *de facto,* a second DPS comprised of the remaining northern populations from Los Angeles County to Oregon. A northern DPS is defined by default, with no specific reference to population structure, population dynamics, or genetic differences with this northern DPS. They suggested we created, by definition, a limited range and number of southern tidewater goby populations to support our conclusion that the southern DPS is endangered. Conversely, we created, again by definition, a northern tidewater goby population that is not endangered because of its much larger range and number of populations.

Our Response: We acknowledge that the proposed establishment of a southern DPS would create an area of multiple populations in the north that could be treated as a DPS. We believe our proposal was in compliance with our DPS policy (61 FR 4722). However, based on the arguments of numerous scientific commenters, we have decided to withdraw the proposal to delist the northern populations of the tidewater goby. This decision makes it unnecessary to pursue further the retention of an endangered DPS in southern California; therefore, we are withdrawing that proposal as well.

Number of Tidewater Goby Locations

Comment 13: A number of commenters noted that one of the main reasons for the proposed delisting was that tidewater gobies actually occur in more locations than known at the time of listing. One commenter stated that it was not uncommon to discover new populations once a species is listed because focused, systematic surveys are conducted. Most who commented on the discovery of new populations were concerned that we merely counted the number of extant tidewater goby populations, failing to evaluate the size, trend, threats, and viability of newly documented populations. They felt we considered all populations equally important, rather than evaluating whether the populations are small and marginal or large and likely to persist over longer time periods. Several commenters felt many of the recently documented tidewater goby populations were small and vulnerable to extirpation. One commenter considers only about 50 tidewater goby populations likely to persist for the long term. Others attempted similar calculations or noted they could not understand (or disagreed with) our estimates of the number of extant populations and what percentage of tidewater goby populations had been extirpated (*i.e.*, our estimates were inconsistent with their data or knowledge of the tidewater goby's status). One commenter noted we had not attempted to take into account the possibility that un-sampled populations had been extirpated. One commenter noted that, although many ''new populations'' occur in a series of small estuaries in a mostly undeveloped area of Santa Barbara County and probably have a fairly high probability of persistence, this is not likely to be the general case in California where many tidewater goby populations are more isolated.

Our Response: We agree that not all populations contribute equally to the long-term persistence of a species. We relied heavily on the documentation of new populations as a rationale for our delisting proposal. One of the major reasons we have decided to withdraw this proposal is the convincing case made by numerous commenters that further information is needed to evaluate new locations.

Comment 14: One comment letter, received during the third comment period in early 2001, noted that a number of the ''new'' populations had not been surveyed for years and that some of those that were surveyed no longer contained tidewater goby populations. Consequently, they were concerned we are relying on outdated population data.

Our Response: At the time of the proposed delisting rule, we used the best available information to evaluate the presence or absence of new populations. Clearly, as time goes by, the situation can change. As noted above, we agree that further evaluation of the new locations is prudent.

Metapopulation Theory and Population Dynamics

Comment 15: Several commenters were concerned that the proposed delisting rule did not consider current understanding about metapopulation or ''source-sink'' dynamics in evaluating the likelihood of tidewater goby persistence. The long-term persistence of a metapopulation is complex, depending on specific habitat conditions, the spatial arrangement of habitats, environmental fluctuations, local population dynamics, dispersal probabilities, and other factors, many of which are site-specific. A number of commenters expressed their opinions that tidewater goby populations likely exhibit ''source-sink'' dynamics, where not all local populations contribute to the overall persistence of the metapopulation. They suggested that larger populations contribute individuals to smaller sites that are not, by themselves, sustainable. One commenter estimated that less than 50 percent of tidewater goby populations can be considered ''sources,'' and 30 to 50 percent are either extirpated or ''sinks.'' Another stated that the additional twenty or so populations we reported since the 1994 listing are probably intermittent populations that could be sinks for the species as a whole, suggesting that the extinction risk is higher than we indicated in the proposed delisting rule. One commenter presented a very preliminary metapopulation viability analysis.

Our Response: Given the comments we received, we agree that we did not fully evaluate (1) metapopulation dynamics in the long-term persistence of local populations of tidewater gobies and (2) whether or not some local populations might behave as ''sinks'' for tidewater gobies from other populations. We agree with the commenters that such considerations are important in evaluating the likelihood of persistence of the tidewater goby. Comments on this topic contributed to our decision to withdraw the proposed delisting.

Comment 16: One peer reviewer noted that true metapopulations are exceedingly rare in nature and that other spatially structured models may be more appropriate for the tidewater goby. He would not advise using a ''true'' metapopulation model.

Our Response: We cannot evaluate whether the other commenters were referring to ''true'' metapopulations or whether they were using the terms more loosely, as often occurs. We agree that tidewater goby dynamics should probably be evaluated using the most appropriate of the more complex models that deal with population dynamics.

Natural Recolonization

Comment 17: Our delisting proposal relied heavily on our conclusion that the tidewater goby has a greater ability than previously thought to recolonize habitat from which it is temporarily absent. We felt that such ability was associated with an increased likelihood the species would persist. Many commenters disagreed with this interpretation, suggesting strongly that we had overestimated the tidewater goby's potential for recolonization. A number stated that (1) the tidewater goby's ability to recolonize habitats is limited, (2) it is not known to occur beyond 10 km (6 mi) from source populations, (3) the tidewater goby has

a weak swimming ability for long distances and against the currents of an estuarine system, and (4) because of prevailing currents, recolonization is most likely to occur to the south rather than the north. Many noted recolonization is much less likely in areas where populations are more widely separated, have geographic barriers, or where there is no nearby population to the north, as occurs in a number of areas. One commenter suggested that delisting the northern populations of tidewater goby is particularly problematic given the apparent one-way movement southward, going with the prevailing southerly ocean currents. In one study cited by a commenter, a high rate of extinction appeared to be related to a low rate of recolonization from outside sources. Another commenter noted that just because some recolonization occurs does not mean recolonization *rates* are sufficient to maintain a tidewater goby metapopulation. In contrast, one commenter suggested that some, perhaps many, of the new populations discovered following the drought were due to recolonization from adjacent areas where tidewater gobies remained, although he thought it would occur over a relatively short distance and might not always be possible (*e.g.*, if a lagoon mouth does not open).

Our Response: Of the 45 total responses from commenters, 20 were identified with tidewater goby experts (multiple responses from some commenters) and a majority of these indicated that we overestimated the likelihood of natural recolonization of tidewater goby over any substantial distance. We are convinced by the commenters' arguments that additional time is needed to assess whether natural recolonization is as frequent as we assumed in the proposed delisting rule. Our delisting proposal relied heavily on our conclusion that recolonization was more frequent than previously thought. One of the major reasons we have decided to withdraw the proposal is the commenters' convincing case that an alternative interpretation may be more appropriate.

Comment 18: One commenter suggested that we consider tidewater goby recolonization in the context of a long-term tidewater goby recovery plan. One peer reviewer strongly recommended additional study to document if natural recolonization is actually occurring between localities where the tidewater goby exists. The peer reviewer and one commenter noted the delisting rule presented no alternatives to natural recolonization to explain presence/absence data. One alternative to our recolonization hypothesis is that local populations periodically experience very low abundances under very unfavorable environmental conditions, and then, when conditions become favorable, repopulate through local reproduction (rather than from recolonization from another locality). Repopulation through local reproduction, along with little migration, could lead to losses of genetic diversity in local populations through bottleneck effects. The peer reviewer suggested approaches to evaluate whether this local reproduction hypothesis is correct.

Our Response: We agree that further study would be beneficial and that such a study would be appropriate as part of a tidewater goby recovery plan. In addition, we have added a brief discussion of susceptibility of small populations to extirpation from random demographic, environmental and/or genetic events to Factor E of the Summary of Factors Affecting the Species.

Comment 19: We stated that a lack of collection efforts at appropriate times may explain the absence of well authenticated records of the tidewater goby from marine environments outside of enclosed coastal lagoons and estuaries. If such collections had been made, we implied, tidewater gobies might have been found, providing evidence of marine movements consistent with natural recolonization. One commenter stated that this argument selectively employs absence of evidence. Another noted that some survey work has actually been done by Larry Allen of California State University, Northridge, and by James Allen, of Marine Environmental Consultants. The commenter noted that, based on their negative survey results, it is clear that marine incursions by tidewater gobies are very rare and involve very few fish.

Our Response: As noted above, there are other equally plausible interpretations of the data. Accordingly, we have reconsidered our rationale regarding recolonization.

Comment 20: Several commenters noted that a new research paper was published, since the time of the proposed delisting, that bears on the issue of recolonization as well as metapopulation dynamics.

Our Response: An unpublished draft of this manuscript was used in the preparation of the proposed delisting rule, cited as Lafferty *et al.* in prep. The work has now been published and is cited in this notice as Lafferty *et al.* 1999.

Salinity Tolerance

Comment 21: In the proposed delisting rule, we reasoned that the tidewater goby's tolerance of relatively high salinities indicated their potential for successful marine dispersal and recolonization of unoccupied habitat. Many commenters strongly disagreed with our interpretation. One peer reviewer noted that demonstrating laboratory survival in high salinities is not equivalent to showing migration through high salinity habitats is likely. He suggested that it is necessary to show documented movement of tidewater gobies from one estuary to another, either directly through tag and recapture studies, or indirectly through targeted genetic studies to show that recolonization occurs. Commenters noted that tidewater gobies prefer low salinities, that the species is most widespread and abundant in low salinity conditions, and that the species is much more restricted in saltier systems. Some gave site-specific examples to support their assertions. For example, Devereux Lagoon, which becomes hypersaline, no longer supports tidewater goby. In addition, the proposed delisting did not discuss long-term effects of high salinity on reproductive behavior, feeding or successful rearing of juveniles.

Our Response: As noted above, the commenters arguments regarding the likelihood of recolonization are compelling, and we are convinced that additional information is necessary to determine whether natural recolonization is as frequent as we assumed in the proposed delisting rule. We also agree that tolerance to high salinity does not necessarily indicate that natural recolonization occurs or is likely. Our proposed delisting relied heavily on our conclusion that recolonization was more frequent than previously thought. One of the major reasons we have decided to withdraw the proposal is the commenters' convincing case that an alternative conclusion may be more appropriate.

Morro Bay Collection

Comment 22: We reopened the comment period for the first time in response to new information that putative tidewater goby larvae had been collected in Morro Bay. The new information came from sampling done by Tenera Associates (G. McLaughlin, U.S. Fish and Wildlife Service, *in litt.* undated; Tenera, *in litt.* undated). We asked the public to provide input on how the collection might influence our interpretation of the frequency of marine dispersal by tidewater gobies. A

number of commenters responded, and none felt that the collection should change our interpretation of the tidewater goby's recolonization potential. One commenter suggested that, even if new information indicated substantial numbers of tidewater gobies were found in nearshore marine waters, it does not change the fact that their colonization of new habitats is an uncommon event that occurs close to the source population. Several noted that the collection was made within Morro Bay and not in the open water, where there were also sampling stations. One commenter stated that the appearance of tidewater goby larvae in Morro Bay does not indicate the species has recovered. In addition, several noted that the species identification was not certain. In fact, later genetic analysis showed the specimens were not tidewater gobies.

Our Response: Genetic data, mentioned by commenters, indicate that the specimens collected during sampling by Tenera Associates were not, in fact, tidewater gobies. Since the specimens were not tidewater gobies, the new collection data are not relevant to the frequency of marine dispersal by tidewater gobies. As noted above, we find that the commenters arguments regarding the potential for tidewater goby recolonization provide a convincing case for more study. One of the major reasons we have decided to withdraw the proposal is the commenters' arguments that the proposed rule overstated the recolonization ability of the tidewater goby merit consideration.

Issue 3: Threats to the Tidewater Goby

The following comments and responses are related to our evaluation of threats to the tidewater goby. Some comments provided new information; where applicable, this new information was incorporated into this withdrawal notice.

Comment 23: Several commenters objected to our characterization of the tidewater goby's status relative to environmental regulations, coastal development, and habitat loss and modification north of Orange and San Diego Counties. They pointed out that we offered no evidence to support our contention that environmental regulations have appreciably reduced the potential for substantial habitat loss and modification. Rather, we inferred the conclusion from the relatively small number of known population extirpations since the implementation of major environmental programs in the early 1970s. In fact, the commenters note, the other environmental regulatory mechanisms are most effective in conjunction with the Act, and some local agencies have already discounted the significance of potential effects to the tidewater goby based on the proposed delisting.

Our Response: We are required to use the best available scientific and commercial data in making our decisions. We are unaware of any studies demonstrating the adequacy or inadequacy of environmental regulations enacted since the 1970's. We agree that documentation of this would be useful. See additional discussion in Factor D below in the Summary of Factors Affecting the Species.

Comment 24: Several commenters felt that we did not adequately, or accurately, assess the current and future threats to the tidewater goby, including the threat to tidewater goby populations from coastal and upstream development projects, the threat of predation and competition by nonnative species, and the cumulative effects of threats in combination. One of these commenters noted that smaller wetlands, which can be ''stepping stones'' between larger tidewater goby habitats, are vulnerable to random events such as drought. On the other hand, larger wetlands tend to be susceptible to human activities.

Our Response: We agree that further analysis of the impacts of coastal and upstream development projects, the threat of predation and competition by nonnative species, and the cumulative effects of threats in combination is needed (*see also* comment 25 below).

Comment 25: A number of commenters stated that we were inconsistent in our evaluation of the northern versus southern portions of the tidewater goby range, suggesting that northern and southern populations of tidewater goby face the same threats from development, bridge and highway maintenance projects, dredging projects, artificial breaching, and inadequate regulatory mechanisms. Several commenters questioned our speculation that tidewater goby biology may differ in the southern portion of the range, a speculation used, in part, as a rationale for north-south distinctions in the rule. One commenter noted that we had failed to identify any substantive differences in population demographics, habitat variation, and response to disturbance between northern and southern tidewater gobies.

Our Response: We have addressed threats to the tidewater goby range-wide in the Summary of Factors Affecting the Species below. To the extent that threats remain, it appears that the distinctions between threats to the northern and southern portions of the tidewater goby range may be less pronounced than we previously believed. Furthermore, there currently appears to be little evidence that northern and southern tidewater gobies differ in biology.

Comment 26: One commenter supporting the proposed delisting of tidewater goby asked whether tidewater gobies in the northern part of the range are threatened or endangered with extinction. He stated that whether or not the local populations in the northern range have limited gene flow among them does not address the basic question of whether the species, as a whole, is endangered. He suggested that new data obtained by Dr. Jacobs (presumably since the delisting proposal was published) only reveal insights to the genetic structure of the species' populations.

Our Response: We agree that Dr. Jacobs's data do not address the status of the tidewater goby in the north. As discussed below in the Summary of Factors Affecting the Species and in the other comments and responses in this section, we believe it is prudent to withdraw the proposal to delist the northern populations. Our decision is based primarily on scientific comments received during the three comment periods questioning the conclusions we drew based on the population increases. Specifically, the commenters felt we overemphasized the importance of the discovery of new tidewater goby populations and overstated the recolonization ability of the tidewater goby. The alternate interpretations of the data presented by the commenters have led us to believe that additional time is necessary to fully understand the dynamic of tidewater goby populations.

Comment 27: One commenter suggested that one wet-dry climate cycle is insufficient to evaluate the resiliency of tidewater goby populations.

Our Response: We agree that data from one wet and dry cycle is subject to multiple interpretations—none of which is conclusive. We discuss the effects of drought in Factor E of the Summary of Factors Affecting the Species.

Issue 4: Site-Specific Comments

The following comments and responses involve site-specific issues. Most site-specific issues were incorporated into the withdrawal, as appropriate. Two are addressed specifically below.

Comment 28: The Marine Corps Base, Camp Pendleton, provided comments that the proposed southern DPS exists in its entirety on Camp Pendleton and that it is not endangered. They provided specific information to support this contention, including an increase in

tidewater goby populations from three to eight and expansion or recolonization of all available tidewater goby habitat. They felt that (1) considering the southern DPS to be endangered is inconsistent with our 1995 Biological Opinion for Riparian and Estuarine/Beach Ecosystems on Camp Pendleton which set a recovery goal of six tidewater goby populations in six of the eight estuaries on the base, (2) we failed to consider and evaluate Camp Pendleton's natural resource management plans and efforts, and (3) the proposed southern DPS should be viewed as viable and self-sustaining, and not nearing extinction.

Our Response: There were 13 historic locations of tidewater goby in Orange and San Diego counties, of which 8 are intermittently extant on Camp Pendleton. All eight localities are relatively pristine coastal wetlands and are all crossed or just downstream of Interstate 5 and the coastal railway. They are, from north to south, San Mateo Creek, San Onofre Creek, Las Flores Creek, Hidden Creek, Aliso Creek, French Creek, Cockleburr Creek, and the Santa Margarita River.

Currently all locations are occupied on Camp Pendleton except French Creek and the Santa Margarita River. As recently as 1991, the number of occupied tidewater goby localities was only three (Swift and Holland 1998, D. Holland, *in litt.* 1999). Based on survey information, San Onofre Lagoon and Los Flores have been consistently occupied since 1987 (Camp Pendleton INRMP, 2001).

In 1995, the Service issued a programmatic biological opinion on the ''Programmatic Activities and Conservation Plans in Riparian and Estuarine/Beach Ecosystems on Marine Corps Base, Camp Pendleton,'' including an Estuarine/Beach Ecosystems Conservation Plan (U.S. Fish and Wildlife Service, Biological Opinion 1–6–95–F 02, 1995). The reasonable and prudent measures of the biological opinion require the Marines to adopt and implement the Estuarine/Beach Ecosystem Conservation Plan.

The Estuarine/Beach Ecosystem Conservation Plan is structured to minimize the effects to listed species resulting from potential impacts associated with ongoing and future training, maintenance, recreation, and construction activities. The Marines have the authority to carry out the measures in the plan, and because the terms and conditions are mandatory, there are assurances that the Conservation Plan will be implemented. While the Conservation Plan focuses primarily on avian species and does address the tidewater goby generally, it does not contain specific biological objectives, recovery criteria, or recovery goals for the tidewater goby. While an internal draft recovery plan for the tidewater goby had been informally released in 1996, we have not formalized and published a draft or final recovery plan for the species that establishes recovery criteria and goals for delisting.

In 2001, Camp Pendleton completed an Integrated Natural Resource Management Plan (INRMP) for the Base that addresses the tidewater goby. However, the INRMP, does not provide conservation and management measures for the tidewater goby beyond those indicated in the Conservation Plan.

In addition, other conditions related to the recent drought conditions in southern California and the presence of non-native predators have threatened tidewater goby populations. For example, Hidden Creek appears to have perennial water flow but may become so hypersaline in a severe drought as to be unsuitable for any fish species (Swift and Holland 1998). Aliso Creek, French Creek, and Cockleburr Creek are all relatively ephemeral and have not supported tidewater gobies in times of drought. The Santa Margarita River seemed to contain a large stable population until 1991, but tidewater gobies disappeared in 1991, shortly after the nonnative yellowfin goby became abundant in the estuary.

Overall, taking into consideration the measures in the Conservation Plan for the tidewater goby, the continued threats to the species and its habitat, and the species' intermittent occupancy in the drainages on Camp Pendleton as discussed above, we believe that the populations of tidewater goby on Camp Pendleton still require the protection afforded it under the Act.

Comment 29: The proposed delisting rule overstates the impact of the Foothill (South) Transportation Corridor.

Our Response: The proposed ''CP alignment'' of the Foothill Transportation Corridor South (FTCS), if constructed, has the potential to negatively impact the tidewater goby, specifically in San Mateo and San Onofre Creeks (Michael Brandman and Associates 1998). The lagoons at the mouth of San Mateo and San Onofre Creeks are occupied by tidewater gobies, and these two lagoons are capable of supporting large tidewater goby populations from several thousand to approximately 70,000 tidewater gobies (Swift and Holland 1998). These two populations, along with Las Flores Creek, are the largest and most persistent in the region and are thought to serve as source populations for dispersal into the ephemeral estuaries and streams in the area. Thus, these populations are important to the recovery of the tidewater goby.

A preliminary investigation of the impacts to tidewater gobies from the CP alignment found that adverse impacts would be less than significant after mitigation (Michael Brandman and Associates 1998). However, mitigation proposals have not been included as part of the project description, and the alternatives for this project are still being developed for an Environmental Impact Statement. Absent complete mitigation being incorporated into the project, the FTCS CP alignment may have both short-term and long-term impacts to tidewater gobies in the San Mateo Creek and San Onofre Creek drainage and accompanying watershed (Michael Brandman and Associates 1998). Short-term impacts could include mortality and temporary loss of habitat for breeding, feeding, and sheltering due to blockage or diversion of water flow, increased siltation from the required earthen cut and fill, and the disturbance of low oxygen sediments. Long-term impacts could include: the alteration of the hydrologic regime, primarily in changes to flow regimes, temperature patterns, and sediment movement characteristics of the streams; loss of habitat for breeding, feeding, and sheltering due to siltation; and deterioration in water quality of the streams from the input of heavy metals and other contaminants. These types of changes to the abiotic elements of a stream are often associated with corresponding changes to the ichthyofauna (fish species assemblage within a region). Generally, this kind of disturbance results in an increase of exotic fish species to the detriment of the indigenous (native) ichthyofauna (Moyle and Light 1996). Currently, projects in coastal streams are regulated by the California Environmental Quality Act (CEQA), the State of California's streambed alteration permit program, the Army Corps of Engineers 404 permits and California's delegated authorities under the Clean Water Act which regulates stormwater runoff from highways and during construction. While such effects as are enumerated are possible, they may be remediated in whole or in part by these regulatory controls prior to project approval and construction.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Act and regulations implementing the listing provisions of the Act (50 CFR part 424)

set forth the procedures for adding species to the Federal list of threatened and endangered species. We must consider the five factors described in section 4(a)(1) of the Act when determining whether any species is an endangered or threatened species. These factors and their application to our decision to withdraw the proposal to delist the tidewater goby are described below:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.*

Coastal development and habitat modification/loss. The final rule listing the tidewater goby indicated that coastal development projects that result in the loss of coastal saltmarsh habitat were the major threat adversely affecting the tidewater goby. Our delisting proposal, on the other hand, stated that north of Orange and San Diego Counties such projects, including dredging of waterways for navigation and harbors and road construction that severed the connections of marshes with the Pacific Ocean, were responsible for *historical* loss of tidewater goby populations. Having reevaluated the number of tidewater goby extirpations resulting from coastal development and habitat modification and loss, we stated that the potential for the significant habitat loss and modification that occurred historically has been substantially reduced in the northern portion of the tidewater goby range. We postulated that this was largely due to the implementation of key environmental regulation required by the Clean Water Act, Coastal Zone Management Act, and related California environmental statutes. We cited only five permanent extirpations resulting from destruction or modification of habitat since the initial promulgation of environmental regulations in the early 1970s.

In Orange and San Diego Counties, we identified several recent human activities that may have adversely affected the tidewater goby. We specifically discussed activities at San Onofre Creek Lagoon and San Mateo Creek Lagoon. We thought both of these locations might be important sources of dispersing tidewater gobies, appearing to be two of the three most stable populations in the area. We felt that population losses or reductions of the San Onofre and San Mateo tidewater goby populations were very serious and illustrated ongoing adverse impacts of earthmoving activities in and around creeks and lagoons in the southern portion of the tidewater goby range.

As noted above in the Summary of Comments and Recommendations, several commenters objected to our characterization of the tidewater goby's status relative to coastal development and habitat loss and modification north of Orange and San Diego Counties. They state that we inferred that environmental regulations have substantially reduced the potential for habitat loss and modification from the relatively small number of known population extirpations since the implementation of major environmental programs in the early 1970s (J. Buse, Environmental Defense Center, *in litt.* 1999, M. Capelli, *in litt.* 1999). Review of pending development projects within the California Coastal Zone indicates that development pressure continues (M. Capelli, *in litt.* 1999) and economic signs point to dramatic human population increases in California in the near future, greatly increasing infrastructure needs that could impact coastal watersheds and drainages (Swift, Emeritus, Section of Fishes, Natural History Museum of Los Angeles County, California, *in litt.* 2001). Some counties, such as San Luis Obispo, are expected to expand by 175 percent by 2010, potentially having significant impacts on tidewater goby habitat (S. Christie, Environmental Center of San Luis Obispo, *in litt.* 1999). Human-made impacts, combined with the effects of drought, could lead to a situation in which a marginal tidewater goby population may not recover from the drought as we would predict based on their life history (Hight, California Department of Fish and Game, *in litt.* 2001). The tidewater goby's estuarine and coastal lagoon habitats are potentially the most highly altered aquatic environments in the state. They are threatened by the impacts from coastal development projects and urban development, and these threats are likely to continue into the near future. Research has shown a pronounced trend toward extirpation when a cyclic species encounters drastic anthropogenic disturbance (M. Marchetti, California State University, Chico, *in litt.* 2001).

Water diversions and groundwater overdrafting. The final listing rule stated that upstream water diversions and groundwater overdrafting may adversely affect the tidewater goby by altering downstream flows. This alteration would diminish the extent of marsh habitats that historically occurred at the mouths of most rivers and creeks and potentially affect the species' breeding and foraging activities. The rule further suggested that alterations of flows upstream of coastal lagoons resulting in changes in downstream salinity regimes might affect the tidewater goby due to its presumed narrow salinity tolerances. The delisting proposal, on the other hand, noted that the San Antonio Creek in Santa Barbara County, which was used as an example of the adverse effects of groundwater overdrafting, was occupied by tidewater gobies in 1995 (but C. Swift, *in litt.* 1999 suggests the proposed delisting rule was in error and should have referred to Santa Rosa Creek).

Scientists who commented on the proposed delisting pointed out that extirpation is not the only effect we ought to be concerned about. Effects short of complete extirpation should be considered as well. For example, population size and stability are important considerations, as is the combination of human influences and natural perturbations (M. Capelli, *in litt.* 1999). In fact, the final listing rule also noted that negative impacts of water diversions and alterations of flows may extend to breeding and foraging activities.

The delisting proposal also included a lengthy discussion of the salinity tolerances of tidewater gobies, suggesting that the tidewater goby appears tolerant of a broad range of salinity conditions and implying, therefore, that salinity changes due to upstream flow alterations would not have adverse effects on the tidewater gobies. Some scientists commenting on the proposed delisting suggested that we confused salinity tolerance with the natural preference of tidewater gobies for mildly brackish water (M. Capelli, *in litt.* 1999, T. Frink, American Fisheries Society, *in litt.* 1999, R. Swenson, The Nature Conservancy, *in litt.* 1999). Most researchers have found that the species is most widespread and abundant in low salinity conditions, and much more restricted in saltier systems (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999). The proposed delisting rule cites only simple extreme saline water experiments; one commenter questioned the long-term effects of saline conditions on critical reproductive behavior, feeding, or the successful rearing of juveniles (M. Capelli, *in litt.* 1999). Furthermore, the response to salinity of benthic invertebrates on which tidewater gobies feed may also be critical in evaluating the long-term response of tidewater gobies to high salinities (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999).

Channelization. The final listing rule noted that channelization of rivers inhabited by the tidewater goby threatens the species because of the scouring effects of high winter flows in the restricted channels and the lack of protective habitat. The delisting

proposal stated that, with the exception of Waddell Creek, Santa Cruz County, we were unable to identify population extirpation due to channelization and that in Waddell Creek, tidewater gobies were reestablished in 1991.

Some scientists who commented on the proposed delisting disagreed with both our characterization of the threat from channelization and our characterization of the situation at Waddell Creek. The effect of channelization is not limited to the increased probability of tidewater gobies being swept into marine environments and to lack of refugia but also includes direct loss of habitat area and increased rate of urban runoff (M. Capelli, *in litt.* 1999). Additionally, the significance of reestablishment in Waddell Creek is questionable because it has not been demonstrated that tidewater gobies were extirpated there or whether instead they were depressed to the point of not being detectable (M. Capelli, *in litt.* 1999) and because they likely have been eliminated again from the lagoon (C. Swift, *in litt.* 1999). Finally, one scientist pointed out that, even if tidewater gobies had recolonized, it is not appropriate to extrapolate that finding to all localities (M. Capelli, *in litt.* 1999).

Cattle and feral pigs. The final listing rule identified cattle grazing and feral pig activity as threats to the tidewater goby, stating that these activities have resulted in increased sedimentation of coastal lagoons and riparian habitats, removal of vegetative cover, increased ambient water temperatures, and elimination of plunge pools and collapsed undercut banks used by tidewater gobies. The proposed delisting rule, on the other hand, argued that many lagoons receiving agricultural and sewage effluents are occupied by tidewater gobies and they are the most abundant fish species present (*e.g.*, in Santa Barbara County lagoons (Ambrose *et al.* 1993)). Tidewater gobies were also found in high numbers in areas with low levels of dissolved oxygen (0.2–1.7 mg/l) (Worcester 1992, Swift *et al.* 1997). We concluded, therefore, that the tidewater goby appears to be tolerant of agricultural and sewage effluents as well as a wide range of dissolved oxygen levels.

Commenters noted that sedimentation and erosion has also been caused by vineyard conversions in some areas (P. Ashley, *in litt.* 1999; S. Christie, *in litt.* 1999). Scientists who commented on the proposal stated that our analysis is insufficient because we have not assessed how many populations persist when subject to siltation and topsoil runoff (D. Holland, *in litt.* 1999). Presence of tidewater gobies in a particular situation does not mean that tidewater gobies are doing well (P. Ashley, biologist, *in litt.* 1999; C. Swift, *in litt.* 1999). They believe that despite tidewater gobies being present, and even abundant, siltation and topsoil runoff and waste discharge may still influence tidewater goby declines and future viability of tidewater gobies and may be important because of other potential effects (*e.g.*, effects of waste discharges on tidewater goby food supply) (M. Capelli, *in litt.* 1999).

Numbers of populations/resiliency/recolonization. In the final listing rule, we stated that extirpated localities had left remaining tidewater goby populations so widely separated that we felt recolonization was unlikely. Many lagoons inhabited by tidewater gobies were small and widely separated. According to Swift *et al.* (1990), only eight extant localities, all north of San Francisco Bay, contained populations considered both large enough and free enough from habitat degradation to be safe for the immediate future. The remaining lagoons were so small or modified that tidewater goby populations were restricted in distribution and vulnerable to elimination (Swift *et al.* 1989, 1990).

In the proposed delisting rule, we stated that new information and analyses showed that the tidewater goby is very well adapted to the climatically dynamic system in which it evolved and that intermittent occupancy of some sites was a normal aspect of the species biology (Swift *et al.* 1994, 1997; Lafferty *et al.* 1999 (cited in proposed delisting as in prep.)). We noted that at the end of the 1987–1992 drought at least 14 populations thought to be extirpated were found to be extant. In addition to these 14 sites, following a return to normal or above average rainfall, tidewater gobies were found in approximately 20 other sites. Our interpretation of this information was that recolonization is possible, and in fact, is a normal process following habitat variation due to climatic fluctuation (Swift *et al.* 1994, 1997; Lafferty *et al.* 1999 (cited in proposed delisting as in prep.)). We determined that the continued survival of tidewater goby populations, after the drought of the late 1980s and early 1990s, indicated we were incorrect in concluding that most tidewater goby populations were extremely vulnerable to extirpation. However, based on the comments we received, we believe it is appropriate to review our interpretations of (1) the meaning of additional tidewater goby locations, and (2) the likelihood of tidewater gobies recolonizing temporarily unoccupied sites. These two premises were fundamental to our rationale to propose delisting the northern populations of the tidewater goby; each is discussed briefly below.

The commenters' arguments that a simple enumeration of locations where tidewater gobies have been identified is not sufficient to evaluate the vulnerability of this species have merit. Information on population sizes, trends and/or viabilities is needed to accurately assess whether the species or individual populations are likely to persist (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999; J. Smith, San Jose State University, San Jose, California, *in litt.* 1999; C. Swift, *in litt.* 2001). A number of scientists noted that not all local tidewater goby populations contribute equally to the overall persistence of the species. The additional populations reported since the 1994 listing are likely to be sink populations, smaller sites that receive individuals from larger sites, and are not by themselves sustainable (C. Swift, *in litt.* 1999; R. Swenson, The Nature Conservancy, *in litt.* 2001). Therefore, evaluating the vulnerability of the tidewater goby will likely require an understanding of the interaction among populations or a demonstration of their persistence or repeat recolonization (*i.e.*, metapopulation structure, source-sink dynamics, other spatial structure) (R. Ambrose, University of California, Los Angeles, *in litt.* 1999; C. Swift, *in litt.* 1999, 2001; R. Swenson, *in litt.* 2001). As noted by Richard Ambrose (*in litt.* 1999), the long-term persistence of a metapopulation depends on numerous factors, including specific habitat conditions, the spatial arrangement of habitats, environmental fluctuations, local population dynamics, dispersal probabilities, and other site-specific factors. In the proposed delisting, we did not evaluate the likelihood of tidewater goby persistence in terms of this complexity, and we feel that it is worthy of further consideration.

A second reason we proposed to delist the northern populations of the tidewater goby was because we felt that the tidewater goby's ability to recolonize temporarily unoccupied habitat was greater than we had previously thought. We felt that such ability was associated with an increased likelihood that the species would persist. As evidence that recolonization occurred, we noted the reappearance of tidewater gobies after cessation of the drought and tidewater goby salinity tolerance. However, recolonization is not the only possible explanation for the reappearance of tidewater gobies after the drought (*e.g.*,

M. Capelli, *in litt.* 1999; T. Turner, University of New Mexico, *in litt.* 2001). In addition, salinity tolerance, particularly as determined in laboratory experiments, does not necessarily indicate that tidewater gobies will travel through the marine environment to recolonize temporarily unoccupied sites (M. Capelli, *in litt.* 1999; T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999; T. Turner, *in litt.* 2001). We believe, based on the evidence presented by the commenters, that the tidewater goby's potential for recolonization may be lower than we believed at the time of the proposed delisting rule (*see also* comments 15 to 20 above). Information presented by the commenters suggests the tidewater goby's ability to recolonize is very limited, perhaps no more than 10 km (6 mi) (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999; Swift *et al.* 1997 as cited in D. Holland, *in litt.* 1999; Lafferty *et al.* 1999; C. Swift, *in litt.* 1999). Recolonization appears to be much less likely where populations are more widely separated, have geographic barriers, or where there is no nearby population to the north (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999). Given this possible interpretation, we feel the tidewater goby may be more vulnerable than we thought at the time of the delisting proposal. We believe it is prudent to evaluate its vulnerability in more detail before delisting any portion of the species.

Artificial lagoon breaching. Although not discussed in the final listing rule, the proposed delisting also discussed artificial lagoon breaching during the dry season as a potential threat to the tidewater goby. We considered significant decreases in water level, exposure of tidewater goby breeding burrows and bottom habitat, and increased salinity resulting from breaching as possible threats to the tidewater goby from breaching during the dry season. However, we noted, in the northern portion of the tidewater goby range, the species continues to persist at numerous locations where unseasonable breaching has occurred (Lafferty 1995, Swenson 1995, Lafferty and Alstatt 1995, Heasly *et al.* 1997; D. W. Alley, *in litt.* 1998). Because we had no records of breaching-related extirpations, we concluded that breaching does not pose a significant threat to the northern populations of the species. In the southern portion of the range, we were aware of adverse effects on tidewater goby from an artificial breaching at San Onofre Creek Lagoon.

The argument we presented in the proposed delisting rule with respect to unseasonable breaching was couched entirely in terms of extirpation (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999; K. Lafferty, U.S. Geological Survey and University of California, Santa Barbara, *in litt.* 1999). Commenters noted a significant threat to tidewater goby populations via loss of individuals, a significant portion of a population, and/or changes in the quality or quantity of habitat may well occur during breaching (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999; K. Lafferty, *in litt.* 1999). Commenters opined that repeated disturbance from breaching events could also jeopardize food supplies for tidewater gobies in lagoon habitats (Swenson 1999 as cited in R. Swenson, *in litt.* 1999). Although breaching can reduce population densities and alter hydrology in ways that may be detrimental to tidewater gobies, several populations manage to persist with regular breaching and it is not possible, given the information available, to determine when and where breaching will lead to extirpation (K. Lafferty, *in litt.* 1999).

One reason we proposed delisting the northern populations of tidewater goby was that we felt threats to the populations were less severe than we believed at the time of listing. Some commenters provided information suggesting that there is cause for concern about the impacts of coastal development, habitat modification and loss, water diversions, channelization, cattle and pigs, and artificial lagoon breaching on tidewater goby populations throughout its range. As noted below in Factors C and E, such impacts may also exacerbate threats from other sources (*e.g.*, predation by non-native fish). In light of these considerations, we believe the prudent course of action is to withdraw the proposed delisting.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Overutilization is not known to be applicable; there is no change in this factor since the delisting proposal in 1999.

C. *Disease or predation.* Disease was not identified as a threat in the final listing rule or the delisting proposal, nor is it known to be a threat at this time.

Trematodes. The proposed delisting rule noted that the digenean trematode (a flatworm or fluke) *Cryptocotyle lingua* could have been a factor in the apparent population decline of tidewater gobies in Pescadero Lagoon in 1992 and 1993 (Swenson 1995). The trematode species also had been reported from Corcoran (Rodeo) Lagoon in Santa Cruz County (Swift *et al.* 1989), where we felt it did not affect tidewater goby populations. In fact, there has been no appropriate investigation to determine whether trematodes are a significant source of mortality in tidewater gobies. However, they are known to be an important mortality source in other fish species. For example, trematodes can cause up to a 30-fold increase in killifish mortality (Lafferty and Morris 1996 as cited in K. Lafferty, *in litt.* 1999).

Nonnative predators. The final listing rule stated that introduced predators, especially centrarchid fish, may have contributed to the elimination of the tidewater goby from several localities in California (Swift *et al.* 1989). We noted that the present day absence of the tidewater goby from the Sacramento-San Joaquin River delta and San Francisco Bay area may well be explained by the presence of introduced predators such as striped bass and native predators including Sacramento perch (Swift *et al.* 1989, 1990) (*see also* Background section). At that time, two recent disappearances of tidewater gobies were also likely due to the presence of exotic largemouth bass (*Micropterous salmoides*) and green sunfish (*Lepomis cyanellus*), in Old Creek of San Luis Obispo County and San Onofre Creek of San Diego County, respectively (Swift *et al.* 1989). Additionally, we were concerned that direct predation on adults, larvae, or eggs by other nonnative predators, such as crayfish (*Cambarus* spp.) and mosquitofish, might threaten the tidewater goby.

In the delisting proposal, we asserted that tidewater goby populations north of Orange and San Diego Counties were not particularly vulnerable to these introduced fish. Centrarchid fish were known, at the time, to exist at many sites inhabited by large populations of tidewater gobies (*e.g.*, Santa Clara River, Las Pulgas Creek, San Mateo Creek). The threat of tidewater goby extirpation throughout its habitat as a result of predation by these nonnatives was thought to be minimal because (1) tidewater goby populations were large and able to repopulate from adjacent streams and (2) tidewater gobies have a wider range of salinity tolerance than the nonnative fish do. Although nonnative fish consume tidewater gobies, we felt the predation was not a serious threat. We also noted that tidewater gobies occur in large numbers in at least one location (Santa Clara River) occupied by African clawed frogs, which also feed on tidewater gobies. We implied that the co-occurrence of both African frogs and nonnative fish with tidewater gobies meant that predation was not a threat.

In contrast, we felt that nonnative predation could be a threat to tidewater gobies in Orange and San Diego

Counties when combined with other factors such as habitat disturbance. We noted that nonnative predators could prevent or contribute to significant reductions in dispersal and recolonization of sites in southern California. Nonnative fish were thought to have played a role in population losses or declines in San Onofre Creek and the Santa Margarita River. In addition, yellowfin goby was, by that time, established in most lagoons inhabited by tidewater gobies in Orange and San Diego Counties. We received no comments that allay our concerns that ongoing impacts continue to endanger the tidewater goby in southern California.

Based on comments and new information we received, it appears that nonnative predators are likely to be a threat to tidewater gobies throughout their range. We implied in the proposed delisting that the presence of tidewater gobies with nonnative species (*i.e.*, co-occurrence) indicated that predation by nonnatives was not a threat. In fact, co-occurrence does not necessarily suggest that long-term co-existence is likely (K. Lafferty, *in litt.* 1999; C. Swift, *in litt.* 1999). Although direct evidence that introductions of nonnatives led to extirpations of tidewater gobies is lacking, tidewater gobies did disappear from several localities soon after centrarchid fish were introduced (Swift *et al.* 1989, 1994; Rathbun *et al.* 1991). Commenters noted specific examples of situations where predation by nonnatives may have negatively affected tidewater goby populations (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999; C. Swift, *in litt.* 1999). In the Santa Ynez River system, tidewater gobies accounted for 61 percent of the prey volume of 55 percent (10 of 18) of the juvenile largemouth bass sampled (Swift *et al.* 1997, M. Capelli, *in litt.* 1999). The decline and subsequent recovery of the tidewater goby population in Las Pulgas Creek closely tracked the absence of green sunfish from the lagoon in this system (Swift and Holland 1998 as cited in D. Holland, *in litt.* 1999). The elimination of tidewater gobies from the Santa Margarita may have been due to the combined influence of nonnative species and decreasing habitat available for the tidewater goby (Swift and Holland 1998 as cited in D. Holland, *in litt.* 1999). Largemouth bass in Old Creek of San Luis Obispo County are likely responsible for the elimination and prevention of re-establishment of tidewater gobies there (D. Holland, *in litt.* 1999). The evidence suggests that nonnative fish are often introduced to tidewater goby habitats, prey on tidewater gobies, and in some documented cases, may lead to the extirpation of tidewater gobies. This evidence, though indirect, suggests that some nonnative predators can have negative impacts on tidewater gobies, including extirpation (K. Lafferty, *in litt.* 1999). In addition, predation by nonnatives may have negative effects short of extirpation, reducing tidewater goby population sizes and, thereby, rendering populations more vulnerable over the long-term to extirpation as a result of natural perturbations of habitat conditions at the site (M. Capelli, *in litt.* 1999).

Some commenters believed that tidewater gobies may have limited ability to repopulate from adjacent streams. We suggested that the ability to repopulate, along with sufficiently large population sizes, made predation by nonnatives a minimal threat. The commenters questioned how many tidewater goby populations might be considered large and how population fluctuations might affect vulnerability (D. Holland, *in litt.* 1999, *see also* comments 13 and 15). In addition, as noted elsewhere (*see* comments 17 to 22 and Factor A), the dispersal ability of tidewater gobies may be very limited, making repopulation of extirpated sites problematic (D. Holland, *in litt.* 1999).

Our argument that tidewater gobies are not threatened by nonnatives because tidewater gobies have a wider salinity tolerance was not supported by scientists commenting on the proposal. The commenters assert that many of the species known or thought to prey on tidewater goby have a wide range of salinity tolerance, including striped bass, chameleon gobies, yellowfin gobies and shimfuri gobies (D. Holland, *in litt.* 1999). Additionally, some commenters asserted that the habitat of the tidewater goby may be essentially freshwater for part, or even much, of the year (Swift and Holland 1998 as cited in D. Holland, *in litt.* 1999), making tidewater gobies vulnerable even to nonnative species with limited salinity tolerance, including largemouth bass, green sunfish, African clawed frogs, and others (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999).

Finally, commenters speculated that ranges of current nonnative species may expand (*e.g.*, African clawed frog, yellowfin goby), and new nonnative species (*e.g.*, Chinese mitten crabs (*Eriocheir sinensis*)) may become a problem in the future. Some establishment and movement of nonnatives may be facilitated by water redistribution plans (D. Holland, *in litt.* 1999).

We received comments to the effect that there is cause for concern about the impacts of nonnative species on tidewater gobies (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999; K. Lafferty, *in litt.* 1999; C. Swift, *in litt.* 1999). The commenters surmise that if nonnative species are not responsible for tidewater goby declines by themselves, they may be important in concert with factors such as drought, habitat loss or alteration, and natural or anthropogenically induced fluctuations in population size (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999).

D. *The inadequacy of existing regulatory mechanisms.* A number of existing State, local, and Federal regulatory requirements provide some protection to the tidewater goby. Section 10 of the Rivers and Harbors Act, section 404 of the Clean Water Act, the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the California Coastal Act, the California Department of Fish and Game's streambed alteration permit program, and the State Water Resources Control Board's stormwater control program all provide some level of protection for the goby and its habitat. At the time of the original listing, however, we concluded that the existing regulatory mechanisms were inadequate to protect the tidewater goby.

In the proposed delisting rule, we changed our position, stating that there is little evidence to support the conclusion that existing regulatory mechanisms inadequately protect the tidewater goby or are contributing to substantial or widespread population decline and loss in the northern portion of the species' range. We stated that (1) review and permitting of projects under sections 10 and 404 was unlikely to allow the extent of destruction and modification of habitat that occurred prior to their implementation, (2) measures included in section 404 permits because of the presence of other listed and sensitive species (*e.g.*, California red-legged frog (*Rana aurora draytonii*), steelhead trout (*Oncorhynchus mykiss*), unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*)) provide protection of tidewater goby habitat, (3) a review of the Environmental Protection Agency's (EPA's) AQUIRE on-line database found no contaminant data directly relating to tidewater goby, and (4) in the current regulatory environment, little evidence exists to support the conclusion that water diversions, groundwater overdrafting, and modifications in salinity regimes, or the discharge of effluents are posing a

significant threat to the tidewater goby. In contrast, we felt that existing regulatory mechanisms failed to protect tidewater gobies in the southern portion of the range. We were concerned because the small number of extant tidewater goby populations in Orange and San Diego Counties would make the loss of any one population a greater cause for concern than in the northern portion of the range.

Several commenters expressed concern over our changed perspective about the northern range. They stated that we presented no evidence to support the contention that environmental regulations have substantially reduced the potential for the substantial habitat loss and modification that occurred historically, instead inferring the conclusion from the relatively small number of known population extirpations since the implementation of major environmental programs in the early 1970s (J. Buse, *in litt.* 1999). Commenters also claimed that our assertion that tidewater goby will be protected by measures for other listed and sensitive species assumes that the species have substantially the same requirements, have the same timing of life history stages, or share the same habitats (J. Buse, *in litt.* 1999; M. Capelli, *in litt.* 1999; T. Frink, *in litt.* 1999; D. Holland, *in litt.* 1999; S. Manion, Resource Conservation District of the Santa Monica Mountains, *in litt.* 1999; J. Smith, *in litt.* 1999; R. Swenson, *in litt.* 1999; A. Wetzler and M. Gold, *in litt.* 1999). This may not be the case; in fact, there is not complete overlap in the distribution of these species and the tidewater goby (*e.g.*, J. Buse, *in litt.* 1999; D. Holland, *in litt.* 1999; R. Swenson, *in litt.* 1999). For example, steelhead and unarmored threespine stickleback are not found in all locations where tidewater gobies occur (J. Buse, *in litt.* 1999; R. Swenson, *in litt.* 1999). Similarly, the range of the California red-legged frog only extends to the vicinity of Point Reyes National Seashore, leaving tidewater gobies north of that area no protection from those regulations protecting the frog (D. Holland, *in litt.* 1999).

Several comments also suggested that regulatory agencies (*e.g.*, Corps, California Coastal Commission) and some local governments have only become aware of the tidewater goby since it was listed and that the Act has, in fact, protected populations of the tidewater goby (J. Buse, *in litt.* 1999; M. Capelli, *in litt.* 1999). We agree that listing the goby under the Endangered Species Act has provided focused protection to this species and that, if the tidewater goby remains listed, proposed and future project proponents and agencies will be more likely to specifically consider the tidewater goby in their planning. That benefit notwithstanding, we have not changed our view that review and permitting of projects under sections 10 and 404 as well as other state and local programs is unlikely to allow the extent of destruction and modification of habitat that occurred prior to the listing.

Finally, several comments took issue with our interpretation of the results of our search of EPA's AQUIRE database. They indicated that a vast body of literature documents the effects of effluents, runoff and contaminants on aquatic organisms and habitats. Even if species-specific data about effects to the goby are lacking, this body of literature suggests effluents, runoff, and contaminants could be a threat to the tidewater goby (D. Holland, *in litt.* 1999), to the extent that they remain even after the prevention and remediation measures required by various local, State, and Federal regulations.

We continue to believe that existing State, local, and Federal regulatory mechanisms provide substantial protections to the tidewater goby. We recognize that these existing mechanisms may not address all the threats to the goby discussed in this notice, and are not in themselves sufficient basis to delist the species.

E. *Other natural or manmade factors affecting their continued existence.*

Drought. In the final listing rule, we stated that the most significant natural factor adversely affecting the tidewater goby was drought and the resultant deterioration of coastal and riparian habitats. At the time, California had recently experienced five consecutive years of lower than average rainfall. We felt that these drought conditions, when combined with human-induced water reductions, degraded coastal and riparian ecosystems and created extremely stressful conditions for aquatic species. Formerly large tidewater goby populations declined in numbers at this time because of the reduced availability of suitable lagoon habitats (*e.g.*, San Simeon Creek, Pico Creek). Other tidewater goby populations disappeared when lagoons dried (*e.g.*, Santa Rosa Creek).

The proposed delisting rule reported that, since the end of the drought, 14 sites believed to be extirpated had been recolonized. The survival and recovery of these populations following the drought alleviated the concern that drought exacerbated by human-induced water reductions would result in significant permanent population decline and loss. In southern California, however, we stated that the loss of many of the larger tidewater goby populations had made recolonization of smaller intermittent lagoons much more unlikely. Therefore, we concluded that extended droughts, along with other physical alterations to the lagoons, threatened the southern California portion of the tidewater goby range.

Periodic droughts are a historical feature of California, which has been repeatedly subject to prolonged droughts (M. Capelli, *in litt.* 1999; T. Frink, *in litt.* 1999; D. Holland, *in litt.* 1999; R. Swenson, *in litt.* 1999). We have documentation in the final listing rule and the proposed delisting rule of the dramatic effects drought can have on the tidewater goby. It is not unexpected that species respond to climatic fluctuations, booming when conditions are favorable and declining sharply when conditions are adverse (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999; W. Watson, fisheries biologist, *in litt.* 2000; M. Marchetti, *in litt.* 2001). Such natural population fluctuations assume a different character when considered in conjunction with other threats to the species, such as coastal development projects, freshwater diversions, pollution, siltation, urban development, and introduced species. A large body of scientific research has demonstrated that when a cyclic species encounters drastic anthropogenic disturbance, there is pronounced threat of extirpation (M. Marchetti, *in litt.* 2001). When coupled with the other human-related modifications to the habitat of the tidewater goby, these droughts increase in significance, and will undoubtedly be repeated in the future (M. Capelli, *in litt.* 1999; D. Holland, *in litt.* 1999). In addition, because the tidewater goby has life history characteristics that make it vulnerable to extirpation (*e.g.*, short lifespan, preference for still water and low-salinity habitats that have a limited distribution, and lack of marine dispersal in all but wet years), there may be little buffer for the species when drought returns (Swenson, *in litt.* 1999). Finally, widely dispersed populations of tidewater gobies occur in the northern portion of the range as well as in the southern portion (M. Capelli, *in litt.* 1999). We argued in the proposed delisting rule that tidewater gobies in the southern portion of the range were threatened by extended droughts because many of the larger tidewater goby populations had been lost, making recolonization of smaller intermittent lagoons much more unlikely. Because it appears that recolonization may not occur over anything but short distances

(*i.e.*, 10 km (6 mi)) (*see* comments 17 to 22 and Factor A above) and because populations in the northern portion of the range appear to be widely separated, we believe we need to reevaluate our assertion that only southern tidewater goby populations are threatened by drought.

We have reconsidered our analysis of the tidewater goby's status with respect to drought. When evaluating the status of a species which fluctuates widely in response to climatic conditions, we should consider a time period which includes the full range of climatic variation. In proposing to delist the tidewater goby, we considered only one drought cycle. Drought can have dramatic negative effects on tidewater goby, at least decreasing goby populations to very low levels (perhaps to the point where they are undetectable) and at most extirpating populations (see final listing rule and delisting proposal). Because future droughts in California are a certainty, we know that tidewater gobies will be subject to the negative effects of drought again. We need to consider the potential magnitude and importance of these drought events on long-term persistence of the tidewater goby prior to delisting any portion of the range of the species.

Flooding. In the final listing rule we indicated that events such as river flooding and heavy rainfall have reportedly destroyed tidewater goby burrows and washed tidewater gobies out to sea. While the tidewater goby was undoubtedly subjected to natural flood events before major human alteration of drainage basins, urbanization and channelization increased the frequency, and perhaps the intensity, of the events. Increased isolation of tidewater goby populations through extirpation of intervening populations reduces the likelihood of successful recolonization after a population is lost in a flood event.

In the proposed delisting rule, we changed our position, stating that flood events have been shown to have no significant adverse effect on tidewater goby populations. Instead, we felt the flushing action of floods was probably the primary mechanism for colonization of other habitats along the coast (Lafferty *et al.* 1996, Swift *et al.* 1997). In southern California, however, we observed that the historic extirpation of many tidewater goby populations has left the remaining populations more isolated. Thus, tidewater gobies must travel greater distances and from smaller source populations, making natural recolonization much more uncertain and difficult. We implied that, on balance, this isolation made flooding more detrimental in southern California than it was in northern California.

As has been mentioned above, we may have overestimated the tidewater goby's potential for recolonization. If the tidewater goby's ability to recolonize sites is actually highly restricted (*i.e.*, no more than 10 km (6 mi) (T. Frink, *in litt.* 1999; R. Swenson, *in litt.* 1999; Swift *et al.* 1997 as cited in D. Holland, *in litt.* 1999), the degree of isolation of tidewater goby populations in northern California is greater than we estimated at the time of the delisting proposal.

Competition with nonnative species. In the final listing rule we stated that competition with introduced species is a potential threat to the tidewater goby. At the time, no problems had been reported, but we were concerned that the spread of the introduced yellowfin goby and chameleon goby might have a detrimental effect of the tidewater goby. In the proposed delisting rule, we stated that no documented extirpation or population decline can be directly attributed to these or other introduced competing species. However, as noted by Holland (*in litt.* 1999), direct evidence of extirpation or population decline through competition is rarely forthcoming, especially without focused surveys. Further research may clarify the impact of competition on tidewater goby.

Population size. Tidewater goby populations are known to fluctuate in size within and between years (Swift *et al.* 1989, Holland 1992, Swift and Holland 1998 as cited in D. Holland, *in litt.* 1999). Populations that are continuously small, or that fluctuate to small size (as tidewater goby populations tend to do), are more susceptible to extirpation from random demographic, environmental, and genetic events than larger populations are. Demographic events that may put small populations at risk involve chance variation in age, sex ratios, and other population characteristics, which can change birth and death rates (Shaffer 1981, 1987; Lande 1988; Meffe and Carroll 1997; Primack 1998). Small, isolated populations are also vulnerable to genetic drift (random changes in gene frequencies) and inbreeding (mating between close relatives). Genetic drift and inbreeding may lead to reductions in the ability of individuals to survive and reproduce (*i.e.*, reductions in fitness) in small populations. In addition, reduced genetic variation in small populations may decrease the potential for persistence in the face of long-term environmental change (Shaffer 1981, 1987; Primack 1998).

Finding and Withdrawal

We proposed to delist the northern portion of the tidewater goby range because we felt the original listing was in error. Specifically, we believed that new evidence showed that (1) there were more populations in the northern portion of the range at the time of the delisting proposal than at the time of the listing, (2) the threats to those populations were less severe than previously believed, and (3) the tidewater goby has a greater ability to recolonize than was known at the time of the listing. We received 45 responses from individuals, agencies or other parties. Thirty-eight of the responses opposed our proposal to remove the northern populations of the tidewater goby from the list of endangered and threatened wildlife. Most commenters did not agree that the original listing was in error. Further, our specific conclusions in the proposal were not corroborated by the comments we received during the three comment periods. In particular, the commenters, including many tidewater goby scientific researchers, suggested that we overemphasized the importance of the discovery of new tidewater goby populations, that we minimized the severity of the threats in the northern portion of the range, and that we overstated the recolonization ability of the tidewater goby. After review of the information presented, we find the commenters' arguments with respect to the goby's ability to recolonize compelling and believe that it is prudent to withdraw the proposed delisting. Withdrawing the delisting proposal for the northern populations of the tidewater goby makes the establishment of an endangered southern California DPS unnecessary. We will focus instead on proceeding with the recovery planning process that will both guide conservation activities for the species and make explicit under what criteria the tidewater goby should be considered for delisting.

We conclude, therefore, based on our review of the best information currently available, including these comments and the recommendations of two scientific peer reviewers, and for the reasons discussed throughout this withdrawal notice, that the tidewater goby should remain listed as an endangered species throughout its range. We withdraw our June 24, 1999, proposal to remove the northern populations of tidewater goby from the list of endangered and threatened wildlife and the concurrent proposal to establish an endangered distinct population segment of tidewater goby in Orange and San Diego

Counties, CA (64 FR 33816).

References Cited

A complete list of all references we cited, as well as others, is available on request from our Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Dated: November 1, 2002.

Steve Williams,

Director, Fish and Wildlife Service.

[FR Doc. 02–28282 Filed 11–6–02; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 67, No. 216

Thursday, November 7, 2002

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Notice of Intent To Revise and Reinstate an Expired Information Collection

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chap. 35) and the Office of Management and Budget (OMB) regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the Cooperative State Research, Education, and Extension Service's (CSREES) intention to request approval of an information collection in support of authorizations to use the 4–H Club Name and/or Emblem. Authorization of a similar information collection expired on July 31, 2002.

DATES: Comments on this notice must be received on or before January 13, 2003 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Dr. Nancy Valentine; National 4–H Program Leader; Families, 4–H, and Nutrition; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; Stop 2225; 1400 Independence Avenue, SW.; Washington, DC 20250–2225; Telephone: (202) 720–2908; E-mail: *nvalentine@reeusda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application for Authorization to Use the 4–H Club Name and/or Emblem.

OMB Number: 0524–0034.

Expiration Date of Approval: July 31, 2002.

Type of Request: Intent to request approval of an information collection.

Summary of Collection: Use of the 4–H Club Name and/or Emblem is authorized by an Act of Congress (18 U.S.C. 707). Use of the 4–H Club Name and/or Emblem by anyone other than 4–H Clubs and those duly authorized by them, representatives of the United States Department of Agriculture, the land-grant colleges and universities, and persons authorized by the Secretary of Agriculture is prohibited by the provisions of 18 U.S.C. 707. The Secretary of Agriculture has delegated authority to the Administrator of CSREES to authorize others to use the 4–H Club Name and Emblem. The Administrator has promulgated regulations at 7 CFR Part 8 that govern such use. The regulatory requirements for use of the 4–H Club Name and/or Emblem reflect the high standards of 4–H and its educational goals and objectives. Pursuant to provisions of 7 CFR § 8.6, anyone requesting authorization from the Administrator to use the 4–H Club Name and Emblem is asked to describe the proposed use in a formal application. The collection of this information is used to determine whether the applicant's proposed use will meet the regulatory requirements in 7 CFR part 8 and whether an authorization for use should be granted.

Need and Use of the Information: CSREES will collect information on the name of the individual, partnership, corporation, or association; the organizational address; the name of an authorized representative; the telephone number, fascimile number, and e-mail address; the proposed use of the 4–H Club Name or Emblem; and the plan for sale or distribution of the product bearing the 4–H Club Name or Emblem. The information collected by CSREES will be used to determine if those applying to use the 4–H Club Name or Emblem meet the regulatory requirements. If the information is not collected, it would not be possible to ensure that the products, services, and materials meet the regulatory requirements as well as 4–H educational goals and objectives.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .5 hours per response.

Respondents: Individuals or households and business or other for-profit or not-for-profit institutions.

Estimated Number of Respondents: 60.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 60 hours.

Copies of this information collection can be obtained from Dr. Nancy Valentine, National 4–H Program Leader, 202–720–2908, *jkahler@reeusda.gov.* Information also is available at *http://www.national4-hheadquarters.gov/4h_name.htm.*

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Dr. Nancy Valentine, National 4–Program Leader, Families, 4–H, and Nutrition; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; Stop 2225; Independence Avenue, SW.; Washington, DC 20250–2225; Telephone: (202) 720–2908; E-mail: *jkahler@reeusda.gov.*

All responses to this notice will be summarized and included in the request to OMB for approval. All comments will become a matter of public record.

Done at Washington, DC, on this 18th day of October 2002.

Colien Hefferan,

Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 02–28350 Filed 11–6–02; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Opal Creek Scenic Recreation Area (SRA) Advisory Council

AGENCY: Forest Service, USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: The Opal Creek Scenic Recreation Area Advisory Council is scheduled to meet on Sunday, November 17, 2002 for a field visit to the Opal Creek Scenic Recreation Area. The field visit will provide a general overview of the area to some of the new council members and the current situation related to recreation use for implementing the management plan, and developing transportation and monitoring plans. The tour is scheduled to begin at 8:30 a.m., and will conclude at approximately 3 p.m. The tour will begin at the Oregon Department of Forestry Office at 22965 North Fork Road in Mehama, Oregon.

The Opal Creek Wilderness and Opal Creek Scenic Recreation Area Act of 1996 (Opal Creek Act) (Pub. L. 104–208) directed the Secretary of Agriculture to establish the Opal Creek Scenic Recreation Area Advisory Council. The Advisory Council is comprised of thirteen members representing state, county and city governments, and representatives of various organizations, which include mining industry, environmental organizations, inholders in Opal Creek Scenic Recreation Area, economic development, Indian tribes, adjacent landowners and recreation interests. The council provides advice to the Secretary of Agriculture on preparation of a comprehensive Opal Creek Management Plan for the SRA, and consults on a period and regular basis on the management of the area.

The public comment period will begin at 10 a.m. and the field tour will begin after the last presentation. Time allotted for individual presentations will be limited to 3 minutes. Written comments are encouraged, particularly if the material cannot be presented within the time limits of the comment period. Written comments may be submitted prior to the November 17 meeting by sending them to Designated Federal Official Stephanie Phillips at the address given below. The public is welcome to attend the tour, however individuals must provide their own transportation throughout the tour and bring a lunch.

FOR FURTHER INFORMATION CONTACT: For more information regarding this meeting, contact Designated Federal Official Stephanie Phillips; Willamette National Forest, Detroit Ranger District, HC 73 Box 320, Mill City, OR 97360; (503) 854–3366.

Dated: October 31, 2002.

Y. Robert Iwamoto,

Deputy Forest Supervisor.

[FR Doc. 02–28322 Filed 11–6–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Ravalli County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ravalli County Resource Advisory Committee will be meeting to discuss 2003 project development and 2002 project monitoring. Agenda topics will include project monitoring reports and a public forum (question and answer session). The meeting is being held pursuant to the authorities in the Federal Advisory Committee Act (Public Law 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393). The meeting is open to the public.

DATES: The meeting will be held on November 26, 2002, 6:30 p.m.

ADDRESSES: The meeting will be held at the Ravalli County Administrative Building, 215 S. 4th Street, Hamilton, Montana. Send written comments to Jeanne Higgins, District Ranger, Stevensville Ranger District, 88 Main Street, Stevensville, MT 59870, by facsimile (406) 777–7423, or electronically to *jmhiggins@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Jeanne Higgins, Stevensville District Ranger and Designated Federal Officer, Phone: (406) 777–5461.

Dated: October 30, 2002.

David T. Bull,

Forest Supervisor.

[FR Doc. 02–28275 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–05–M

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: November 12, 2002; 11:30 A.M.–12:30 P.M.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b. (c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b. (c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b. (c)(2) and (6))

FOR FURTHER INFORMATION CONTACT: Persons interested in obtaining more information should contact either Brenda Hardnett or Carol Booker at (202) 401–3736.

Dated: November 4, 2002.

Carol Booker,

Legal Counsel.

[FR Doc. 02–28461 Filed 11–5–02; 10:16 am]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

[I.D. 110102G]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Monitoring of Fish Trap Fishing in the Gulf of Mexico.

Form Number(s): None.

OMB Approval Number: 0648–0392.

Type of Request: Regular submission.

Burden Hours: 184.

Number of Respondents: 63.

Average Hours Per Response: 5 minutes.

Needs and Uses: Persons using fish traps to participate in the commercial reef fish fishery in the Gulf of Mexico must make an appointment with NMFS in order for the fish traps to be inspected. This is a one-time requirement. Fishermen will also be required to make telephone reports when initiating and terminating fishing trips. The information is needed to monitor fish trap fishing.

Affected Public: Business or other for-profit organizations, and individuals or households.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02–28339 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

[I.D. 110102H]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Southeast Region Electronic Reporting Survey.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Regular submission.

Burden Hours: 657.

Number of Respondents: 3,940.

Average Hours Per Response: 10 minutes (0.166).

Needs and Uses: This collection would be a one-time survey of all vessel owners and seafood dealers that have an active Federal fisheries permit. The purpose of the survey is to determine the availability of personal computers and access to the Internet. This information would be used to help evaluate the potential for optional electronic reporting of catch and effort or other mandatory data.

Affected Public: Business or other for-profit organizations, and individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02–28340 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit for Final Results of Antidumping Duty New-Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 7, 2002.

FOR FURTHER INFORMATION CONTACT: Holly Hawkins or Thomas Gilgunn, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0414 and (202) 482–4236, respectively.

The Applicable Statute

Unless otherwise indicated, all citations are to the Tariff Act of 1930, as amended (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are codified at 19 CFR part 351 (2001).

Background

On September 20, 2001, the Department of Commerce received a request from Shouzhou Huaxiang Foodstuffs, Co., Ltd. to conduct a new shipper review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China. On September 28, 2001, the Department received a similar request from North Supreme Seafood (Zhejiang) Co., Ltd. On November 8, 2001, the Department found that the requests for review met all of the regulatory requirements set forth in section 351.214(b) of the Department's regulations and initiated these new shipper antidumping reviews covering the period September 1, 2001, through August 31, 2001. *See ''Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of New Shipper Antidumping Review,''* 66 FR 56536 (November 8, 2001). The preliminary results were published on August 12, 2002. *See* ''*Notice of Preliminary Results of Antidumping Duty New Shipper Reviews: Freshwater Crawfish Tail Meat from the People's Republic of China,*'' 67 FR 52442 (August 12, 2002).

Extension of Time Limits for Final Results

Pursuant to section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the Department's regulations, the Department may extend the deadline for completion of the final results of a new shipper review if it determines that the case is extraordinarily complicated. The Department has determined that this case is extraordinarily complicated, and the final results of these new shipper reviews cannot be completed within the statutory time limit of 90 days after the date on which the preliminary results were issued. The Department needs more time to analyze the issues raised in the parties' briefs with respect to valuation and the *bona fides* of the sales. Given these issues, the Department finds that these reviews are extraordinarily complicated. Accordingly, the Department is extending the time limit for the completion of the final results by 44 days, to December 17, 2002, in accordance with section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the Department's regulations.

Dated: November 1, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–28342 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has received timely requests to conduct new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China. In accordance with 19 CFR 341.214(d), we are initiating a review for Qingdao Jin Yong Xiang Aquatic Foods Co. Ltd. (Qingdao JYX) and its producer Hefei Zhongbao Aquatic Co., Ltd. (Hefei Zhongbao); Siyang Foreign Trading Corporation (Siyang) and its producer Anhui Golden Bird Agricultural Products Development Co., Ltd. (Anhui). We are also initiating a new shipper review for Hubei Qianjiang Houhu Frozen & Processing Factory (Hubei Houhu) and for Zhoushan Huading Seafood Co., Ltd. (Zhoushan Huading), each of which both produced and exported freshwater crawfish tail meat from the People's Republic of China (''PRC'').

EFFECTIVE DATE: November 7, 2002.

FOR FURTHER INFORMATION CONTACT: Holly Hawkins, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0414.

Applicable Statute and Regulations

Unless otherwise indicated, all citations are references to the provisions of the Tariff Act of 1930, as amended (''the Act''). In addition, unless otherwise indicated, all citations are to the Department's regulations, codified at 19 CFR part 351 (April 2002).

SUPPLEMENTARY INFORMATION:

Background

The Department received timely requests from Hubei Houhu, Qingdao JYX, Siyang, and Zhoushan Huading, in accordance with 19 CFR 351.214(c), for new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the PRC, which has a September anniversary month.

As required by 19 CFR 351.214(b)(2)(i), (ii), and (iii)(A), each company identified above has certified that it did not export freshwater crawfish tail meat to the United States during the period of investigation (''POI''), and that it has never been affiliated with any exporter or producer which did export freshwater crawfish tail meat during the POI. Pursuant to 19 CFR 341.214(b)(2)(iii)(B), the company has further certified that its export activities are not controlled by the central government of the PRC. Further, pursuant to the Department's regulations at 19 CFR 351.214(b)(2)(iv), each company submitted documentation establishing the date on which it first shipped the subject merchandise to the United States, the date of entry of that first shipment, the volume of that shipment and subsequent shipments, and the date of the first sale to an unaffiliated customer in the United States. For Siyang and Qingdao JYX, both of which exported the subject merchandise but did not produce it, complete certifications, as required by section 351.214(b)(2)(ii), were also submitted by Anhui (the producer of crawfish tail meat exported by Siyang) and by Hefei Zhongbao (the producer of crawfish tail meat exported by Qingdao JYX).

In accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214(b) of the Department's regulations, we find that the requesters (Hubei Houhu, Zhoushan Huading, Siyang and its producer Anhui, and Qingdao JYX and its producer Hefei) submitted all of the information required by the statute and the Department's regulations.

Initiation of Review

In accordance with section 751(a)(2)(B)(ii)(I) of the Act and 19 CFR 351.214(d)(1), we are initiating new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the PRC. We intend to issue the preliminary results of these reviews no later than 180 days after the date on which the review is initiated.

Antidumping Duty New Shipper Review Proceedings	Period to be reviewed
Hubei Qianjiang Houhu Frozen and Processing Factory; Qingdao Jin Yong Xiang Aquatic Foods Co., Ltd./Hefei Zhongbao Aquatic Foods Co., Ltd. Siyang Foreign Trading Corporation/Anhui Golden Bird Agricultural Products Development Co., Ltd. Zhoushan Huading Seafood Co., Ltd	09/01/01–08/31/02

We will instruct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from the above-listed companies. Zhoushan Huading and Hubei Houhu each have certified that they both produce and export the subject merchandise, the sales of which were the basis of these new shipper review requests. Therefore, we will apply the bonding option under 19 CFR 251.107(b)(1)(i) only to subject merchandise for which each is both the producer and exporter. Qingdao JYX has identified Hefei Zhongbao Aquatic Co., Ltd. as the producer of the subject merchandise for the sales under review. in addition, Siyang has identified Anhui Golden Bird Agricultural Products Development Co., Ltd. (Anhui) as the producer of the subject merchandise for the sales under review. We will apply the bonding option under 19 CFR 351.107(b)(1)(i) only to entries of subject merchandise from these two exporters for which the respective producers under review are the suppliers.

Interested parties that need access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a)(2)(B) of the Act (19 U.S.C. 1675(a)(2)(B)) and 19 CFR 351.214(d).

Dated: November 1, 2002.

Joseph A. Spetrini,

Deputy Assistant Secertary for Import Administration, Group III.

[FR Doc. 02–28343 Filed 11–6–02; 8:45 am]

BILLING CODE 3516–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–816]

Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Extension of Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for final results of antidumping duty administrative review.

SUMMARY: The Department of Commerce (''the Department'') is extending the time limit for the final results of the review of stainless steel butt-weld pipe fittings from Taiwan. This review covers the period June 1, 2000, through May 31, 2001.

EFFECTIVE DATE: November 7, 2002.

FOR FURTHER INFORMATION CONTACT: James Doyle, Enforcement Group III—Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0159.

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR part 351 (2001).

Background

On July 23, 2001, the Department published a notice of initiation of this antidumping duty administrative review for the period of June 1, 2000, through May 31, 2001 (66 FR 38252). We published the preliminary results of review on July 9, 2002 (67 FR 45467).

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Act states that if it is not practicable to complete the review within the time specified, the administering authority may extend the 120-day period, following the date of publication of the preliminary results, to issue its final results by an additional 60 days. Completion of the final results within the 120-day period is not practicable for the following reasons:

- This review involves certain complex Constructed Export Price (''CEP'') adjustments including but not limited to CEP Profit and CEP Offset which were raised by respondent and petitioners after the verification and after the preliminary results of review.
- The review involves a large number of transactions and complex adjustments other than those mentioned above.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for issuing the final results of review by 30 days until December 6, 2002.

Dated: November 1, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–28345 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–822]

Stainless Steel Sheet and Strip in Coils From Mexico; Antidumping Duty Administrative Review; Time Limits

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limits.

SUMMARY: The Department of Commerce (the Department) is extending the time limits for the final results of the 2000–2001 administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico. This review covers one manufacturer/exporter of the subject merchandise to the United States, ThyssenKrupp Mexinox S.A. de C.V., and the period July 1, 2000, through June 30, 2001.

EFFECTIVE DATE: November 7, 2002.

FOR FURTHER INFORMATION CONTACT: Deborah Scott at (202) 482–2657 or Robert James at (202) 482–0649, Antidumping and Countervailing Duty Enforcement Group III, Office Eight, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On August 7, 2002, we published the preliminary results of the administrative review of stainless steel sheet and strip in coils from Mexico for the period July 1, 2000, through June 30, 2001. *See ''Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review,''* 67 FR 51204 (August 7, 2002). Currently, the final results of this administrative review are due on December 5, 2002. However, we determine it is not practicable to complete the final results of this review within the original time limit due to a number of significant case issues. Petitioners' and respondent's case and rebuttal briefs raise complicated issues related to the further manufacturing of subject merchandise in the United States, level of trade, and cost of production, such as material costs and the calculation of interest and general and administrative expenses. Making a determination with respect to each of these issues, particularly those related to further manufacturing and cost of production, requires considerable scrutiny of respondent's questionnaire and supplemental questionnaire responses. Therefore, because it is not practicable to complete this review within the normal statutory time limit, the Department is extending the time limits for completion of the final results until February 3, 2003, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Tariff Act).

This extension is in accordance with section 751(a)(3)(A) of the Tariff Act (19 U.S.C. 1675 (a)(3)(A) (2001)).

Dated: November 1, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–28344 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Case Numbers: A–822–805, A–821–818, A–823–814]

Postponement of the Final Determinations in the Less-Than-Fair-Value Investigations of Urea Ammonium Nitrate Solutions From Belarus, the Russian Federation, and Ukraine

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 7, 2002.

FOR FURTHER INFORMATION CONTACT: Thomas Martin at (202) 482–3936, Paige Rivas at (202) 482–0651 or Crystal Crittenden at (202) 482–0989, AD/CVD Enforcement, Office 4, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave, NW., Washington, DC 20230.

SUMMARY: The Department of Commerce is postponing the final determinations in the less-than-fair-value investigations of urea ammonium nitrate solution (UANS) from Belarus, the Russian Federation, and Ukraine. The Department will make its final determinations not later than February 18, 2003.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR part 351 (2000).

Background

On October 3, 2002, the Department of Commerce (the Department) published notices of preliminary determination of sales at less than fair value for UANS from Belarus, the Russian Federation and Ukraine. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions From Belarus,* 67 FR 62015 (October 3, 2002); *Notice of Preliminary Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions From the Russian Federation,* 67 FR 62008 (October 3, 2002); *Notice of Preliminary Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions From Ukraine,* 67 FR 62013 (October 3, 2002). The final determinations for these investigations are currently due no later than December 10, 2002. Pursuant to section 735(a)(2) of the Act, on October 15, 2002, Grodno Production Republican Enterprise of Belarus (Grodno) and JSC Nevinnomysskij Azot of the Russian Federation (Nevinka) requested that the Department postpone its final determinations in these investigations until 135 days after the date of the publication of the preliminary determination in the **Federal Register**. On October 31, 2002, the Trade and Economic Mission of Ukraine on behalf of the government of Ukraine submitted its request for the Department to postpone a final determination in the investigation of UANS from Ukraine pursuant to section 735(a)(2) of the Act. Additionally, Grodno, Nevinka, and the Ukrainian government requested that the Department extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) to not more than six months.

Postponement of Final Determination and Extension of Provisional Measures

In accordance with 19 CFR 351.210(b), because (1) our preliminary determinations are affirmative, (2) the requesting exporters account for a significant proportion of exports of the subject merchandise from their respective countries, and (3) no compelling reasons for denial exist, we are granting Grodno's, Nevinka's, and the Ukrainian government's requests and are fully extending the time for the final determinations, until no later than February 18, 2003. Where applicable, suspension of liquidation will be extended accordingly.

This notice is issued and published pursuant to Section 735(a)(2) of the Act and 19 CFR 351.210(g).

Dated: November 1, 2002.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 02–28341 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 102402B]

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of cancellation of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) has cancelled a joint meeting of the Reef Fish Management and Artificial reef Committees that was scheduled for Wednesday, November 13, 2002, from 8;30 to 9;30 a.m. The meeting was announced in the **Federal Register** on October 29, 2002.

FOR FURTHER INFORMATION CONTACT: Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone (813)228–2815.

SUPPLEMENTARY INFORMATION: The initial notice was published on October 29, 2002 (67 FR 65954). All other previously published information remains the same.

Dated: November 1, 2002.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–28338 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110102B]

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management's Council's Summer Flounder Monitoring Committee, Scup Monitoring Committee, and Black Sea Bass Monitoring Committee will hold a public meeting.

DATES: The meeting will be held on Thursday, November 21, 2002, beginning at 9 a.m. with the Summer Flounder Monitoring Committee, followed by the Scup Monitoring Committee and the Black sea Bass Monitoring Committee.

ADDRESSES: The meeting will be held at the Holiday Inn BWI, 890 Elkridge Landing Road, Baltimore, MD' telephone 410–859–8400.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904, telephone: 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to recommend the 2003 recreational management measures for summer flounder, scup, and black sea bass.

Although non-emergency issues not contained in this agenda may come before the Committee for discussion, those issues may not be the subject of formal Committee action during this meeting. Committee action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 205 (c) of the Magnuson-Stevens Act, provided the public has been notified of the Committee's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Council (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: November 1, 2002.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–28402 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 102802D]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of applications for scientific research permit (1407) and request for comment.

SUMMARY: Notice is hereby given that NMFS has received an application for scientific research from California Department of Fish and Game (CDFG) in Chico, CA (1407). This permit would affect three Evolutionarily Significant Units (ESUs) of salmonids identified in Supplementary Information below. This document serves to notify the public of the availability of the permit application for review and comment before a final approval or disapproval is made by NMFS.

DATES: Written comments on the permit applications must be received at the appropriate address or fax number (*see* **ADDRESSES**) no later than 5 p.m. Pacific Standard Time on December 9, 2002.

ADDRESSES: Written comments on the modification request should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the request. Comments will not be accepted if submitted via e-mail or the Internet. The applications and related documents are available for review, by appointment, for permit 1407: Protected Resources Division, NMFS, 650 Capitol Mall, Suite 8–300, Sacramento, CA 95814 (ph: 916–930–3600, fax: 916–930–3629). Documents may also be reviewed by appointment in the Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 3226 (301–713–1401).

FOR FURTHER INFORMATION CONTACT: Rosalie del Rosario at phone number 916–930–3600, or e-mail: *Rosalie.delRosario@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531 1543) (ESA), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222 226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (*see* ADDRESSES). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

This notice is relevant to three federally listed salmonid ESUs: endangered Sacramento River Winter-run Chinook salmon (*Oncorhynchus tshawytscha*), threatened Central Valley Spring-run Chinook salmon (*O. tshawytscha*), and threatened Central Valley steelhead (*O. mykiss*).

New Applications Received

CDFG requests a 5–year permit for takes of adult and juvenile threatened Central Valley Spring-run Chinook salmon and threatened Central Valley steelhead to study their life history. The goal of the study is to provide baseline population information for evaluating restoration efforts in Butte and Big Chico creeks and to provide information for the recovery of the species.

Dated: November 1, 2002.

Margaret Lorenz,

Acting Chief, Endangered Species Division,Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–28337 Filed 11–6–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Advisory Panel To Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for the next meeting of the Panel to Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction. Notice of this meeting is required under the Federal Advisory Committee Act.

DATES: November 7 and 8, 2002.

ADDRESSES: RAND, 1200 S. Hayes Street, 4th floor, Arlington, VA 22202–5050.

PROPOSED SCHEDULE AND AGENDA: Panel to Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction will meet from 8:30 a.m. until 5:30 p.m. on November 7, 2002 and from 8:30 a.m. until 2 p.m. on November 8, 2002. Time will be allocated for public comments by individuals or organizations at the end of the meeting on November 8.

FOR FURTHER INFORMATION CONTACT: RAND provides information about this Panel on its web site at *http://www.rand.org/organization/nsrd/terrpanel;* it can also be reached at (703) 413–1100 extension 5321. Public comment presentations will be limited to two minutes each and must be provided in writing prior to the meeting. Mail written presentations and requests to register to attend the open public session to: Nancy Rizor, RAND, 1200 South Hayes Street, Arlington, VA 22202–5050. Public seating for this meeting is limited, and is available on a first-come, first-served basis.

Dated: October 31, 2002.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–28283 Filed 11–6–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Department of the Air Force

HQ USAF Scientific Advisory Board; Meeting

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given of the forthcoming meeting of the 311th Human Systems Wing Advisory Group. The purpose of the meeting is to provide technical advice and assessment to the Commander, 311th Human System Wing. Because classified and contractor-proprietary information will be discussed, this meeting will be closed to the public.

DATES: November 24–27, 2002.

ADDRESSES: Brooks City Base, San Antonio, Texas.

FOR FURTHER INFORMATION CONTACT: Major John Pernot, Air Force Scientific Advisory Board Secretariat, 1180 Air Force Pentagon, Room 5D982, Washington DC 20330–1180, (703) 697–4811.

Pamela D. Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 02–28285 Filed 11–6–02; 8:45 am]

BILLING CODE 5001–5–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineer

Intent To Prepare a Draft Supplemental Environmental Impact Statement for the Big Sunflower River Maintenance Feasibility Report

AGENCY: Department of the Army, U.S. Army Corps of Engineer, DoD.

ACTION: Notice of Intent.

SUMMARY: Authorized channel improvements in the Big Sunflower River Basin began in the 1940s and were completed in the 1960s. The work consisted of channel improvements on a number of streams including the Big Sunflower and Little Sunflower Rivers and Bogue Phalia; channel improvements consisted primarily of clearing and snagging, with some channel enlargement and channel cleanout. The Big Sunflower River Basin has experienced extensive flooding to agricultural land and urban areas in recent years. Results of surveys taken and engineering data collected indicated the lower reaches of the project streams had experienced loss of designed capacity due to vegetation growth and sediment accumulation, thereby requiring major maintenance. Corrective maintenance actions will require extensive channel cleanout, channel clearing, and snagging within the Big Sunflower channel system.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft Supplemental Environmental Impact Statement (DSEIS) should be directed to: Mr. Marvin Cannon, Vicksburg District Corps of Engineers, 4155 Clay Street, CEMVK–PP–PQ, Vicksburg, MS 39183–3435 or telephone (601) 631–5437.

SUPPLEMENTARY INFORMATION: This project is authorized by the Flood Control Act (FCA) of December 22, 1944 (House Document [HD] 516–78–2), as amended by FCAs of July 24, 1946, and May 17, 1950, October 23, 1962 (HD–358–89–2), and October 27, 1965 (HD–308–88–2).

1. A Final Environmental Impact Statement (FEIS), Flood Control, Mississippi River and Tributaries, Yazoo Basin, Mississippi, was completed in December 1975, covering the original flood control project on Big Sunflower River. A Final Supplemental No. 2 to the FEIS, Flood Control, Mississippi River and Tributaries, Yazoo Basin, Mississippi, Big Sunflower River Maintenance Project was completed in July 1996, for maintenance of the original flood control project on the Big Sunflower River. A Draft Environmental Assessment (EA) was prepared in February 2002 to supplement the information contained in Supplement No. 2 to the FEIS, Flood Control, Mississippi River and Tributaries, Yazoo Basin, Mississippi, Big Sunflower River Maintenance Project. The Draft EA was circulated for agency and public review and comment. To ensure the environmental sustainability of this project, the District Engineer has decided to prepare a DSEIS No. 3 to the FEIS, Flood Control, Mississippi River and Tributaries, Yazoo Basin, Mississippi, Big River Maintenance Project.

2. The proposed action involves evaluating several non-structural and structural alternatives of channel cleanout of sediment and debris from the channel bottoms and channel clearing and snagging to restore the project channels to authorized design capacities.

3. A public scoping meeting will be held in December 2002 in Rolling Fork, MS. Significant issues identified during this scoping process will be analyzed in depth in the DSEIS. The following agencies are invited to cooperate: The U.S. Coast Guard; Natural Resources Conservation Service; U.S. Forest Service; U.S. Environmental Protection Agency; U.S. Fish and Wildlife Service; Mississippi Department of Environmental Quality; and Mississippi Department of Wildlife, Fisheries and Parks. Federally recognized Indian Tribes will also be invited to cooperate. These agencies and tribes will be asked to participate in the review of study data and the DSEIS.

4. Upon completion, the DSEIS will be distributed for agency and public review and comment. Additionally, a public meeting will be held to present results of the DSEIS evaluations and the recommended plan.

5. The DSEIS is estimated to be completed in November 2003.

Frederick L. Clapp, Jr.,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 02–28358 Filed 11–6–02; 8:45 am]

BILLING CODE 3710–PU–M

DEPARTMENT OF DEFENSE

Department of Army; Corps of Engineers

Intent To Prepare A Joint Environmental Impact Statement/ Environmental Impact Report for the Peninsula Beach Feasibility Study, Long Beach, Los Angeles County, CA

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Intent.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the city of Long Beach propose to assess the feasibility of providing additional storm damage protection for a portion of the Peninsula Beach between the Alamitos Bay west jetty and approximately 54th Place.

DATES: A scoping meeting will be held on November 13, 2002, at 6:30 p.m., in the Belmont Plaza Pool, 4000 Olympic Plaza, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Questions regarding the scoping process or preparation of the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) may be directed to Mr. Paul Rose, Chief, Environmental Resources Branch, U.S. Army Corps of Engineers, PO Box 532711, Los Angeles, CA 90053–2325, (213) 452–3840.

SUPPLEMENTARY INFORMATION:

1. *Proposed Action:* Peninsula Beach is a chronically narrow beach that has undergone repeat nourishment projects by the City of Long Beach to provide an adequate beach width for protection of homes and beach facilities, and

recreation opportunities for local residents and other beach users.

The gap between the tip of Alamitos Bay west jetty and the east end of the Long Beach Breakwater allows waves to pass through and to directly impact the shoreline at Peninsula Beach. The long-term trend in sediment transport is expected to be to the west. The Corps has estimated the annual sediment loss to be about 55,000 cubic meters.

Due to the sediment loss, there is a potential danger of flooding when wave runup overtops the bulkhead or goes around either end and runs into homes.

2. *Alternatives:* Alternatives that may be considered include beach nourishment, perched beach, revetment/seawall, submerged breakwater, groins and/or t-groins, and no-project.

3. *Scoping Process:* The Corps and the City of Long Beach are preparing a joint EIS/EIR to address potential impacts associated with the proposed project. The Corps is the Lead Federal Agency for compliance with National Environmental Policy Act (NEPA) for the project, and the City of Long Beach is the Lead State Agency for compliance with the California Environmental Quality Act (CEQA) for the non-Federal aspects of the project. The Draft EIS/EIR (DEIS/EIR) document will incorporate public concerns in the analysis of impacts associated with the Proposed Action and associated project alternatives. The DEIS/EIR will be sent out for a 45-day public review period, during which time both written and verbal comments will be solicited on the adequacy of the document. The Final EIS/EIR (FEIS/EIR) will address the comments received on the DEIS/EIR during public review, and will be furnished to all who commented on the DEIS/EIR, and is made available to anyone that requests a copy during the 30-day public comment period. The final step involves, for the federal EIS, preparing a Record of Decision (ROD) and, for the state EIR, certifying the EIR and adopting a Mitigation Monitoring and Reporting Plan. The ROD is a concise summary of the decisions made by the Corps from among the alternatives presented in the FEIS/EIR.

The ROD can be published immediately after the FEIS public comment period ends. A certified EIR indicates that the environmental document adequately assesses the environmental impacts of the proposed project with the respect to CEQA. A formal scoping meeting to solicit public comment and concerns on the proposed action and alternatives will be held on Wednesday, November 13, 2002 (see **DATES**).

Dated: October 31, 2002.

Richard G. Thompson,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 02–28359 Filed 11–6–02; 8:45 am]

BILLING CODE 3710–KF–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy. Navy Case No. 83,913, entitled ''Modular, Interoperable Software Definable Command Control Computer Communications Intelligence (C41) Operations Center'' and Navy Case No. 84,339, entitled ''Infrastructure Linkage and Augmentation System (INFRALYNX)''.

ADDRESSES: Requests for information about the inventions cited should be directed to the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Catherine M. Cotell, Ph.D., Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone (202) 767–7230. Due to temporary U.S. Postal Service delays, please fax (202) 404–7920, e-mail: *cotell@nrl.navy.mil* or use courier delivery to expedite response.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: October 31, 2002.

R.E. Vincent II,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 02–28276 Filed 11–6–02; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Secretary of Education's Commission on Opportunity in Athletics; Meeting

AGENCY: Secretary of Education's Commission on Opportunity in Athletics; Department of Education.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming public meeting of the Secretary of Education's Commission on Opportunity in Athletics (the Commission). The Commission invites comments from the public regarding the application of current Federal standards for ensuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX of the Education Amendments of 1972 (''Title IX''). The meeting will take place in San Diego, California.

Individuals who will need accommodations for a disability in order to attend the meetings should notify the Commission office no later than November 13, 2002. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATES: November 20–21, 2002.

Location: Wyndham San Diego at Emerald Park Hotel, 400 West Broadway, San Diego, California, 92101.

Times: November 20: 9 a.m.–12:30 p.m., 2 p.m.–5 p.m. November 21: 9 a.m.–1 p.m.

Meeting Format: This meeting will be held according to the following schedule:

1. Date: November 20, 2002, Time: 9 a.m.–12:30 p.m., 2 p.m.–5 p.m.

2. Date: November 21, 2002, Time: 9 a.m.–1 p.m.

Attendees: If you would like to attend any or all of the above listed meetings, we ask that you register with the Commission office by email or fax to the address listed under **ADDRESSES.** Please provide us with your name and contact information.

Participants: The meeting scheduled for November 20, 2002, will begin with presentations from panels of invited speakers. After the presentations by invited speakers, there will be time reserved for comments from the public.

The meeting scheduled for November 21, 2002, will consist of review and discussion by the Commissioners of the information from the previous public meetings in preparation for the Commission's forthcoming report to the Secretary of Education. The public is invited to observe this meeting; however there will not be opportunity for public comment.

If you are interested in participating in the public comment period to present comments on the Federal standards for ensuring equal opportunity for men and

women to participate in athletics under Title IX at this meeting, you are requested to reserve time on the agenda of the meeting by contacting the Commission office by email or fax.

We request that you submit a request to the Commission office by email or fax. Please include your name, the organization you represent if appropriate, and a brief description of the issue you would like to present. Participants will be allowed approximately three to five minutes to present their comments, depending on the number of individuals who reserve time on the agenda. At the meeting, participants are also encouraged to submit two written copies of their comments. Persons interested in making comments are encouraged to address the issues and questions discussed under **SUPPLEMENTARY INFORMATION.**

Given the expected number of individuals interested in providing comments at the meetings, reservations for presenting comments should be made as soon as possible. Persons who are unable to obtain reservations to speak during the meetings are encouraged to submit written comments. Written comments will be accepted at each meeting site or may be mailed to the Commission at the address listed under **ADDRESSES.**

In addition to making reservations, individuals attending the public meetings, for security purposes, must be prepared to show photo identification in order to enter the meeting location.

Request for Written Comments: In addition to soliciting input during the public meetings, we invite the public to submit written comments relevant to the Commission.

DATES: We would like to receive your written comments on the Act by November 29, 2002.

ADDRESSES: Submit all comments to the Commission using one of the following methods:

1. *Internet.* We encourage you to send your comments through the Internet to the following address: *OpportunityinAthletics@ed.gov.*

2. *Mail.* You may submit your comments to The Secretary of Education's Commission on Opportunity in Athletics, 400 Maryland Avenue, SW., ROB–3 Room 3060, Washington, DC 20202. Due to delays in mail delivery caused by heightened security, please allow adequate time for the mail to be received.

3. *Facsimile.* You may submit comments by facsimile at (202) 260–4560.

FOR FURTHER INFORMATION CONTACT: See the Commission address under the **ADDRESSES** section of this notice. View the Commission's web site at: *http://www.ed.gov/inits/commissionsboards/athletics.* The Commission office number is 202–708–7417.

SUPPLEMENTARY INFORMATION: The nation is commemorating the 30th anniversary of the passage of Title IX, the landmark legislation prohibiting recipients of Federal funds from discriminating on the basis of sex. Since this legislation was enacted, there has been a dramatic increase in the number of women participating in athletics at the high school and college levels. The Secretary of Education has determined that this anniversary provides an appropriate time to review the application of Title IX to educational institutions' efforts to provide equal opportunity in athletics to women and men. In order to do so, the Secretary established the Commission on Opportunity in Athletics. The Commission will produce a report no later than January 31, 2003, outlining its findings relative to the opportunities for men and women in athletics in order to improve the effectiveness of Title IX.

Comments are encouraged on the following priority areas:

1. Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?

2. Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?

3. Is further guidance or are other steps needed at the junior and senior high school levels where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?

4. How should activities such as cheerleading or bowling factor into the analysis of equitable opportunities?

5. How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will ''walk-on'' to intercollegiate teams—without athletic financial aid and without having been recruited—women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?

6. In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?

7. Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

Electronic Access to This Document

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To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

Dated: November 1, 2002.

Rod Paige,

Secretary of Education.

[FR Doc. 02–28288 Filed 11–6–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; List of Correspondence

AGENCY: Department of Education.

ACTION: List of correspondence from April 1, 2002 through June 30, 2002.

SUMMARY: The Secretary is publishing the following list pursuant to section 607(d) of the Individuals with Disabilities Education Act (IDEA). Under section 607(d) of IDEA, the Secretary is required, on a quarterly basis, to publish in the **Federal Register** a list of correspondence from the Department of Education received by individuals during the previous quarter that describes the interpretations of the Department of Education of IDEA or the regulations that implement IDEA.

FOR FURTHER INFORMATION CONTACT: Melisande Lee or JoLeta Reynolds. Telephone: (202) 205–5507.

If you use a telecommunications device for the deaf (TDD) you may call (202) 205–5637 or the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of this notice in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to Katie Mincey, Director of the Alternate Format Center. Telephone: (202) 205–8113.

SUPPLEMENTARY INFORMATION:

The following list identifies correspondence from the Department issued from April 1, 2002 through June 30, 2002.

Included on the list are those letters that contain interpretations of the requirements of IDEA and its implementing regulations, as well as letters and other documents that the Department believes will assist the public in understanding the requirements of the law and its regulations. The date and topic addressed by a letter are identified, and summary information is also provided, as appropriate. To protect the privacy interests of the individual or individuals involved, personally identifiable information has been deleted, as appropriate.

Part A—General Provisions

Section 602—Definitions.

Topic Addressed: Special Education AND Related Services

• Letter dated April 19, 2002 to individual, (personally identifiable information redacted), regarding the circumstances under which transportation must be provided as a related service; and clarifying that IDEA does not address whether parents are entitled to reimbursement for transporting their child if transportation is not a required related service on the individualized education program.

Part B—Assistance for Education of All Children With Disabilities

Section 611—Authorization; Allotment; Use of Funds; Authorization of Appropriations.

Topic Addressed: Distribution of Funds

• OSEP memorandum 02–06 dated April 26, 2002, regarding implementation of the new funding formula under IDEA, specifically the year of age cohorts for which a free appropriate public education (FAPE) is ensured.

Topic Addressed: Use of Funds

• Letter dated May 22, 2002 to Louisiana Department of Education Division of Appropriation Control Director Kitty Littlejohn regarding the ability to add program income, generated from registration fees assessed on participants at conferences conducted by the State Department of Education, to the IDEA Part B grant award.

Section 612—State Eligibility.

Topic Addressed: Condition of Assistance and Annual Count

• Letter dated April 2, 2002 to individual, (personally identifiable information redacted), clarifying that (1) the Florida Department of Education (FDE) operates a one-tier due process system; (2) the FDE is revising its eligibility documents which will be reviewed by the Office of Special Education Programs; (3) the FDE is developing a State Improvement Plan; and (4) a school district may include in its annual count children placed by their parents in private schools through Florida's program of Scholarships to Public or Private Schools of Choice for Students with Disabilities if these children are being provided special education or related services under 34 CFR 300.452–300.462.

Topic Addressed: State Educational Agency General Supervisory Authority

• Letter dated June 27, 2002 to Dina O. Harris, Esq., John F. Walsh, Esq. and Arizona Assistant Attorney General Kacey Gregson, regarding the ability of a State educational agency (SEA) to reduce or withhold funds from a local educational agency (LEA) that is not meeting its obligation to provide FAPE to all students with disabilities it is responsible for serving.

Topic Addressed: Personnel Standards

• Letter dated April 2, 2002 to G. Emerson Dickman, Esquire, clarifying requirements regarding qualifications of personnel under both the IDEA and the No Child Left Behind Act (NCLB Act) and a parent's right to be informed about the qualifications of individuals providing services to a child.

Section 614—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Topic Addressed: Individualized Education Programs

• Letter dated June 27, 2002 to Illinois State Board of Education Director of Special Education Dr. Anthony E. Sims, clarifying that, although the Part B ''at no cost'' requirement does not preclude incidental fees normally charged to nondisabled students or their parents as part of the regular education program, it would be impermissible for a public agency to charge parents a fee for extended school year services if summer school services, for which incidental fees are charged, are not a part of the extended school year services provided to the student.

Section 615—Procedural Safeguards

Topic Addressed: Timelines For Appeals

• Letter dated June 26, 2002 to Connecticut Department of Education Bureau Chief George P. Dowaliby clarifying that to require that issues be raised at a planning and placement team meeting before they can be addressed at a due process hearing establishes impermissible notice and exhaustion burdens inconsistent with the IDEA and its implementing regulations.

• Letters dated June 25, 2002 to Minnesota Department of Children Families and Learning Director of Special Education Norena A. Hale, Mississippi State Department of Education Program Improvement and Outreach Bureau Director Dr. Melody Bounds, and Missouri Department of Elementary and Secondary Education Coordinator of Special Education Services Melodie Friedebach, clarifying that the States must revise or delete their 30-day time limits because Circuit Court decisions applicable to these States have specifically rejected a 30-day time for appealing due process hearing decisions since it conflicts with the policies and purposes of the IDEA.

• Letter dated June 4, 2002 to Arkansas Department of Education Associate Director of Special Education Marcia Harding, requesting that Arkansas revise its 30-day time limit for filing a civil action under IDEA to be consistent with a case involving the Arkansas time limit.

• Letters dated June 4, 2002 to Minnesota Department of Children, Families and Learning Director of Special Education Norena A. Hale, Mississippi State Department of Education Program Improvement and Outreach Bureau Director Dr. Melody Bounds, Missouri Department of Elementary and Secondary Education Coordinator of Special Education Services Melodie Friedebach, and Nebraska Department of Education Special Populations Administrator Gary M. Sherman, requesting that the States either explain why case law rejecting a 30-day time limit for judicial review of IDEA claims is not applicable to civil actions in their States or revise their 30-day time limits.

Part C—Infants and Toddlers with Disabilities

Section 636—Individualized Family Service Plan

Topic Addressed: Early Intervention Services

• Letter dated June 11, 2002 to Kentucky Acting Part C Coordinator Ms. Trish Howard, clarifying that (1) guidelines established by a State to assist teams in developing an individualized family service plan (IFSP) may not be implemented in a manner that restricts the authority and responsibility of the IFSP team and (2) that the IFSP team makes the final determination of the frequency and intensity of early intervention services needed by the child.

Other Letters Relevant to the Administration of IDEA Programs

Topic Addressed: Free Appropriate Public Education

• Dear Colleague letter dated June 14, 2002 regarding preliminary guidance for programs which must be implemented by the 2002–2003 school year on public school choice, supplemental education services, and collective bargaining agreements under the provisions of the NCLB Act.

• Letter dated May 10, 2002 to Florida Department of Education Bureau of Instructional Support and Community Services Chief Shan Goff, regarding Florida's obligation under Federal civil rights laws to ensure that its Scholarship Program for Students with Disabilities is administered in a nondiscriminatory manner.

Topic Addressed: Personnel Standards

• Letter dated April 30, 2002 to Alabama Superintendent of Education Edward R. Richardson, clarifying Title I paraprofessional requirements under the NCLB Act.

Electronic Access to This Document

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(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

Dated: October 31, 2002.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 02–28363 Filed 11–6–02; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7405–8]

Agency Information Collection Activities: Proposed Collection; Comment Request: Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction Prior to May 30, 1991 and Have Not Been Modified or Reconstructed Since May 30, 1991; EPA ICR Number 1893.03; OMB Control Number 2060–0430; Expiration Date February 28, 2003

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction Prior to May 30, 1991 and Have Not Been Modified or Reconstructed Since May 30, 1991; EPA ICR Number 1893.03; OMB Control Number 2060–0430; expiration date February 28, 2003. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before January 6, 2003.

ADDRESSES: Compliance Assessment and Media Programs Division, Office of Compliance, Office of Enforcement and Compliance Assurance, Mail Code 2223A, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. A hard copy of a specific ICR may be obtained without charge by calling or sending an E-mail to the contact person listed in this notice.

FOR FURTHER INFORMATION CONTACT: Sharie A. Centilla of the Office of Compliance at (202) 564–0697 or via E-mail at *Centilla.Sharie@epa.gov* and ask for EPA ICR Number 1893.03; OMB Control Number 2060–0430; expiration date February 28, 2003.

SUPPLEMENTARY INFORMATION:

Title: Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction Prior to May 30, 1991 and Have Not Been Modified or Reconstructed Since May 30, 1991 (40 CFR Part 62, Subpart GGG); EPA ICR Number 1893.03; OMB Control Number 2060–0430; expiration date February 28, 2003.

Affected Entities: Entities potentially affected by this action are owners or operators of existing municipal solid waste landfills that are located in any State for which a State plan has not been approved and become effective.

Abstract: The Agency has determined that the emissions from municipal solid waste landfills cause, or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. The Administrator is charged under Section 111 of the Clean Air Act (CAA) to establish procedures for each State to submit a plan that would establish standards of performance for any existing source for any air pollutant. If the State has not developed such a plan, then the Administrator may require any person who owns or operates any emission source or is subject to any requirements of the CAA, to establish and maintain reports; make reports; install, use, and maintain monitoring equipment or methods; sample emissions; and provide any other information as required.

All owners and operators of existing municipal solid waste landfills must submit an initial design capacity report. If the design capacity of an existing landfill is equal to or greater than 2,500,000 megagrams in weight and equal to or greater than 2,500,000 cubic meters in volume, the owner or operator is required to determine the facility's annual, nonmethane, organic compound (NMOC) emission rate. Based on a three-tier emission rate calculation system, the owner or operator is required to either install a collection and control system, or perform emission test using the criteria specified at the next tier level. If the NMOC emission rate is determined to be less than 50 megagrams per year, as determined by Tier 1, Tier 2, or Tier 3 emission rate calculations, no further calculations or testing is required for that year.

For landfills required to install collection and control systems,

submission of a collection and control system design plan is required. After review of the design plan and installation of the collections and control system, and initial performance test and report for the system is required. There after, annual compliance reports are required. Owners or operators are required to keep continuous monitoring records of the parameters reported in the initial performance report and records of monthly monitoring of surface methane concentration.

Burden Statement: The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

In the previously approved ICR, the estimated number of respondents for this information collection was 3,837 with 384 responses per year. The annual industry reporting and recordkeeping burden for this collection of information was 15,110 hours. On the average, each respondent reported approximately 0.10 times per year and approximately 39 hours were spent preparing each response. The total annual reporting and recordkeeping cost burden for this collection of information was $890,000. This included an annual cost of $788,000 associated with capital/startup costs and $102,000 associated with the annual operation and maintenance costs.

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

Dated: October 29, 2002.

Michael M. Stahl,

Director, Office of Compliance.

[FR Doc. 02–28355 Filed 11–6–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7405–4]

Notice of Public Scoping Meeting on the Preparation of an Environmental Impact Statement (EIS) on the Federal Funding, Construction, Operation and Monitoring of a Coastal Wetlands Restoration Project, the Mississippi River Water Reintroduction Into Maurepas Swamp

On April 26, 2002, the U.S. Environmental Protection Agency, Region 6 (EPA) published a Notice of Intent (NOI) in the **Federal Register** that it was planning to develop an environmental impact statement on the restoration project as the Federal member of the Task Force created by the Coastal Wetlands Planning, Protection and Restoration Act, Public Law 101–646 (CWPPRA) designated to carry out the project. The EPA will hold a Scoping Meeting for the EIS on December 11, 2002, at the Garyville/Mt. Airy Magnet School, 240 Highway 54, in Garyville, LA 70051. Formal meeting presentations will begin at 6:30 p.m.; the meeting room will be open with poster displays at 5:30 p.m. Individuals, groups, officials, and Federal, State, Tribal, and local agencies are invited to participate in the scoping process to help determine impacts on resources, issues, and alternatives to be examined in detail in the EIS.

Purpose: EPA has determined that the proposed wetlands restoration effort is a Major Federal Action significantly impacting the human environment. The purpose of the EIS is to ensure that decisions are made in accordance with the policies and purposes of the National Environmental Policy Act. The EIS will be considered by the CWPPRA Task Force in its decisions on funding, construction, operations, monitoring and on alternative features and activities associated with carrying out the project.

Summary of Project: The proposed action provides for the reintroduction of Mississippi River water into swamps south of Lake Maurepas in Louisiana for the purpose of restoring the ecological health and productivity of the swamps. Over time, hydrologic modifications to the riverine system have eliminated the natural inputs of freshwater, nutrients, and sediment that built and maintained the wetlands. These swamps are stressed and dying due to saltwater intrusion and excessive flooding, which is due to subsidence and insufficient accumulation of sediment. The project will divert in excess of 1,500 cubic feet per second of fresh river water through a proposed box-culvert diversion structure in the levee of the Mississippi River, then through an outflow channel for a distance of approximately five miles, and into the Maurepas swamps. The presently proposed water diversion would be constructed in the Garyville, Louisiana area, connecting to the existing Hope Canal north of U.S. Highway 61. As part of this alternative, the Hope Canal is proposed to be enlarged in order to accommodate the estimated flows. The project is estimated to benefit more than 36,000 acres of cypress-tupelo swamps by increasing input of freshwater, sediments, nutrients, and oxygen. The EIS will consider impacts of this project with existing and/or proposed flood control measures of the foreseeable future. Efforts will be made to ensure that severity of existing local drainage problems is not increased as a result of this project. Information from reconnaissance level studies for project development included preliminary site reviews; hydrologic modeling of existing conditions and basic diversion scenarios; baseline ecological field studies; and surveys of elevations and cross-sections, and will be provided in the EIS.

Alternative Actions: The CWPPRA Task Force may determine to fund and construct the restoration project; the CWPPRA Task Force may deny funding and construction of the restoration project; or, the Task Force may determine to take no final action until additional funds are available. The EIS will be utilized in other actions such as the Clean Water Act Section 404 Permit which (1) may be issued as requested, (2) may be issued with conditions, or (3) may be denied.

To Submit Scoping Comments, To Request Additional Information, or To Be Placed on the EIS Mailing List, Contact: Jeanene Peckham at EPA Water Quality Protection Field Office, 707 Florida Blvd., Suite B–21, Baton Rouge, LA, 70801; telephone (225) 389–0736, e-mail *peckham.jeanene@epa.gov.*

Estimated Date for Release of Draft EIS: Spring 2004.

Responsible Official: Gregg A. Cooke, Regional Administrator.

Oscar Ramirez, Jr.,

Acting Director, Water Quality Protection Division (6WQ).

[FR Doc. 02–28352 Filed 11–6–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7405–9]

Notification of the National Advisory Council for Environmental Policy and Technology (NACEPT) Standing Committee on Compliance Assistance Meeting; Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of public NACEPT standing committee on compliance assistance meeting on December 3, 2002.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the U.S. Environmental Protection Agency (EPA) will hold an open meeting of the NACEPT Standing Committee on Compliance Assistance (Committee) on Tuesday, December 3, 2002 from 8 a.m. to 4 p.m. The meeting will be held at the Adams Mark Hotel at 111 Pecan Street East, San Antonio, Texas 78205. Seating at the meeting will be on a first-come basis and limited time will be provided for public comment. The meeting will focus on the areas of the Compliance Assistance program on which the Committee has been asked to advise the EPA. These are: (1) Strengthening the national compliance assistance network by helping identify opportunities to enhance communication among compliance assistance providers and by promoting collaboration in compliance assistance planning and tool development; (2) developing and testing performance measurement systems to demonstrate the effectiveness and environmental outcomes of compliance assistance; and (3) acting as a sounding board to provide feedback on compliance assistance policies, strategies or other related matters. A formal agenda will be available at the meeting.

SUPPLEMENTARY INFORMATION: NACEPT is a federal advisory committee under the Federal Advisory Committee Act, Public Law 92–463. NACEPT provides advice and recommendations to the EPA Administrator and other EPA officials on a broad range of domestic and international environmental policy issues. NACEPT consists of a representative cross-section of EPA's partners and principal constituents who provide advice and recommendations on policy issues and serve as a sounding board for new strategies. Over the last two years, EPA has undertaken a number of actions to improve our compliance assistance activities. To ensure that the Agency's efforts to improve compliance assistance are implemented in a way that continues to reflect stakeholder needs, NACEPT created a new Standing Committee on Compliance Assistance. This will provide a continuing Federal Advisory Committee forum from which the EPA can continue to receive valuable stakeholder advice and recommendations on compliance assistance activities. For further information concerning the NACEPT Standing Committee on Compliance Assistance, including the upcoming meeting, contact Joanne Berman, Designated Federal Officer (DFO), on (202) 564–7064, or e-mail: *berman.joanne@epa.gov.*

Inspection of Subcommittee Documents: Documents relating to the above topics will be publicly available at the meeting.

Dated: October 31, 2002.

Frederick F. Stiehl,

Acting Director, Office of Compliance.

[FR Doc. 02–28354 Filed 11–6–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2002–0301; FRL–7279–4]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 67979–EUP–E from Syngenta Seeds requesting an experimental use permit (EUP) for the plant-incorporated protectant *Bacillus thuringiensis* VIP3A. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket ID number OPP–2002–0301, must be received on or before December 9, 2002.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Leonard Cole, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5412; e-mail address: cole.leonard@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are interested in agricultural biotechnology or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2002–0301. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at http://www.epa.gov/fedrgstr/.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA

Dockets at http://www.epa.gov/edocket/ to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at http://www.epa.gov/edocket, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2002–0301. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2002–0301. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency (7502C), 1200 Pennsylvania Ave., NW., Washington, DC, 20460–0001, Attention: Docket ID Number OPP–2002–0301.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA., Attention: Docket ID Number OPP–2002–0301. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI.

Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

Syngenta Seeds, 3054 Cornwallis Road, Research Triangle Park, North Carolina 27709–2257, has applied for an EUP for field testing of the plant-incorporated protectant *Bacillus thuringiensis* VIP3A insect control protein as expressed in cotton plants. The proposed states are Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas. The total acreage for this plant-incorporated protectant EUP will be 904.5.

III. What Action is the Agency Taking?

Following the review of the Syngenta Seeds application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

IV. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is under 40 CFR part 172.

List of Subjects

Environmental protection, Experimental use permits.

Dated: October 29, 2002.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 02–28356 Filed 11–6–02; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL RESERVE SYSTEM

[Docket No. R–1133]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board has approved the fee schedules for Federal Reserve priced services and electronic connections and a private-sector adjustment factor (PSAF) for 2003 of $171.7 million. These actions were taken in accordance with the requirements of the Monetary Control Act of 1980, which requires that, over the long run, fees for Federal Reserve priced services be established on the basis of all direct and indirect costs, including the PSAF.

DATES: The new fee schedules become effective January 2, 2003.

FOR FURTHER INFORMATION CONTACT: For questions regarding the fee schedules: Joseph Baressi, Financial Services Analyst, (202/452–3959); William Driscoll, Financial Services Analyst, check payments, (202/452–3117); Edwin Lucio, Financial Services Analyst, ACH payments, (202/736–5636); Gregory Cannella, Financial Services Analyst, Fedwire funds transfer, Fedwire securities, and noncash collection services, (202/530–6214); Marybeth Butkus, Senior Financial Services Analyst, special cash services, (202/452–3917); or Amy Pierce, Senior IT Analyst, electronic connections, (202/736–5675), Division of Reserve Bank Operations and Payment Systems. For questions regarding the PSAF: Brenda Richards, Senior Financial Analyst, (202/452–2753) or Gregory Evans, Manager, Financial Accounting, (202/452–3945), Division of Reserve Bank Operations and Payment Systems. For users of Telecommunications Device for the Deaf (TDD) *only,* please call 202/263–4869. Copies of the 2003 fee schedules for the check service are available from the Board, the Federal Reserve Banks, or the Reserve Banks' financial services Web site at *http://www.frbservices.org.*

SUPPLEMENTARY INFORMATION:

I. Priced Services

A. Discussion

Over the period 1992 through 2001, the Reserve Banks recovered 99.8 percent of their total costs for providing priced services, including special project costs, imputed expenses, and targeted after-tax profits or return on equity (ROE).[1]

Table 1 summarizes the priced services' actual, estimated, and budgeted cost recovery rates for 2001, 2002, and 2003 respectively. Cost recovery is estimated to be 92.2 percent in 2002 and budgeted to be 94.4 percent in 2003. The aggregate cost-recovery rates are heavily influenced by the performance of the check service, which accounts for approximately 85 percent of the total cost of priced services. The electronic services (FedACH, Fedwire funds transfer, Fedwire securities, and national settlement) account for approximately 15 percent of costs, while noncash and special cash services represent a de minimis amount.

[1] Imputed costs, such as taxes that would have been paid and return on equity that would have been provided had the services been furnished by a private business firm, are referred to as the private-sector adjustment factor (PSAF). The ten-year recovery rate is based upon the pro forma income statements for Federal Reserve priced services published in the Board's *Annual Report.* Beginning in 2000, the PSAF included additional financing costs associated with pension assets attributable to priced services. This ten-year cost recovery rate has been computed as if these costs were not included in the PSAF calculations prior to 2000. If these costs were included in the calculations, and assuming that the Reserve Banks would not have made any contemporaneous cost or revenue adjustments, the 10-year recovery rate would be 98.7 percent.

TABLE 1.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1[a] Revenue	2[b] Total expense	3 Net income (ROE) [1–2]	4[c] Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	960.4	901.9	58.5	109.2	95.0%
2002 (Estimate)	912.9	898.0	14.8	92.5	92.2%
2003 (Budget)	933.7	883.9	49.8	104.7	94.4%

[a] Includes net income on clearing balances (NICB). Clearing balances, net of imputed reserve requirements and balances used to finance priced-services assets, are assumed to be invested in three-month Treasury bills. NICB equals the income from this imputed investment less earnings credits granted to clearing balance holders at the federal funds rate.

[b] The calculation of total expense includes operating expenses and imputed expenses. Imputed expenses include taxes, FDIC insurance, Board of Governors priced services expenses, the cost of float, and interest on imputed debt, if any. Credits related to the accounting for pensions under FAS 87 are also included.

[c] Target ROE is the ROE included in the PSAF.

Table 2 presents an overview of the 2001 actual, budgeted 2002, estimated 2002, and projected 2003 cost recovery performance by category of priced service.

TABLE 2.—PRICED SERVICES COST RECOVERY

[Percent]

Priced service	2001 Actual	2002 Budget	2002 Estimate	2003 Budget
All services	95.0	96.4	92.2	94.4
Check	93.9	95.5	90.9	93.0
ACH	103.7	101.4	102.5	101.6
Fedwire funds transfer	99.5	101.1	95.9	104.1
Fedwire securities	90.2	100.4	98.7	104.9
Noncash collection	111.9	94.3	93.1	110.3
Special cash	103.3	103.4	91.1	77.5

1. *2002 Estimated Performance*—In 2002, the Reserve Banks estimate that they will recover 92.2 percent of the costs of providing priced services, compared with the budgeted recovery rate of 96.4 percent. The Reserve Banks expect to recover fully actual and imputed expenses, earning net income of $14.8 million, which is $77.7 million less than the budgeted net income, or ROE, of $92.5 million. The shortfall from the 2002 budget is largely driven by declining check volume. The Reserve Banks estimate that check revenue in 2002 will be $45.3 million below budget. Though the Reserve Banks have taken steps to reduce check operating costs, these reductions are largely offset by increases in non-operating factors.

Forward-processed check volume in 2002 was budgeted to be 2.9 percent higher than in 2001. The Reserve Banks now estimate, however, that 2002 volume will be 1.8 percent lower than in 2001. Even this estimate may be optimistic, as processed check volume through August 2002 is 3.4 percent below 2001 volume for the same period. The deterioration in the Reserve Banks' check volume appears to be consistent with nationwide trends away from check use and toward greater use of electronic payment methods. The Federal Reserve System's recent retail payments research shows that the number of checks written in the United States appears to have been declining since the mid-1990s.[2] Lower volumes in 2002 may also have been influenced by slower growth in the overall economy.

2. *2003 Projected Performance*—For 2003, the Reserve Banks project a priced services cost recovery rate of 94.4 percent, with net income of $49.8 million, as compared to target net income, or ROE, of $104.7 million. The primary factor affecting 2003 cost recovery is the continued check volume decline.

The primary risks to the Reserve Banks' ability to achieve their budget targets are (1) cost overruns in the check modernization projects, (2) significantly lower-than-projected returns on pension assets, and (3) a steeper decline in the Reserve Banks' check volume than the projected 2.8 percent annual decline.[3] To address the apparent continuing decline in check volumes, the Reserve Banks are developing a business and operational strategy that will position the service to achieve its financial and payment system objectives over the long term.

3. *2003 Pricing*—The following summarizes the Reserve Banks' changes in fee structures and levels for priced services:

Check

- The Reserve Banks are raising fees for forward-collection check products 2.5 percent, return check products 4.0 percent, and payor-bank check products 4.8 percent compared with January 2002 fees.

[2] Gerdes, Geoffrey R. and Jack K. Walton II, ''The Use of Checks and Other Noncash Payment Instruments in the United States,'' Federal Reserve Bulletin, August 2002, pp. 360–374. (This article is available on line at *www.federalreserve.gov/pubs/bulletin/default.htm*). During the late 1990s, the volume of checks processed by the Reserve Banks rose, albeit slowly, which implies that the proportion of interbank checks cleared through the Reserve Banks increased.

[3] Check modernization is a multiyear initiative to standardize the processing of checks at all Reserve Banks, adopt a common platform for processing and researching check-adjustment cases, create a national system for archiving and retrieving check images, and deliver check services to depository institutions using web technology. Check modernization should improve the operational efficiency and cost-effectiveness of the Reserve Banks' check services once fully implemented. It will also improve the consistency, quality, and uniformity of the check services that Reserve Banks deliver to their customers and allow new services to be developed and deployed more quickly.

• Since 1996, the price index for check services has increased 31 percent.[4]

FedACH

• The Reserve Banks will (1) Retain current per-item origination fees for items in large files, (2) reduce per-item origination fees for items in small files from $0.004 to $0.003, and (3) reduce per-item receipt fees (for all items) from $0.0035 to $0.0025.[5]

• The ACH price index has decreased 61 percent since 1996.

Fedwire Funds Transfer and National Settlement Services [6]

• The Reserve Banks will reduce fees in all volume tiers: from $0.31 to $0.30 per transfer if less than 2,501 transfers per month, from $0.22 to $0.20 per transfer if between 2,501 and 80,000 transfers per month, and from $0.15 to $0.10 per transfer if more than 80,000 transfers per month.

• The price index for Fedwire funds transfer and national settlement services has decreased 60 percent since 1996.

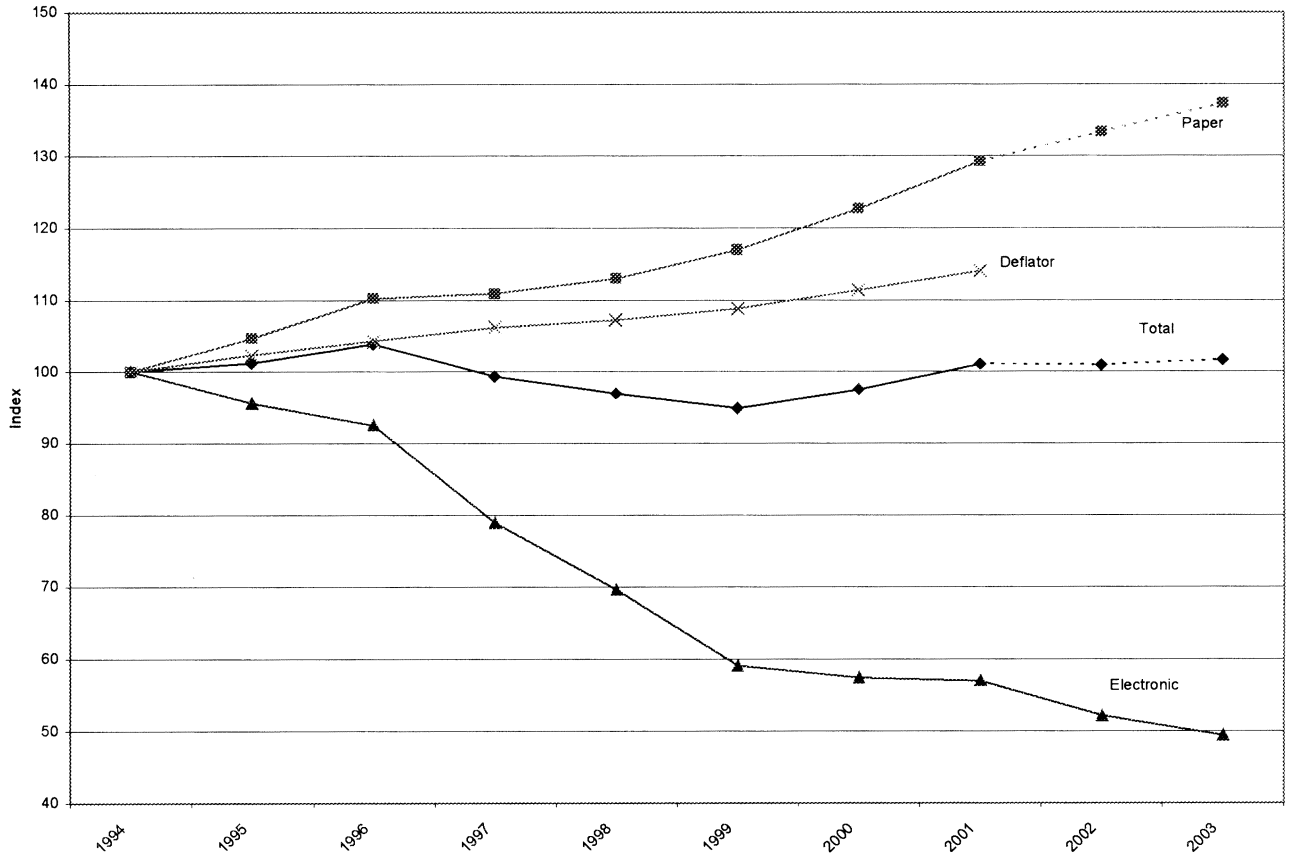
Fedwire Securities Service

• The Reserve Banks will reduce the on-line transfer origination and receipt fees from $0.66 to $0.40.

• The price index for the Fedwire securities service has decreased 34 percent since 1996.

4. *2003 Price Index*—The price index for electronic payment services (ACH, Fedwire funds transfer and national settlement, Fedwire securities, and electronic check) and electronic connections is projected to decline 5 percent in 2003. By contrast, the index for paper-based payment services (check, special cash, and noncash collection) is expected to increase about 3 percent in 2003. The overall 2003 price index for all Federal Reserve priced services is projected to increase less than 1 percent. Since 1996, the overall price index has declined by about 2 percent. Figure 1 compares the Federal Reserve's price index for priced services with the GDP price deflator.

FIGURE 1
FEDERAL RESERVE PRICE INDEX
Chained Fisher ideal index compared with GDP price deflator



B. Check

Table 3 shows the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for the check service.

[4] The price index estimates are based on a chained Fisher ideal price index. This index is not adjusted for quality changes in Federal Reserve priced services. Data elements used in calculating the index include explicit fee revenue from priced services and volumes associated with those services. For 2003, the year-over-year percentage change in the index is based on a comparison of the 2003 projections with the 2002 estimates for priced services revenues and volumes. The price index is calculated based on 1994–2001 actual, 2002 estimated, and 2003 projected revenues and volumes.

[5] Files containing fewer than 2,500 items are small; files with 2,500 or more items are large.

[6] The name of the net settlement service was changed to national settlement service effective August 2002.

TABLE 3.—CHECK PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net income (ROE) [1–2]	4 Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	793.2	754.4	38.9	90.2	93.9%
2002 (Estimate)	760.0	758.3	1.7	78.2	90.9%
2003 (Budget)	789.0	758.7	30.3	89.4	93.0%

1. *2001 Performance*—The check service recovered 93.9 percent of total costs in 2001, including imputed expenses and targeted ROE, which was below the targeted recovery rate of 97.6 percent. The volume of checks collected decreased 0.5 percent from 2000 levels, partly because of a decline in fine-sort volumes as banks presented more checks directly. Revenue grew from 2000 levels primarily because of price increases, but revenue was $22 million below the budgeted amount. Costs exceeded the budgeted amount by $18.5 million because of lower-than-budgeted pension credits, somewhat offset by lower-than-budgeted check modernization costs.

2. *2002 Performance*—Through August 2002, the check service has recovered 93.0 percent of total costs, including imputed expenses and targeted ROE. For the full year, the Reserve Banks expect to recover all direct and indirect costs of providing check services and a modest portion of the targeted return on equity. Specifically, the Reserve Banks estimate that the check service will recover 90.9 percent of its total costs for the full year compared with the budgeted 2002 recovery rate of 95.5 percent, amounting to a $39 million shortfall.[7] The lower-than-budgeted recovery rate is primarily due to lower-than-budgeted revenues. Service revenue is estimated to be $57 million below budget, due to lower-than-expected volume in forward-collection, return-collection, and electronic check products. Additionally, in the current low-interest-rate environment, depository institutions select lower-priced, later-availability check products. Major factors are summarized in Table 4.

TABLE 4.—CHECK 2002 BUDGET VS. 2002 ESTIMATE

[millions of dollars]

	Budget	Estimate	Variance
Operating revenue	820.0	763.3	−56.7
NICB	−14.7	−3.3	−11.4
Total revenue	805.3	760.0	−45.3
Operating costs	692.2	681.0	11.3
Check modernization	106.2	101.4	4.8
Pension credits	−66.6	−41.0	−25.7
PSAF	111.2	95.1	16.1
Total cost	843.0	836.4	6.5
Net revenue	−37.7	−76.5	−38.8
Recovery rate (percent)	95.5	90.9	.....

Reserve Banks expect lower-than-budgeted pension credits to offset estimated local cost reductions of $27 million. The estimated full-year recovery rate is lower than the rate through August as severance expenses are recognized and data processing and data communications charges increase during the fourth quarter.

The volume of checks handled by the Reserve Banks has declined (as shown in table 5) reflecting a broader market trend in which the number of checks written each year appears to be declining, as discussed in a recent Federal Reserve check study.[8] Year-to-date forward-collection check product volume through August, excluding electronic fine sort volume, declined 3.6 percent, compared with the 0.6 percent increase for the similar period last year.[9] For the full year 2002, the Reserve Banks estimate that forward-processed volume will decline 1.8 percent, compared with a budgeted 2.9 percent growth rate. (The decline is due to lower local volumes, partly offset by higher nonlocal volumes, from both large and small banks.) The full-year rate of decline is less than the decline to date because of recent volume growth in several Districts. There is some risk, however, that the full-year rate of decline may exceed the estimate. Return-check volume has declined 3.8 percent through August 2002, and full-year volume is expected to decline 4.7 percent, as depository institutions seek alternative ways to return checks at

[7] The cost-recovery estimate does not reflect reduced depreciation expense for some check-sorting equipment of approximately $1 million, resulting from a recent System re-evaluation of the useful life of such equipment.

[8] Gerdes, Geoffrey R. and Jack K. Walton II, ''The Use of Checks and Other Noncash Payment Instruments in the United States,'' Federal Reserve Bulletin, August 2002, pp. 360–374.

[9] Electronic fine-sort is a service offered by two Reserve Banks that allows depository institutions to exchange fine-sort information electronically with paper checks to follow. Presentment occurs when the paper checks are delivered.

lower cost because of the Reserve Banks' continuing price increases for return products.

TABLE 5.—PAPER CHECK PRODUCT VOLUME CHANGES

[percent]

	Budgeted 2002 change	Year-to-date change through August 2002	Estimated 2002 change
Total forward-collection [a]	3.6	−3.6	−1.7
Forward-processed	2.9	−3.4	−1.8
Fine-sort [a]	13.1	−6.5	0.0
Returns	−2.3	−3.8	−4.7

[a] These rates exclude electronic fine-sort volume. Including the electronic fine-sort product, fine-sort volume growth was budgeted to increase 8.7 percent in 2002 and is now estimated to increase 9.0 percent.

Reversing a trend over the past few years, electronic check volumes have declined. Recent data are summarized in table 6. Reserve Banks provide payor banks with electronic check data or images for about 38 percent of the checks they collect. Year-to-date 2002 image volumes have declined about 5 percent, to approximately 884 million check images, which represents about 8.4 percent of all checks collected by the Reserve Banks. The decline in image volume, compared with the target growth of 25.6 percent, is likely due to delays in implementing FedImage services.[10] The Board believes that Reserve Banks' estimates for electronic check service volume for the full year, which reflect a higher rate of growth than experienced through August, may be somewhat optimistic.

TABLE 6.—ELECTRONIC CHECK PRODUCT SHARE AND VOLUME CHANGES

	Volume change through August 2002 (percent)	Estimated 2002 change (percent)	Share of checks collected through August 2002 (percent)
Electronic check presentment	−2.4	−0.2	23.0
Truncation	−6.1	−5.6	5.3
Non-truncation	−0.2	1.5	17.6
Electronic check information	−10.4	−8.8	6.7
Images	−4.8	1.9	8.4

3. *2003 Pricing*—For the coming year, the Reserve Banks will continue to focus on check modernization initiatives to standardize check processing across all Reserve Bank offices. The Reserve Banks will incur significant transition costs associated with these initiatives, at least through 2003 (costs in 2003 are discussed below). These initiatives, however, are expected to reduce steady-state production costs and improve service over the long term.

In 2003, fees for all check products are increasing 2.8 percent on a volume-weighted basis compared with current fees, as shown in table 7.[11] Forward-collection fee increases of 2.5 percent are composed of an increase in forward-processing cash letter fees of 10 percent and per-item fee increases of 1.5 percent. The average volume-weighted fees for payor bank services will increase 4.8 percent compared with current fees. Fees for electronic check products are increasing faster than fees for paper check products because the Reserve Banks are instituting more consistent fees for these products that better reflect the value they provide to depository institution customers.

TABLE 7.—2003 FEE CHANGES

[percent]

Product	Fee change
Total check service	2.8
Forward-collection	2.5
Returns	4.0
Payor bank services	4.8
Electronic check presentment	7.1
Electronic check information	7.3
Image services	4.0

Table 8 summarizes ranges of selected check fees for 2002 and 2003, and shows 2003 price changes in bold type.

TABLE 8.—SELECTED CHECK FEES

	Current fee ranges	2003 fee ranges
Items:	(per item)	(per item)
Forward-processed:		
City	$0.005 to 0.079	$0.005 to 0.080

[10] The rollout of Reserve Bank FedImage services has taken longer than expected due to complexities associated with developing the application.

[11] This discussion evaluates volume-weighted changes in the direct fees for check products. The price index, discussed earlier, evaluates the average change in costs that would be incurred by a customer purchasing an average market basket of Federal Reserve check products.

TABLE 8.—SELECTED CHECK FEES—Continued

	Current fee ranges	2003 fee ranges
RCPC	0.003 to 0.350	0.003 to 0.340
Forward fine-sort:		
City	0.005 to 0.021	0.005 to 0.021
RCPC	0.005 to 0.036	0.005 to 0.036
Qualified returned checks:		
City	0.08 to 0.80	0.08 to 0.80
RCPC	0.10 to 1.10	0.10 to 1.10
Raw returned checks:		
City	1.50 to 5.00	1.50 to 5.00
RCPC	1.30 to 5.00	1.30 to 5.00
Consolidated shipment [a]	0.004 to 0.036	0.004 to 0.036
Cash letters:	(per cash letter)	(per cash letter)
Forward-processed [b]	2.00 to 36.00	2.00 to 37.00
Forward fine-sort	4.00 to 14.00	6.00 to 14.00
Returned checks: raw/qualified	2.25 to 14.00	2.00 to 16.00
Payor bank services:	(Fixed) (per item)	(Fixed) (per item)
MICR information	2–15 0.0030–0.0170	5–15 0.0030–0.0150
Electronic presentment	1–12 0.0005–0.0130	2–15 0.0005–0.0110
Truncation	2–7 0.0020–0.0180	2–7 0.0020–0.0180
Image capture	2–15 0.0020–0.0170	2–15 0.0020–0.0150
Image delivery	Varies [c] 0.0020–0.0080	Varies [c] 0.0020–0.0080
Image archive	N/A 0.0010–0.0060	N/A 0.0007–0.0060
Image retrieval	N/A 0.25–5.00	N/A 0.30–5.00

Note: Bold indicates change from 2002 prices.
[a] Per-item fees for consolidated shipments include a half mill surcharge due to higher fuel costs.
[b] Cash letter fees for forward-processed items transported by the Reserve Banks include a fifty-cent surcharge due to higher fuel costs.
[c] Fixed fee varies by media type.

4. *2003 Projected Cost Recovery*—For 2003, the Reserve Banks project that the check service will recover 93.0 percent of total costs, including imputed expenses, costs associated with the check modernization project, and targeted ROE. In total, the Reserve Banks expect to recover all direct and indirect costs of providing check services, but only a portion of targeted return on equity.

Total adjusted costs before taxes are projected to increase approximately $6.8 million, or 0.8 percent, from estimated 2002 expenses.[12] These costs for 2003 include $102.8 million in costs for the four check modernization projects, representing an increase of $1.5 million over the 2002 estimate. Budgeted 2003 local costs, aside from local check modernization costs and offsets, are $18.2 million lower than 2002 estimated costs, a 3.1 percent reduction, which slightly exceeds the projected percentage decline in forward-processed volume.

Total check revenue is projected to increase $29 million, or 3.8 percent, from the 2002 estimate due to increased fees for payor-bank products and return-check products. (Increases in fees for forward-collection products are projected to be more than offset by lower volumes and shifts to lower-priced products due to low interest rates.) In 2003, revenues from paper-based services, electronic services, and other operating and imputed revenues are expected to represent about 83 percent, 12 percent, and 5 percent, respectively, of the check service's budgeted $789.0 million in revenue.

In 2003, forward-processed check volume is projected to be 14.4 billion, a decrease of 2.7 percent compared with the 2002 estimate, with the decline coming mostly from large banks, perhaps partly due to their customers' shift to electronic payment instruments. Fine-sort check volume is expected to continue to decline by 41 million checks, or 3.7 percent, from the 2002 estimate. Total returns are projected to be 166 million, a decrease of 2.3 percent compared with the 2002 estimate.

The Reserve Banks expect an increase in payor-bank service volumes. The Reserve Banks project electronic presentment volume to increase 5.5 percent in 2003 and truncation volume to increase 0.9 percent. Image services volume is projected to grow 8.4 percent in 2003, compared with an estimated 2002 increase of 1.9 percent. Image volume growth is expected to be driven by the increased functionality of FedImage services (for example, electronic access to archived check images using web technology). MICR information volume is projected to increase 0.2 percent in 2003, compared with a 9 percent decline estimated for 2002.

The Board believes that the greatest risks to achieving the projected cost-recovery rate for the check service of 93.0 percent are (1) challenges in meeting System volume projections and related revenue projections, (2) challenges in reducing local costs as budgeted, (3) potential downward revisions to priced pension credits, and (4) potential check modernization cost overruns.

C. Automated Clearinghouse (ACH)

Table 9 presents the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for the commercial ACH service.

[12] This estimate does not reflect reduced depreciation expense for check sorting equipment of approximately $3.5 million, resulting from a recent System re-evaluation of the useful life of such equipment.

TABLE 9.—ACH PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net income (ROE) [1–2]	4 Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	79.4	67.7	11.8	8.9	103.7%
2002 (Estimate)	70.8	62.6	8.2	6.5	102.5%
2003 (Budget)	69.9	61.2	8.7	7.5	101.6%

1. *2001 Performance*—In 2001, the ACH service recovered 103.7 percent of total expenses, including imputed costs and targeted ROE, compared with a targeted recovery rate of 101.3 percent. Commercial ACH volume was 16.2 percent higher than 2000 volume, compared with the 11.1 percent increase originally projected for 2001. The Reserve Banks changed their prices on October 1, 2001, to reflect better the cost structure of the ACH service, which is characterized by high fixed and low variable costs. The Reserve Banks decreased per-item fees for large-volume files and increased monthly fixed fees, thereby lowering overall fees to large and medium-sized customers. Also on October 1, the Reserve Banks implemented pricing agreements with other ACH operators for interoperator ACH transactions. Under the new interoperator agreements, the Reserve Banks stopped charging per-item fees to depository institutions that are customers of other ACH operators. Instead, the Reserve Banks and the other ACH operators began to charge each other fees for interoperator transactions. Thus, for ACH items originated by a Reserve Bank customer but sent to a customer of another ACH operator, the Reserve Banks now pay a fee to the other operator and no longer assess per-item fees to that ACH operator's customer.

2. *2002 Estimate*—The Reserve Banks estimate that the ACH service will recover 102.5 percent of total expenses in 2002, compared with the budgeted recovery rate of 101.3 percent. The difference from targeted recovery rate is mainly due to higher-than-projected volume. The $5.1 million year-over-year expense decrease results primarily from consolidating the twelve Districts' ACH customer support operations into two offices. On February 1, 2002, the Reserve Banks reduced fees to reflect lower operating costs following the consolidation. Despite this price reduction, total revenue is projected to be $4.3 million or 6.5 percent above the 2002 budget figure.

The Reserve Banks estimate that their 2002 commercial ACH volume will be 9.1 percent higher than experienced in 2001, which is 20.3 percent higher than budgeted. Year-to-date through August 2002, the Reserve Banks' ACH volume increased 10.8 percent from the same period in 2001. The full-year projection reflects the Reserve Banks' expectation that some large depositors will continue to shift some volume to another ACH operator, or at least split their transactions between the Federal Reserve and another operator.

3. *2003 Pricing*—The Reserve Banks project that the ACH service will recover 101.6 percent of its costs in 2003 including imputed expenses and targeted ROE. For the third time since January 2001, the Reserve Banks are reducing fees, which would decrease revenue by 1.3 percent from the 2002 estimate. The fee to originate items in files with fewer than 2,500 transactions will be reduced from $0.004 to $0.003, and the receipt fee for all items will be reduced from $0.0035 to $0.0025. These changes should reduce costs for low-to medium-volume customers. Assuming constant volume, the lower fees would reduce revenue by $5.4 million. The Reserve Banks expect a 3.7 percent increase in transaction volume, reflecting growth of at least that amount in nationwide use of ACH transactions, however, which would offset somewhat the revenue effect from the lower fees. The Board believes that the Reserve Banks' volume and revenue projections are reasonable.

D. Fedwire Funds Transfer and National Settlement

Table 10 presents the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for the funds transfer and national settlement services.

TABLE 10.—FEDWIRE FUNDS AND NATIONAL SETTLEMENT SERVICE PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net income (ROE) [1–2]	4 Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	63.8	56.7	7.1	7.4	99.5%
2002 (Estimate)	56.0	53.0	3.0	5.5	95.9%
2003 (Budget)	51.9	44.5	7.4	5.4	104.1%

1. *2001 Performance*—The funds transfer and national settlement service recovered 99.5 percent of total costs in 2001, including imputed expenses and targeted ROE, below the targeted recovery rate of 101.2 percent. Expenses for 2001 were $1.6 million (2.5 percent) more than original budget projections, primarily because of higher-than-anticipated Federal Reserve Information Technology costs, while service revenue was only $0.6 million (1.0 percent) more than original budget projections.

2. *2002 Performance*—Through August 2002, the funds transfer and

national settlement services recovered 100.0 percent of total costs, including imputed expenses and targeted ROE. For full-year 2002, the Reserve Banks estimate that the funds transfer and national settlement services will recover 95.9 percent of total expenses, compared with a targeted recovery rate of 101.1 percent. The underrecovery is attributed to several factors, including lower pension credits, an unbudgeted FedLine for Web project, and a FedLine for Windows write-off. Funds transfer volume through August has decreased 0.5 percent relative to the same period in 2001. For the full year, the Reserve Banks estimate a 0.5 percent volume decrease, compared with a budgeted decline of 1.1 percent.

3. *2003 Fedwire Funds Transfer Pricing*—The Reserve Banks are maintaining the current thresholds for volume-based discounts but reducing the per-transfer fees for each threshold. Specifically, the Reserve Banks are lowering the transfer fee for the first volume tier (≤2,500 transfers per month) $0.01 from $0.31 to $0.30 (3.0 percent), lowering the transfer fee for the second volume tier (2,501–80,000 transfers per month) $0.02 from $0.22 to $0.20 (9.1 percent), and lowering the transfer fee for the third volume tier (>80,000 transfers per month) $0.05 from $0.15 to $0.10 (33.3 percent). The average (volume-weighted) per-transfer price would decline from its current level of $0.2009 to $0.1679 (16.4 percent). In addition, the Reserve Banks are retaining the off-line surcharge at its current level.

Reserve Banks project that the Fedwire funds transfer service will recover 104.1 percent of total costs in 2003, including imputed expenses and targeted ROE. Total costs are expected to decline $8.6 million (14.7 percent) from the 2002 estimate because of lower data communications charges and the full-year effect of savings from the consolidation of local on-line operations support.[13] Volume for 2003 is expected to remain flat compared with the 2002 estimate. The Reserve Banks project total funds transfer revenue to decline by $4.1 million (7.4 percent) in 2003 from the 2002 estimate primarily because of the effect of the 2003 price reductions, which is partially offset by increases in electronic connection revenue and NICB. The Board believes that the Reserve Banks' projections for 2003 funds transfer volume and revenue are reasonable.

4. *2003 National Settlement Service Pricing*—Continued consolidations among check clearinghouses in 2003 that use the national settlement service are expected to decrease transaction volume. The Reserve Banks expect this decrease to be offset by volume from new customers such as securities exchanges and card networks. On balance, the Reserve Banks are retaining the current national settlement service fees for 2003. In addition, the Reserve Banks will retain the monthly $60 minimum account maintenance fee per arrangement. The Reserve Banks expect settlement entry and file volumes to remain stable in 2003 compared with the 2002 estimate.

E. Fedwire Securities Service[14]

Table 11 presents the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for the Fedwire securities service.[15]

TABLE 11.—FEDWIRE SECURITIES SERVICE PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net income (ROE) [1–2]	4 Target ROE [1/(2+4)]	5 Recovery rate after target ROE
2001	19.7	19.5	0.2	2.3	90.2%
2002 (Estimate)	23.2	21.3	1.9	2.2	98.7%
2003 (Budget)	20.6	17.4	3.2	2.2	104.9%

1. *2001 Performance*—The Fedwire securities service recovered 90.2 percent of total costs in 2001, including imputed expenses and targeted ROE, below the target recovery rate of 95.6 percent. Total costs for 2001 were $0.9 million (4.4 percent) more than budgeted, and service revenue was approximately $0.3 million (1.4 percent) less than budgeted. The lower revenue was due to the delay in the scheduled addition of Ginnie Mae securities to the service caused by the events of September 11. Total securities transfer volume increased 18.8 percent from the 2000 level.

2. *2002 Performance*—Through August 2002, the Fedwire securities service recovered 98.7 percent of total costs, including imputed expenses and targeted ROE. For full-year 2002, the Reserve Banks estimate that the Fedwire securities service will also recover 98.7 percent of total costs, compared with a targeted recovery rate of 100.4 percent. The underrecovery is attributed to several factors, including unbudgeted costs associated with the postponed addition and testing of Ginnie Mae securities, the FedLine for the Web project, and a write-off associated with the FedLine for Windows project.

Through August 2002, total Fedwire securities transfer volume has increased 22.5 percent compared with volume during the same period in 2001. For the full year, the Reserve Banks estimate that total Fedwire securities volume will increase 25.4 percent from 2001, compared with a budgeted 21.0 percent increase. The increased volume is primarily due to the addition of Ginnie Mae securities to the Fedwire securities service earlier this year. Higher-than-anticipated mortgage refinancing activity has also contributed to the overall increase in volume.

3. *2003 Pricing*—The Reserve Banks are reducing the on-line transfer origination and receipt fee $0.26 from $0.66 to $0.40 (39.4 percent) and lowering the per-issue, per-account

[13] Specifically, the Reserve Banks consolidated on-line funds transfer operations to two sites and consolidated computer interface testing. The consolidation began in September 2001 and was completed in May 2002.

[14] Includes purchase and sale activity.

[15] The Reserve Banks provide securities transfer services for securities issued by the U.S. Treasury, federal government agencies, government-sponsored enterprises, and certain international institutions. The priced component of this service, reflected in this memorandum, consists of revenues, expenses, and volumes associated with the transfer of all non-Treasury securities. For Treasury securities, the U.S. Treasury assesses fees for the securities transfer component of the service. The Reserve Banks assess a fee for the funds settlement component of a Treasury securities transfer, this component is not treated as a priced service.

maintenance fee $0.01 from $0.41 to $0.40 (2.4 percent). The Reserve Banks are retaining the off-line surcharge and account maintenance fee at their current levels. In addition, the Reserve Banks implemented a new automated claim adjustment processing feature to support automated claim adjustments related to failed securities transactions, interim accounting for securities with an accrual date different than the record date, and repurchase agreement tracking.[16] Phased in during the past year, this new feature allows participants to add information to transfer messages that the Fedwire securities service can use to calculate cash payments owed to counterparties involved with related transfers. Only participants that use this functionality (currently fewer than 100) will be charged a fee. The Reserve Banks are establishing a $0.38 fee per automated claim adjustment entry.

With the consolidation of operational support for processing joint custody collateral, costs for this labor-intensive product can be clearly identified and explicitly recovered by a new surcharge. The Reserve Banks, therefore, are establishing a $22.00 surcharge per customer-initiated joint custody account withdrawal, effective July 2003.

After many years of declining volume, the business of executing orders for the purchase and sale of Fedwire-eligible securities by the Reserve Banks will be discontinued as of year-end 2002. Banking industry consolidation and the availability of discount brokerage services have reduced significantly the need for the Reserve Banks to continue this accommodation for customers. The purchase and sale activity represents less than 0.5 percent of the costs and revenues of the securities service line.

The Reserve Banks project that the Fedwire securities service will recover 104.9 percent of costs in 2003, including imputed expenses and targeted ROE. Total costs are expected to decline $3.9 million (16.5 percent) from the 2002 estimate, primarily due to lower data communication charges, and the full-year impact of savings from the consolidation of local on-line operations support.[17] The Board believes that the 2003 cost projections are reasonable.

The Reserve Banks project that the volume of agency securities transfers in 2003 will increase 4.3 percent from the 2002 estimate and total revenue will decrease 11.2 percent from the 2002 estimate. The volume increase is primarily due to the full-year effect of adding Ginnie Mae securities to the service.[18] The Board believes the 2003 securities volume and revenue projections are reasonable.

F. Noncash Collection Service

Table 12 lists the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for the noncash collection service.

TABLE 12.—NONCASH COLLECTION PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net Income (ROE) [1 – 2]	4 Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	2.0	1.6	0.4	0.2	111.9%
2002 (Estimate)	1.6	1.5	0.0	0.2	93.1%
2003 (Budget)	1.9	1.6	0.4	0.2	110.3%

1. *2001 Performance*—The noncash collection service recovered 111.9 percent of total expenses in 2001, including imputed expenses and targeted ROE, exceeding the targeted recovery rate of 102.5 percent. Volume for 2001 declined 20.7 percent from 2000 levels, compared with a budgeted decline of 20.9 percent, and revenue declined 16.8 percent from 2000 levels, compared with a budgeted decline of 17.7 percent. Total costs for 2001 decreased 19.5 percent over 2000 levels, compared with a 12.4 percent budgeted decline.

2. *2002 Performance*—Through August 2002, the noncash collection service recovered 105.5 percent of its costs. For full-year 2002, the Reserve Banks estimate that the noncash collection service will recover 93.1 percent of costs, including imputed expenses and targeted ROE, compared with the targeted recovery rate of 94.3 percent. This drop in the recovery rate for the year is primarily due to a 26.4 percent decrease in the average volume for the remaining four months of the year, compared with the first eight months of the year. The Board believes that full-year cost recovery will be higher than the Reserve Bank estimate.

3. *2003 Pricing*—As the number of outstanding physical municipal securities continues to decline, the volume of coupons and bonds presented for collection also declines. New issues of bearer municipal securities effectively ceased in 1983 when the Tax Equity and Fiscal Responsibility Act of 1982 removed tax advantages for investors. To simplify the pricing structure in a small and rapidly declining business, the Reserve Banks are eliminating the practice of charging variable cash letter and coupon envelope prices and establishing a single price regardless of deposit size. Specifically, the Reserve Banks are establishing a single fee per cash letter of $13.00 and a single fee per coupon envelope of $4.50. In addition, the Reserve Banks are implementing a $15.00 increase (75.0 percent), from $20 to $35, in the return-item fee and a $15 increase (38.0 percent), from $40 to $55, in the bond-collection fee. The Reserve Banks project that the noncash collection service will recover 110.3 percent of total costs, including imputed expenses and targeted ROE, in 2003. The Board believes that the Reserve Banks' projections are reasonable.

G. Special Cash Services

Special cash services represent a small portion (less than one tenth of one percent) of overall priced services provided by the Reserve Banks to

[16] The new feature is currently available only for mortgage-backed securities; functionally for Treasury securities and other agency debt may be incorporated later.

[17] Specifically, the Reserve Banks consolidated on-line securities operations to two sites, joint custody collateral processing to one site, and consolidated computer interface testing. The consolidation began in September 2001 and was completed in May 2002.

[18] Ginnie Mae securities were added to the Fedwire securities service in March 2002.

depository institutions. In 2002, special cash services included wrapped coin, nonstandard packaging of currency orders and deposits, and registered mail shipments of currency and coin. The two offices that offered registered mail shipments discontinued this service in 2002. The one office that currently offers wrapped coin will discontinue this service in 2003. In 2004, nonstandard packaging of currency will be the only remaining special cash service. Table 13 presents the actual 2001, estimated 2002, and projected 2003 cost-recovery performance for special cash services.

TABLE 13.—SPECIAL CASH PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	1 Revenue	2 Total expense	3 Net income (ROE) [1–2]	4 Target ROE	5 Recovery rate after target ROE [1/(2+4)]
2001	2.3	2.1	0.2	0.1	103.3%
2002 (estimate)	1.4	1.4	−0.1	0.1	91.1%
2003 (budget)	0.4	0.5	0.0	0.1	77.5%

1. *2001 Performance*—In 2001, special cash services recovered 103.3 percent of total expenses, including imputed expenses and targeted ROE, compared with a targeted recovery rate of 104.4 percent.

2. *2002 Performance*—Through August 2002, special cash services recovered 103.2 percent of total expenses, including imputed expenses and targeted ROE. For full-year 2002, the Reserve Banks estimate that recovery for special cash services will decline to 91.1 percent, compared with a targeted recovery rate of 103.8 percent. The estimated underrecovery is due primarily to the Kansas City and Helena offices discontinuing registered mail shipments of currency in 2002. Kansas City discontinued this service in August 2002 primarily because of rising insurance and postage rates. In response to these increasing costs, the office increased the surcharge for registered mail shipments, which resulted in a significant volume decline, though Kansas City will continue to incur support costs for the remainder of the year. Helena discontinued the registered mail service in October 2002 and will continue to incur support charges for the remainder of the year. In addition, coin-wrapping volume in Helena is down 23.0 percent from its 2002 budgeted volumes.

3. *2003 Pricing*—For 2003, the Reserve Banks project that special cash services will recover 77.5 percent of costs, including imputed expenses and targeted ROE. Relative to 2002 estimates, total costs are projected to decrease $0.9 million, or 60.0 percent, and revenue is expected to decrease $0.9 million, or 67.6 percent. Helena will discontinue the coin-wrapping service in 2003 and expects coin-wrapping volumes to decline significantly during the transition period, though it will continue to incur support costs through the end of 2003. The Board believes that the Reserve Banks' projections are reasonable.

II. Private-Sector Adjustment Factor

A. Background

Each year, as required by the Monetary Control Act of 1980, the Reserve Banks set fees for priced services provided to depository institutions. These fees are set to recover, over the long run, all direct and indirect costs and imputed costs, including financing costs, return on equity (profit), taxes, and certain other expenses that would have been incurred if a private business firm provided the services. These imputed costs are based on data developed in part from a model comprising consolidated financial data for the nation's fifty largest bank holding companies (BHCs).[19] The imputed costs and imputed profit are collectively referred to as the PSAF. In a comparable fashion, investment income is imputed and netted with related direct costs associated with clearing balances to estimate net income on clearing balances (NICB).

1. *Private Sector Adjustment Factor*—The method for calculating the financing and equity costs in the PSAF requires determining the appropriate levels of debt and equity to impute and then applying the applicable financing rates. This process requires developing a pro forma priced services balance sheet using actual Reserve Bank assets and liabilities associated with priced services and imputing the remaining elements that would exist if the Reserve Banks' priced services were provided by a private sector business firm.

The amount of the Reserve Banks' assets that will be used to provide priced services during the coming year is determined using Reserve Bank information on actual assets and projected disposals and acquisitions. The priced portion of mixed-use assets is determined based on the allocation of the related depreciation expense. The priced portion of actual Reserve Bank liabilities consists of balances held by Reserve Banks for clearing priced services transactions (clearing balances), estimated based on historical data, and other liabilities such as accounts payable and accrued expenses.

Long-term debt is imputed only when core clearing balances and long-term liabilities are not sufficient to fund long-term assets or if the interest rate risk sensitivity analysis indicates that estimated risk will exceed a change in cost recovery of more than two percentage points.[20, 21] Short-term debt is imputed only when clearing balances not used to finance long-term assets and short-term liabilities are not sufficient to fund short-term assets. Equity is imputed to meet the FDIC definition of a well-capitalized institution, which is currently 5 percent of total assets and 10 percent of risk-weighted assets.

a. *Financing Rates*—When needed to impute short-and long-term debt, the debt rates are derived based on these elements in the BHC model. Equity financing rates are based on the average

[19] The peer group of the fifty largest bank holding companies is selected based on total deposits.

[20] A portion of clearing balances is used as a funding source for priced services assets. Long-term assets are partially funded from an initial core amount of $4 billion clearing balances. Core clearing balances are considered the portion of the balances that has remained stable over time without regard to the magnitude of actual clearing balances.

[21] The PSAF methodology includes an analysis of interest rate risk sensitivity, which compares rate-sensitive assets with rate-sensitive liabilities and measures the effect on cost recovery of a change in interest rates of up to 200 basis points.

of the return on equity (ROE) results of three economic models using data from the BHC model.[22]

For simplicity, given that federal corporate tax rates are graduated, state tax rates vary, and various credits and deductions can apply, a specific tax rate is not calculated for Reserve Bank priced services. Instead, the use of a pre-tax ROE captures imputed taxes. The resulting ROE influences the dollar level of the PSAF and Federal Reserve price levels because this is the return a shareholder would expect in order to invest in a private business firm. The use of the pre-tax return on equity assumes 100 percent recovery of expenses, including the targeted return on equity. The recommended PSAF is, therefore, based on a matching of revenues and actual and imputed costs. Should the pre-tax earnings be greater or less than the targeted ROE, the PSAF is adjusted for the tax expense or savings associated with the adjusted recovery. The imputed tax rate is the median of the rates paid by the BHCs over the past five years adjusted to the extent that BHCs have invested in municipal bonds.

b. *Other Costs*—The PSAF also includes the estimated priced services-related expenses of the Board of Governors and imputed sales taxes based on Reserve Bank expenses. An assessment for FDIC insurance, when required, is imputed based on current FDIC rates and projected clearing balances held with the Federal Reserve.

2. *Net Income on Clearing Balances*—The NICB calculation is made each year along with the PSAF calculation and is based on the assumption that Reserve Banks invest clearing balances net of imputed reserve requirements and balances used to finance priced-services assets. Based on these net clearing balance levels, Reserve Banks impute an investment in three-month Treasury bills. The calculation also involves determining the priced services cost of earnings credits (amounts available to offset future service fees) on contracted clearing balances held, net of expired earnings credits, based on the federal funds rate. The rates and clearing balance levels used in the NICB estimate are based on the actual rates and balances from the six months before the calculation date. Because clearing balances are held for clearing priced services transactions, they are directly related to priced services. Therefore, the net earnings or expense attributed to the imputed Treasury-bill investments and the cost associated with holding clearing balances are considered net income for priced services activities.

B. Discussion

The increase in the 2003 PSAF is primarily due to a significant increase in clearing balances on which investments in marketable securities are imputed and the resulting increase in total assets. Because required imputed equity is based on five percent of total assets, priced services equity and cost of equity increased.

1. *Asset Base*—The total estimated cost of Federal Reserve assets to be used in providing priced services is reflected in table 14. Total assets have increased $3,664.3 million, or 30.9 percent. Growth of $3,416.9 million in imputed investments in marketable securities and $365.3 million in imputed reserve requirements, which are based on the level of clearing balances, explains the majority of this increase. These increases are offset by a decrease of $166.5 million in items in process of collection.

While assets financed through the PSAF such as premises, receivables, and prepaid expenses have decreased, most priced service assets, including the prepaid pension costs, furniture and equipment, and Board of Governors' assets have increased. Table 15 shows that the short-term assets funded with short-term payables and clearing balances total $103.8 million. This amount represents a decrease of $9.5 million, or 8.4 percent, from the short-term assets funded in 2002. Long-term assets funded with long-term liabilities, equity, and core clearing balances are projected to total $1,537.4 million. This amount represents an increase of $58.1 million, or 3.9 percent, from the long-term assets funded in 2002. Growth of $35.9 million in prepaid pension costs explains the majority of the increase, while increases in Reserve Bank leasehold improvements and long-term prepayments and furniture and equipment assets explain an additional $23.5 million. These increases are offset by a decrease of $1.3 million in Reserve Bank premises assets.

2. *Debt and Equity Costs and Taxes*—As previously mentioned, core clearing balances from the NICB calculation are available as a funding source for priced services assets. Table 15 shows that $503.9 million in clearing balances are used to fund priced services assets in 2003. The interest rate sensitivity analysis in table 16 indicates that potential T-bill and federal funds rate decreases of 200 basis points produce a decrease in cost recovery of 0.4 percentage points. The established threshold for change to cost recovery is two percentage points; therefore, interest rate risk associated with using these balances is within acceptable levels and no long-term debt is imputed.

Table 17 shows the imputed PSAF elements, the pre-tax return on equity, and other required PSAF recoveries approved for 2003 and 2002. The significant increase in clearing balances from which marketable security investments are imputed increases total assets. An increase in total assets, and the resulting increase in imputed equity, increases expenses associated with the return on equity. Although the pre-tax return on equity rate decreased from 22.1 percent for 2002 to 19.4 percent for 2003, with increased imputed equity, the pre-tax return on equity increased $19.6 million. As indicated previously, the pre-tax return on equity is calculated using the combined results of three models. The effective tax rate used in 2003 also increased to 30.4 percent from 29.3 percent in 2002.

3. *Capital Adequacy and FDIC Assessment*—As shown in table 18, the amount of equity imputed for the 2003 PSAF is $775.6 million, an increase of $183.3 million from imputed equity of $592.3 million in 2002. As noted above, equity is based on 5 percent of total assets, as required by the FDIC for a well-capitalized institution in its definition for purposes of assessing insurance premiums. In both 2003 and 2002, the capital to risk-weighted asset ratio and the capital to total assets ratio both exceed regulatory guidelines. As a result, no FDIC assessment is imputed for either year.

III. Analysis of Competitive Effect

All operational and legal changes considered by the Board that have a substantial effect on payments system participants are subject to the competitive impact analysis described in the March 1990 policy statement ''The Federal Reserve in the Payments System.'' [23] Under this policy, the Board assesses whether the proposed change would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services because of differing legal powers or constraints or because of a dominant market position of the Federal Reserve deriving from such legal differences. If the fees or fee

[22] The pre-tax return on equity (ROE) is determined using the results of the comparable accounting earnings model (CAE), the discounted cash-flow model (DCF), and the capital asset pricing model (CAPM). Within the CAPM and DCF models, the ROE is weighted based on market capitalization, and within the CAE model, the ROE calculation is equally weighted. The results of the three models are averaged to impute the PSAF pre-tax ROE.

[23] Federal Reserve Regulatory Service 7–145.2.

structures create such an effect, the Board must further evaluate the changes to assess whether their benefits—such as contributions to payment system efficiency, payment system integrity, or other Board objectives—can be retained while reducing the hindrances to competition.

The 2003 fees result in a projected ROE below the target established using a model that is based, in part, on the consolidated results over time of the largest fifty bank holding companies. To the extent that these bank holding companies expect a mature, declining business, such as check processing, to have the same return on equity as the organization as a whole, the Reserve Banks' underrecovery could have an adverse competitive effect. Given the current market environment, however, greater fee increases are not likely to materially improve the Reserve Banks' cost recovery and might even reduce the revenue that the Reserve Banks receive as depository institutions seek lower-cost alternatives. Overall, the Board believes that the proposed fees are reasonable.

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Table 14
Comparison of Pro Forma Balance Sheets
for Federal Reserve Priced Services
(millions of dollars – average for year)

	2003	2002
Short-term assets		
Imputed reserve requirement on clearing balances[24]	$ 1,043.8	$ 678.5
Imputed investment in marketable securities[24]	8,889.9	5,473.0
Receivables	77.4	81.7
Materials and supplies	3.0	3.8
Prepaid expenses	23.4	27.8
Items in process of collection[25]	3,936.3	4,102.8
Total short-term assets	13,973.8	10,367.6
Long-term assets		
Premises [26]	429.8	431.1
Furniture and equipment	188.3	177.7
Leasehold improvements and long-term prepayments	83.3	70.4
Prepaid pension costs	836.0	800.1
Total long-term assets	1,537.4	1,479.3
Total assets	$15,511.2	$11,846.9
Short-term liabilities[27]		
Clearing balances and balances arising from early credit of uncollected items	$10,508.5	$7,377.5
Deferred credit items[25]	3,865.4	3,509.8
Short-term payables	77.0	103.9
Total short-term liabilities	14,450.9	10,991.2
Long-term liabilities[27]		
Postemployment/retirement benefits	284.7	263.4
Total liabilities	14,735.6	11,254.6
Equity	775.6	592.3
Total liabilities and equity	$15,511.2	$11,846.9

[24] Funded with clearing balances.
[25] Represents float costs that are directly estimated at the service level.
[26] Includes allocations of Board of Governors' assets to priced services of $1.5 million for 2003 and $1.1 million for 2002.
[27] No debt is imputed because clearing balances are used as an available funding source.

Table 15
Portion of Clearing Balances used
to Fund Priced Services Assets
(millions of dollars)

	2003		2002	
A. Short-term asset financing				
Short-term assets to be financed:				
Receivables	$ 77.4		$ 81.7	
Materials and supplies	3.0		3.8	
Prepaid expenses	23.4		27.8	
Total short-term assets to be financed	$103.8		$113.3	
Short-term funding sources:				
Short-term payables	77.0		103.9	
Portion of short-term assets funded with clearing balances[28]		$26.8		$ 9.4
B. Long-term asset financing				
Long-term assets to be financed:				
Premises	$429.8		$431.1	
Furniture and equipment	188.3		177.7	
Leasehold improvements and long-term prepayments	83.3		70.4	
Prepaid pension costs	836.0		800.1	
Total long-term assets to be financed	$1,537.4		$1,479.3	
Long-term funding sources:				
Postemployment/retirement benefits	284.7		263.4	
Imputed equity[29]	775.6		592.3	
Total long-term funding sources	1,060.3		855.7	
Portion of long-term assets funded with core clearing balances[28]		$477.1		$623.6
C. Total clearing balances used for funding priced-services assets		$503.9		$633.0

[28] Clearing balances shown on table 14 are available for financing priced-services assets. Using these balances reduces the amount available for investment in Treasury bills for the net income on clearing balances calculation. Long-term assets are financed with core clearing balances; a total of $4 billion in balances is available for this purpose. Short-term assets are financed with clearing balances not used to finance long-term assets. No short- or long-term debt is imputed.

[29] See table 17 for calculation of required imputed equity amount.

Table 16
2003 Interest Rate Sensitivity Analysis
(millions of dollars)

	Rate Sensitive	Rate Insensitive	Total
Assets			
Imputed reserve requirement on clearing balances		$1,043.8	$1,043.8
Imputed investment in marketable securities	$8,889.9		$8,889.9
Receivables		77.4	77.4
Materials and supplies		3.0	3.0
Prepaid expenses		23.4	23.4
Items in process of collection[30]	70.9	3,865.4	3,936.3
Long-term assets		1,537.4	1,537.4
Total assets	$8,960.8	$6,550.4	$15,511.2
Liabilities			
Clearing balances and balances arising from early credit of uncollected items[31]	$8,699.8	$1,808.7	$10,508.5
Deferred credit items		3,865.4	3,865.4
Short-term payables		77.0	77.0
Long-term liabilities		284.7	284.7
Total liabilities	$8,699.8	$6,035.8	$14,735.6

[30] The amount designated rate sensitive represents the amount of cash items in process of collection that are invested in three-month Treasury bills.
[31] The amount designated rate insensitive represents clearing balances on which earnings credits are not paid.

Table 16
2003 Interest Rate Sensitivity Analysis
(millions of dollars)
(Continued)

Rate change results		200 basis point decrease in both rates
Asset yield ($8,960.8 x -.02)		$(179.2)
Liability cost ($8,699.8 x -.02)		(174.0)
Effect of 200 basis point decrease		$ (5.2)
2003 budgeted revenue	933.7	
Effect of decrease	(5.2)	
Revenue adjusted for effect of interest rate decrease	$928.5	
2003 budgeted total expenses	883.9	
2003 budgeted target ROE	104.7	
Tax effect of interest rate decrease ($-5.2 x 30.4%)	(1.6)	
Total recovery amounts	$987.0	
Recovery rate before interest rate decrease	94.4%	
Recovery rate after interest rate decrease	94.0%	
Effect of interest rate decrease on cost recovery[32]	- 0.4%	

[32] Effect of a potential change in rates is less than a 2 percentage point change in cost recovery, therefore, no long-term debt is imputed for 2003.

Table 17
Derivation of the 2003 and 2002 PSAF
(millions of dollars)

		2003			2002	
A. Imputed elements						
Short-term debt[33]		$ 0.0			$ 0.0	
Long-term debt[34]		$ 0.0			$ 0.0	
Equity						
Total assets from table 14	$15,511.2			$11,846.99		
Required capital ratio[35]	5%			5%		
Total equity		$775.6			$592.3	
B. Cost of Capital						
1. Financing rates/costs						
Short-term debt		N/A			N/A	
Long-term debt		N/A			N/A	
Pre-tax return on equity[36]		19.4%			22.1%	
2. Elements of capital costs						
Short-term debt			$ 0.0			$ 0.0
Long-term debt			0.0			0.0
Equity	$775.6 x	19.4% =	150.5	$592.3 x	22.1% =	130.9
			$150.5			$130.9
C. Other required PSAF recoveries						
Sales taxes		$14.8			$14.1	
Federal Deposit Insurance assessment		0.0			0.0	
Board of Governors expenses		6.4			5.1	
			21.2			19.2
D. Total PSAF recoveries			$171.7			$150.1
As a percent of assets		1.1%				1.3%
As a percent of expenses[37]		22.4%				19.0%
E. Tax rates		30.4%				29.3%

[33] No short-term debt is imputed because clearing balances are used as a funding source for those assets that are not financed with short-term payables.
[34] No long-term debt is imputed because clearing balances are used as a funding source.
[35] Based on the Federal Deposit Insurance Corporation's definition of a well-capitalized institution for purposes of assessing insurance premiums.
[36] One component of the pre-tax return on equity is based on the average after-tax rate of return on equity, adjusted by the effective tax rate to yield the pre-tax rate of return on equity for each bank holding company for each year. These data are then averaged over five years to yield the pre-tax return on equity for use in the PSAF. The final pre-tax rate of return on equity is determined averaging the result from this component (22.9%), along with results from a capital asset pricing model (13.8%), and a discounted cash flow model (21.6%).
[37] System 2003 budgeted priced services expenses less shipping are $765.2 million.

Table 18
Computation of 2003 Capital Adequacy
for Federal Reserve Priced Services
(millions of dollars)

	Assets	Risk Weight	Weighted assets
Imputed reserve requirement on clearing balances	$1,043.8	0.0	$0.0
Imputed investment in marketable securities	8,889.9	0.0	0.0
Receivables	77.4	0.2	15.5
Materials and supplies	3.0	1.0	3.0
Prepaid expenses	23.4	1.0	23.4
Items in process of collection	3,936.3	0.2	787.3
Premises	429.8	1.0	429.8
Furniture and equipment	188.3	1.0	188.3
Leases, leasehold improvements & long-term prepayments	83.3	1.0	83.3
Prepaid pension costs	836.0	1.0	836.0
Total	$15,511.2		$2,366.6

Imputed equity for 2003	$775.6
Capital to risk-weighted assets	32.8%
Capital to total assets	5.0%

Automated Clearing House Fee Schedule

	Fee
Origination (per item or record):[38]	
Items in small files	**$0.0030**
Items in large files	$0.0025
Addenda record	$0.0010
Input file-processing fee (per file):	$5.00
Receipt (per item or record):[39]	
Item	**$0.0025**
Addenda record	$0.0010
Monthly fee (per routing number):	
Account servicing fee[40]	$25.00
FedACH settlement[41]	$20.00
Information extract file	$10.00
Voice response return item/notification of change (NOC) fee:[42]	$2.00
Nonelectronic input/output fee:[43]	
Tape input/output	$25.00
Paper output	$15.00
Facsimile return/NOC[44]	$15.00
Cross-border fee:	
Cross-border item surcharge[45]	$0.039
Same-day recall of item at receiving gateway operator	$3.50
Same-day recall of item not at receiving gateway operator	$5.00
Item trace	$5.00
Microfiche	$3.00

Note: Bold indicates change from 2002 prices.

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[38] Small files contain fewer than 2,500 items and large files contain 2,500 or more items. These origination fees do not apply to items that the Reserve Banks receive from other operators.

[39] These receipt fees do not apply to items that the Reserve Banks send to other operators.

[40] The account-servicing fee applies only to routing numbers that have received or originated transactions that are processed by the Reserve Banks. Institutions that receive only U.S. government transactions or that elect to use another operator exclusively are not assessed the account-servicing fee.

[41] The fee for FedACH settlement is applied to any routing number with activity during a month. This fee does not apply to routing numbers that use the Reserve Banks for government transactions only.

[42] The fee includes the transaction fee in addition to the voice-response fee. The Reserve Banks also assess a $15 fee for every government paper return/NOC they process. This service is not considered a priced service. The fee includes the transaction fee in addition to the conversion fee.

[43] These services are offered in contingency situations only.

[44] The fee includes the transaction fee in addition to the conversion fee.

[45] The cross-border item surcharge is assessed in addition to the standard item, addenda, and file-processing fees.

Fedwire Funds Transfer and National Settlement Service Fee Schedule

	Fee
Fedwire funds transfer service:	
Basic volume-based transfer fee (originations and receipts)	
Per transfer for the first 2,500 transfers per month	**$0.30**
Per transfer for additional transfers up to 80,000 per month	**$0.20**
Per transfer for every transfer over 80,000 per month	**$0.10**
Surcharge	
Off-line transfer originated	$15.00
National Settlement Service:	
Basic	
Settlement entry fee	$0.80
Settlement file fee	$14.00
Surcharge	
Off-line surcharge	$25.00
Minimum monthly charge (account maintenance)[46]	$60.00
Special settlement arrangements[47]	
Fee per day	$100.00

Note: Bold indicates change from 2002 prices.

[46] This minimum monthly charge will only be assessed if total settlement charges during a calendar month are less than $60. The fee will be reduced by the total amount of any per entry and per settlement charges incurred during the month.

[47] Special settlement arrangements use Fedwire funds transfers to effect settlement. Participants in arrangements and settlement agents are also charged the applicable Fedwire funds transfer fee for each transfer into and out of the settlement account.

Fedwire Securities Service Fee Schedule (Agency Securities)

	Fee
Basic transfer fee	
Transfer or reversal originated or received	**$0.40**
Surcharge	
Off-line transfer or reversal originated or received	$25.00
Monthly maintenance fees	
Account maintenance (per account)	$15.00
Issues maintained (per issue/per account)	**$0.40**
Claims adjustment fee:	**$0.38**
Joint custody fee:[48]	**$22.00**

Note: Bold indicates change from 2002 prices.

[48] Price implementation for joint custody will begin July 1, 2003.

Noncash Collection Fee Schedule

Coupon collection:	Fee
Cash letters fee	**$13.00**
Coupon envelopes	**$4.50**
Return items	**$35.00**
Bond collection (per bond):[49]	**$55.00**

Note: Bold indicates change from 2002 prices.

[49] Plus actual shipping costs.

Special Cash Services Fee Schedule

	Fee
Wrapped coin (per box)[50]	
Helena	$4.00
Nonstandard packaging	
Seventh District offices	
(per currency order or deposit)[51]	$12.00
Registered mail fees	
Helena	Discontinued October 2002
Tenth District offices	Discontinued August 2002

Note: Bold indicates change from 2002 prices.

[50] There are fifty rolls of coin in each box.

[51] This service only applies to the $1 through $20 denominations.

Electronic Connection Fee Schedule

There are three types of electronic connections by which depository institutions access the Reserve Banks' priced services: FedLine for DOS, FedLine for the Web, and computer interface (mainframe to mainframe). The Reserve Banks allocate their costs and revenues associated with these electronic connections to the various priced services. In 2003, the Reserve Banks recommend retaining connection fees at current levels and adding three new fees associated with the rollout of FedLine for the Web: a one-time setup fee of $50, a monthly institution-level fee of $25, and a monthly per-subscriber fee of $10. (Bold indicates change from 2002 prices.)

Dial – receive and send, FedLine for DOS (monthly)	$75.00
FedLine® for the Web:	
Setup fee (one time)	**$50.00**
Institution-level fee (monthly)	**$25.00**
Basic subscriber fee (monthly)	**$10.00**
Frame relay network (monthly):	
Frame Relay-FedLine @ up to 19.2 kbps	$500.00
Frame Relay-Computer Interface (CI) @ 56 kbps	$1,000.00
Frame Relay-CI @ 256 kbps	$2,000.00
Frame Relay-CI T1	$2,500.00

Test and contingency options:

CONNECTION TYPE	FULL CIRCUIT BACKUP[a]	FRAME CONNECTION ONLY[b]	REDUNDANT COMPONENT SET[c]
FedLine @ up to 19.2 kbps only	$500	$420	N/A
FedLine @ up to 19.2 kbps Spare Part Set	N/A	N/A	$155
CI @ 56 kbps	$845	$765	N/A
CI @ 256 kbps	$1,750	$1,585	N/A
CI T1	$2,230	$2,010	N/A

a) Applies to production and test systems, or production and contingency systems, that are located at separate facilities, including another bank office or a third-party contingency site. This option replicates full production technology and costs; only one set of equipment components is provided. Prices shown are for full-circuit backup only located at the customer site. Multiple customers sharing a single disaster-recovery connection at a third-party provider require custom implementations.

b) Applies to production and test systems, or production and contingency systems, that are located at separate facilities. The institution uses a frame relay link connection with no ISDN dial-up backup. Only one set of equipment components is provided. Prices shown are for frame connection only located at the customer site. Multiple customers sharing a single disaster recovery connection at a third-party provider require custom implementations.

c) Includes a Cisco router, a digital service unit, and a link encryptor.

By order of the Board of Governors of the Federal Reserve System, October 31, 2002.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 02–28116 Filed 11–6–02; 8:45 am]

<FNP>

GENERAL SERVICES ADMINISTRATION

Governmentwide Per Diem Advisory Board

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Governmentwide Per Diem Advisory Board will hold an open meeting from 2:00 p.m. to 4:00 p.m. on Thursday, November 14, 2002. The meeting will be held at The Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202. This meeting is open to the public. Members of the public who wish to file a written statement with the Board may do so in writing c/o Rob Miller, Designated Federal Officer (MTT), General Services Administration, 1800 F St., NW, Room G–219, Washington, DC 20405, or via e-mail at *robl.miller@gsa.gov*. Due to critical mission and schedule requirements, there is insufficient time to provide the full 15 calendar days' notice in the **Federal Register** prior to this meeting, pursuant to the final rule on Federal Advisory Committee management codified at 41 CFR 102–3.150.

Purpose: To review the current process and methodology that is used by GSA's Office of Governmentwide Policy to determine the per diem rates for destinations within the continental United States (CONUS). The Board will receive recommendations for improvements to the current process and methodology used to establish the federal per diem rates within CONUS, and receive best practice recommendations for developing a Governmentwide lodging program.

For security and building access: (1) ADA accessible facility; (2) Public seating may be limited.

FOR FURTHER INFORMATION CONTACT: Rob Miller, Designated Federal Officer, on (202) 501–4621, or Joddy Garner on (202) 501–4857, Per Diem Program Manager, General Services Administration. Also, inquiries may be sent to *robl.miller@gsa.gov.*

Dated: November 4, 2002.

Becky Rhodes,

Deputy Associate Administrator, Office of Transportation and Personal Property.

[FR Doc. 02–28510 Filed 11–6–02; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS).

Time and Date: November 19, 2002—9 a.m.–6 p.m. November 20, 2002—9 a.m.–4 p.m.

Place: Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 705A, Washington, DC 20201.

Status: Open.

Purpose: At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the first day the full Committee will hear updates and status reports from the Department on several topics including the implementation of the administrative simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). There will also be a discussion of the Committee's proposed recommendations to the Department on privacy and code sets for medical records. There will be Subcommittee breakout sessions late in the afternoon of the first day and prior to the full Committee meeting on the second day. Agendas for these breakout sessions may be found on the NCVHS website (URL below). On the second day the Committee will hear presentations on data issues on minority health and population-based health. Each of the NCVHS Subcommittees will report on their breakout sessions and other activities. Finally, the agendas for future NCVHS meetings will be discussed.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, Room 1100, Presidential Building, 6525 Belcrest Road, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/,* where further information including an agenda will be posted when available.

Dated: October 29, 2002.

James Scanlon,

Acting Director, Office of Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 02–28293 Filed 11–6–02; 8:45 am]

BILLING CODE 4151–05–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Statement of Organization, Functions, and Delegations of Authority

Part T (Agency for Toxic Substances and Diseases Registry) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (50 FR 25129–25130, dated June 17, 1985, as amended most recently at 62 FR 1119–1120, dated January 8, 1997) is amended to abolish the Office of Federal Programs, Office of the Assistant Administrator, Agency for Toxic Substances and Disease Registry.

Section T–B, Organization and Functions, is hereby amended as follows:

Delete the title and functional statement for the *Office of Federal Program (TBB)* in their entirety.

Dated: October 29, 2002.

Julie Louise Gerberding,

Administrator.

[FR Doc. 02–28320 Filed 11–6–02; 8:45 am]

BILLING CODE 4160–70–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 01P–0350]

Determination That Sodium Tetradecyl Sulfate Injection Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that sodium tetradecyl sulfate injection (Sotradecol) was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new

drug applications (ANDAs) for sodium tetradecyl sulfate injection.

FOR FURTHER INFORMATION CONTACT: J. Kenneth Borgerding, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA sponsors must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved under a new drug application (NDA). Sponsors of ANDAs do not have to repeat the extensive clinical testing otherwise necessary to gain approval of an NDA. The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products with Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, drugs are withdrawn from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162). Regulations also provide that the agency must make a determination as to whether a listed drug was withdrawn from sale for reasons of safety or effectiveness, before an ANDA that refers to that listed drug may be approved (21 CFR 314.161(a)(1)). FDA may not approve an ANDA that does not refer to a listed drug.

Sodium tetradecyl sulfate injection is the subject of NDA 5–970. On August 13, 1946, Elkins Sinn received approval to market sodium tetradecyl sulfate injection. During 2000, Elkins Sinn discontinued manufacture of this product.

On August 13, 2001, Bennett and Company submitted a citizen petition (Docket No. 01P–0350/CP1) under § 10.30 (21 CFR 10.30) to FDA requesting that the agency determine whether sodium tetradecyl sulfate injection was withdrawn from sale for reasons of safety or effectiveness. In addition, on December 6, 2001, Omega Laboratories, Ltd., submitted a citizen petition (Docket No. 01P–0350/CP2) under § 10.30 to FDA making the same request. FDA has reviewed its records and has found no information to indicate that sodium tetradecyl sulfate injection was withdrawn from the market for safety or efficacy reasons. Therefore, FDA concludes that the decision to not manufacture and market the product was not due to safety or efficacy concerns. Accordingly, the agency will maintain sodium tetradecyl sulfate injection in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to sodium tetradecyl sulfate injection may be approved by the agency.

Dated: October 28, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–28400 Filed 11–6–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 02D–0439]

Medical Devices; Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System; Guidance for Industry and FDA; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System; Guidance for Industry and FDA.'' This document describes a means by which transcutaneous air conduction hearing aid systems (TACHAS) may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying TACHAS into class II (special controls).

DATES: Submit written or electronic comments on this guidance by February 5, 2003.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System; Guidance for Industry and FDA'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments should be identified with the docket number found in brackets in the heading of this document. Submit electronic comments to http://www.fda.gov/dockets/ecomments.

FOR FURTHER INFORMATION CONTACT: Eric M. Mann, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2080.

SUPPLEMENTARY INFORMATION:

I. Background

The TACHAS is intended to compensate for impaired hearing without occluding the ear canal. It consists of an air conduction hearing aid attached to a surgically fitted tube system, which is placed through the soft tissues between the post auricular region and the outer ear canal. This special control guidance document lists the risks to health identified by FDA and describes measures that, if followed by manufacturers and combined with the general controls, will generally address the risks associated with these devices.

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying TACHAS into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for the TACHAS device. Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may,

within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices (GGPs) regulation (§ 10.115). The guidance represents the agency's current thinking on TACHAS. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations. This guidance document is issued as a level 1 guidance consistent with GGPs.

III. Electronic Access

In order to receive the ''Class II Special Controls Guidance Document: Transcutaneous Air Conduction Hearing Aid System; Guidance for Industry and FDA'' via your fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt press 1 to order a document. Enter the document number (1414) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

You may obtain a copy of the guidance from the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that you may download to a personal computer. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. You may access the CDRH home page at http://www.fda.gov/cdrh. You may search for all CDRH guidance documents at http://www.fda.gov/cdrh/guidance.html. Guidance documents are also available on the Dockets Management Branch Internet site at http://www.fda.gov/ohrms/dockets.

IV. Comments

Interested persons may submit to Dockets Management Branch (see **ADDRESSES**) written comments regarding this immediately in effect guidance by (see **DATES**). Two copies of any comments are to be submitted, except that individuals may submit one copy. Identify comments with the docket number found in brackets in the heading of this document. The guidance document and comments received may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 28, 2002.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 02–28399 Filed 11–6–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4734–N–66]

Notice of Submission of Proposed Information Collection to OMB: Requirements for Notification of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* December 9, 2002.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2539–0009) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–2974; E-mail *Lauren_Wittenberg@omb.cop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice Also Lists the Following Information

Title of Proposal: Requirements for Notification of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance.

OMB Approval Number: 2539–0009.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: Requirements to provide a pamphlet on lead poisoning prevention to tenants and purchasers, provision of a notice to occupants on the results of hazard evaluation and hazard reduction actions, and special reporting requirements if there is a child with an environmental intervention blood lead level residing in the unit, and record keeping requirements.

Respondents: Not-for-profit institutions, Business or other for-profit, State, Local or Tribal Governments.

Frequency of Submission: On occasion.

Reporting Burden:

Number of respondents	Annual responses	×	Hours per response	=	Burden hours
80,637	2,355,621		0.1		253,742

Total Estimated Burden Hours: 253,742.

Status: Extension of a currently approved collection.

Authority: Sec. 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 31, 2002.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 02–28289 Filed 11–6–02; 8:45 am]

BILLING CODE 4210–72–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4734–N–65]

Notice of Submission of Proposed Information Collection to OMB: Application Submission Requirements—Section 202 Supportive Housing for the Elderly

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* December 9, 2002.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2502–0267) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; E-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice also lists the following information:

Title of Proposal: Application Submission Requirements—Section 202 Supportive Housing for the Elderly.

OMB Approval Number: 2502–0267.

Form Numbers: HUD–92015–CA, HUD 92041, (SF424, SFLLL *et.al.*

Description of the Need for the Information and its Proposed Use: To apply for capital advances for HUD's Section 202 Program, prospective private nonprofit organizations submit completed Section 202 Supportive Housing for the Elderly Application Kits.

Respondents: Not-for profit institutions.

Frequency of Submission: On occasion.

Reporting Burden:

Number of respondents	Annual responses	×	Hours per response	=	Burden hours
400	1		40.4		16,164

Total Estimated Burden Hours: 16,164.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 31, 2002.

Wayne Eddins,

Departmental Reports Management Officer, Officer of the Chief Information Officer.

[FR Doc. 02–28290 Filed 11–6–02; 8:45 am]

BILLING CODE 4210–72

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4768–C–04]

Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2002; Notice of Technical Corrections

AGENCY: Office of Public and Indian Housing, HUD.

ACTION: Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants, Notice of Technical Corrections.

SUMMARY: This notice makes two technical corrections to HUD's Fiscal Year (FY) 2002 Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants.

DATES: Application Due Date. Revitalization grant applications are due

to HUD Headquarters on or before 5:15 p.m., Eastern Time, on December 6, 2002.

FOR FURTHER INFORMATION CONTACT: Milan Ozdinec, Deputy Assistant Secretary for Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4130, Washington, DC 20410; telephone (202) 401–8812; fax (202) 401–2370 (these are not toll free numbers). Persons with hearing-or speech-impairments may call via TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On July 31, 2002 (67 FR 49766), HUD published its Fiscal Year (FY) 2002 Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants (HOPE VI NOFA), which announced the availability of approximately $492.5 million in FY 2002 funds for the HOPE VI Revitalization Program. The July 31, 2002, HOPE VI NOFA provided an application due date of November 29, 2002. Because November 29, 2002, falls on the Friday after Thanksgiving, HUD extended the application due date under the July 31, 2002, HOPE VI NOFA for one week to Friday, December 6, 2002, in a notice published on September 27, 2002 (67 FR 61150). Additionally, in a notice published on October 23, 2002 (67 FR 65139), HUD announced a number of additional technical corrections. This notice makes two additional technical corrections to the July 31, 2002 HOPE VI NOFA.

In Section XIV(B)(4), HUD will reduce the time requirement by the length of the application deadline extension (7 days), meaning that an option must extend for least 173 days after the application deadline of December 6, 2002.

In Section XVI(A)(3) a new paragraph (e) will be added because the page limit of 150 pages of attachments stated under Section XVI(A)(2((b) does not apply to the NOFA criteria under Section XIV(B)(4) and Section XIV(B)(5)(a). Accordingly, documentation provided for attachments 27 and 28, as described in the 2002 HOPE VI Revitalization Application Kit, will not be counted.

Accordingly, FR Doc. 02–19276, the Fiscal Year (FY) 2002 Notice of Funding Availability for Revitalization of Severely Distressed Public Housing, HOPE VI Revitalization Grants, published in the **Federal Register** on July 31, 2002 (67 FR 49766) is corrected as follows:

1. On page 49783, Section XIV(B)(4) in column 3, remove the number ''180'' and insert in its place the number ''173''.

2. On page 49785, Section XVI(A)(3), add paragraph (e) to read as follows:

(e) Documentation for NOFA criteria under Section XIV(B)(4) and Section XIV(B)(5)(a) (Mixed Income Communities).

Dated: November 5, 2002.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 02–28480 Filed 11–5–02; 1:56 pm]

BILLING CODE 4210–33–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Exxon Valdez Oil Spill Trustee Council; Renewal of the Public Advisory Committee Charter

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice.

SUMMARY: This notice is published in accordance with 41 CFR part 102–3, subpart B, How Are Advisory Committees Established, Renewed, Reestablished, and Terminated. Following the recommendation and approval of the *Exxon Valdez* Oil Spill Trustee Council, the Secretary of the Interior hereby renews the *Exxon Valdez* Oil Spill Public Advisory Committee Charter to continue for approximately 2 years, to September 30, 2004.

FOR FURTHER INFORMATION CONTACT: Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 ''C'' Street, Room 119, Anchorage, Alaska, (907) 271–5011.

SUPPLEMENTARY INFORMATION: On March 24, 1989, the T/V *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound in Alaska spilling approximately 11 million gallons of North Slope crude oil. Oil moved into the Gulf of Alaska, along the Kenai coast to Kodiak Island and the Alaska Peninsula—some 600 miles from Bligh Reef. Massive clean-up and containment efforts were initiated and continued to 1992. On October 8, 1991, an agreement was approved by the United States District Court for the District of Alaska that settled claims of the United States and the State of Alaska against the Exxon Corporation and the Exxon Shipping Company for various criminal and civil violations. Under the civil settlement, Exxon agreed to pay to the governments $900 million over a period of 10 years. An additional 5-year period was established to possibly make additional claims.

The *Exxon Valdez* Oil Spill Trustee Council was established to manage the funds obtained from the civil settlement of the *Exxon Valdez* Oil Spill. The Trustee Council is composed of three State of Alaska trustees (Attorney General; Commissioner, Department of Environmental Conservation; and Commissioner, Department of Fish and Game) and three Federal representatives appointed by the Federal Trustees (Secretary, U.S. Department of Agriculture; the Administrator of the National Oceanic and Atmospheric Administration; and the Secretary, U.S. Department of the Interior).

The Public Advisory Committee was created pursuant to Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991 and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska*, Civil Action No. A91–081 CV. The Public Advisory Committee was originally chartered as the Pubic Advisory Group by the Secretary of the Interior on October 23, 1992, and functions solely as an advisory body, and in compliance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. app.).

The Public Advisory Committee was established to advise the Trustee Council, and began functioning in October 1992. The Public Advisory Committee consists of 20 members representing the following principal interests: Sport hunting and fishing, conservation and environmental, public-at-large, recreation users, commercial tourism, local government, science/technical, subsistence, commercial fishing, aquaculture and mariculture, marine transportation, regional monitoring programs, tribal government, and Native landowners. Members are appointed to serve a 2-year term.

To carry out its advisory role, the Public Advisory Committee makes recommendations to, and advises, the Trustee Council in Alaska on the following matters:

All decisions related to injury assessment, restoration activities, or other use of natural resource damage recovery monies obtained by the governments, including all decisions regarding:

a. Planning, evaluation and allocation of available funds;

b. Planning, evaluation and conduct of injury assessment and restoration activities;

c. Planning, evaluation and conduct of long-term monitoring and research activities; and

d. Coordination of a, b, and c.

Trustee Council intentions regarding the importance of obtaining a diversity of viewpoints is stated in the *Public Advisory Committee Background and Guidelines:* ''The Trustee Council intends that the Public Advisory Committee be established as an important component of the Council's public involvement process.'' The Council continues, stating their desire that ''* * * a wide spectrum of views and interest are available for the Council to consider as it evaluates, develops, and implements restoration activities. It is the

Certification

I hereby certify that the renewal of the Charter of the Public Advisory Committee, an advisory committee to make recommendations to and advise the *Exxon Valdez* Oil Spill Trustee Council in Alaska, is necessary and in the public interest in connection with the performance of duties mandated by the settlement of *United States* v. *State of Alaska,* No. A91–081 CV, and is in accordance with the comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended and supplemented.

Dated: August 20, 2002.

Gale A. Norton,

Secretary of the Interior.

[FR Doc. 02–28357 Filed 11–6–02; 8:45 am]

BILLING CODE 4310–RG–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Endangered Species Recovery Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications.

SUMMARY: The following applicants have applied for a scientific research permit to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). We, the U.S. Fish and Wildlife Service, solicit review and comment from local, State, and Federal agencies, and the public on the following permit requests.

DATES: Comments on these permit applications must be received on or before December 9, 2002, to receive consideration by us.

ADDRESSES: Written data or comments should be submitted to the Chief, Endangered Species, Ecological Services, U.S. Fish and Wildlife Service, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (fax: 503–231–6243). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 20 days of the date of publication of this notice to the address above (telephone: 503–231–2063). Please refer to the respective permit number for each application when requesting copies of documents.

SUPPLEMENTARY INFORMATION:

Permit No. TE–797234

Applicant: LSA Associates, Inc., Point Richmond, California.

The permittee requests an amendment to take (harass by survey, capture, handle, collect tail tissue, collect voucher specimens, and release) the Sonoma distinct population segment (DPS) of the California tiger salamander (*Ambystoma californiense*) in conjunction with demographic research in Sonoma County, California for the purpose of enhancing its survival.

Permit No. TE–027296

Applicant: Michael Fawcett, Bodega, California.

The permittee requests an amendment to take (harass by survey, capture, handle, collect tail tissue, collect voucher specimens, release, and recapture) the Sonoma distinct population segment (DPS) of the California tiger salamander (*Ambystoma californiense*) in conjunction with demographic research in Sonoma County, California for the purpose of enhancing its survival.

Permit No. TE–825572

Applicant: Jeff Dreier, San Rafael, California.

The permittee requests an amendment to take (harass by survey, capture, handle, and release) the Sonoma distinct population segment (DPS) of the California tiger salamander (*Ambystoma californiense*) in conjunction with demographic research in Sonoma County, California for the purpose of enhancing its survival.

Permit No. TE–032713

Applicant: California Department of Transportation, Fresno, California.

The applicant requests a permit to take (capture) the Fresno kangaroo rat (*Dipodomys nitratoides exilis*) and the Buena Vista Lake shrew (*Sorex ornatus relictus*) in conjunction with surveys throughout the species range in California for the purpose of enhancing their survival.

Permit No. TE–063230

Applicant: Jim Rocks, San Diego, California.

The applicant requests a permit to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with demographic research in San Diego, Riverside, Orange, and Imperial Counties, California, for the purpose of enhancing its survival.

Permit No. TE–062391

Applicant: Shauna A. McDonald, Riverside, California.

The applicant requests a permit to take (capture, mark) the Stephens' kangaroo rat (Dipodomys stephensi) in conjunction with surveys and demographic studies throughout the species range in California for the purpose of enhancing its survival.

Permit No. TE–802089

Applicant: Patricia Tatarian, Petaluma, California.

The permittee requests an amendment to take (harass by survey, capture, handle, tag, mark, release, and recapture) the Sonoma distinct population segment (DPS) of the California tiger salamander (*Ambystoma californiense*) in conjunction with demographic research in Sonoma County, California for the purpose of enhancing its survival.

Permit No. TE–063608

Applicant: Brian Lohstroh, San Diego, California.

The applicant requests a permit to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with demographic research in San Diego, Riverside, Orange, and Imperial Counties, California, for the purpose of enhancing its survival.

Permit No. TE–063427

Applicant: Sarah Powell, Carmichael, California.

The applicant requests a permit to take (harass by survey) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), the vernal pool fairy shrimp (*Branchinecta lynchi*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–063429

Applicant: California Department of Water Resources, Fresno, California.

The applicant requests a permit to take (capture, mark, and release) the Fresno kangaroo rat (*Dipodomys nitratoides exilis*), the giant kangaroo rat (*Dipodomys ingens*), the Tipton's kangaroo rat (*Dipodomys nitratoides nitratoides*), and the Buena Vista Lake shrew (*Sorex ornatus relictus*) in conjunction with surveys in Fresno, Kern, Kings, Madera, Merced, Monterey, San Benito, San Luis, Stanislaus, and Tulare Counties, California, for the purpose of enhancing their survival.

Dated: October 24, 2002.

Rowan W. Gould,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. 02–28321 Filed 11–6–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–020–03–7122–DS–64GG]

New Mexico; Notice of Agency and Public Scoping Meetings for the Amendment to the Taos Resource Management Plan and Associated Environmental Impact Statement

AGENCY: Bureau of Land Management, Taos Field Office.

ACTION: Taos Resource Management Plan Amendment and Environmental Impact Statement Scoping Meeting schedule for December 2002.

SUMMARY: The following dates, times and locations have been identified for scoping meetings to discuss the Taos Resource Management Plan Amendment and Environmental Impact Statement. The Bureau of Land Management Taos Field Office is considering an amendment to the Taos Resource Management Plan (RMP) to provide for the possible disposal of approximately 160 acres of public land in Rio Arriba County, New Mexico. The land would be used by the North Central Solid Waste Authority for a new regional landfill. The public is invited to provide scoping comments on the issues that should be addressed in the plan amendment and environmental impact statement.

- Agency Scoping Meeting—Wednesday, December 4—at El Convento in Espanola, NM 2 p.m.–4 p.m.
- Public Scoping Meeting 1—Wednesday, December 4—at El Convento in Espanola, NM, 6 p.m.–8 p.m.
- Public Scoping Meeting 2—Thursday, December 5—at the Ojo Caliente Elementary School Cafeteria, Ojo Caliente, NM, 6 p.m.–8 p.m.

For meeting updates please call the BLM—Taos Field office at (505) 751–4709.

FOR FURTHER INFORMATION CONTACT: Lora Yonemoto, Realty Specialist, Bureau of Land Management, Taos Field Office, 226 Cruz Alta Rd., Taos, NM 87571, or call (505) 751–4709.

Dated: November 1, 2002.

Sam DesGeorges,

Assistant Field Office Manager.

[FR Doc. 02–28319 Filed 11–6–02; 8:45 am]

BILLING CODE 4310–FB–U

INTERNATIONAL TRADE COMMISSION

[USITC SE–02–035]

Sunshine Act Meeting

Agency Holding the Meeting: United States International Trade Commission.

Time and Date: November 19, 2002 at 11 a.m.

Place: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

Status: Open to the public.

Matters to Be Considered:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–430 and 731–TA–1019 (Preliminary)(Durum and Hard Red Spring Wheat from Canada)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before November 25, 2002; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before December 3, 2002.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 5, 2002.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 02–28465 Filed 11–5–02; 10:44 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil Case No. 02–1768]

Proposed Final Judgment and Competitive Impact Statement; United States v. Archer-Daniels-Midland Company and Minnesota Corn Processors, LLC

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that a proposed Final Judgment, Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Archer-Daniels-Midland Company and Minnesota Corn Processors, LLC,* Civil Case No. 1:02 CV 01768 (JDB). The proposed Final Judgment is subject to approval by the Court after the expiration of the statutory 60-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

On September 6, 2002, the United States filed a Complaint alleging that the proposed acquisition by Archer-Daniels-Midland Company of Minnesota Corn Processors, LLC would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the manufacture and sale of corn syrup and high fructose corn syrup (''HFCS'') in the United States and Canada. ADM and MCP are two of the largest corn wet millers in the United States, competing against only four other firms in the manufacture and sale of corn syrup and HFCS. MCP sells these products through an exclusive sales joint venture that it formed in December 2000 with another corn wet miller, Corn Products International, Inc. To preserve competition, the proposed Final Judgment requires the defendants to dissolve the joint venture that MCP formed with CPI by December 31, 2002, thus allowing CPI to compete independently. A Competitive Impact Statement, filed by the United States, describes the Complaint, the proposed Final Judgment, and remedies available to private litigants. Copies of the Complaint, the proposed Final

Judgment, Stipulation and Order, and Competitive Impact Statement are available for inspection at the U.S. Department of Justice, Antitrust Division, Suite 215 North, 325 7th Street, NW., Washington, DC 20530 (telephone: 202/514–2692), and at the Clerk's Office of the U.S. Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Public comment is invited within 60-days of the date of the notice. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments may be filed with the Department of Justice in either paper or electronic form. Comments filed in paper form should be directed to Roger W. Fones, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 325 7th Street, NW., Suite 500, Washington, DC 20530 (facsimile 202/307–2784). Comments filed in electronic form should be submitted to the following e-mail address: *ADM–MCP.atr@usdoj.gov.*

Constance K. Robinson,

Director of Operations, Antitrust Division.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, subject to approval and entry by the Court, that:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

5. If the United States has withdrawn its consent, as provided in paragraph 2 above, or if the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

6. Defendants represent that the required actions set forth in Sections IV and V of the proposed Final Judgment can and will be made, and that the defendants will later raise no claims of hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

Respectfully submitted,

For Plaintiff, United States of America:

Michael P. Haronis,
Pennsylvania State Bar #17994, Attorney, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW., Suite 500, Washington, DC 20530. Telephone: (202) 307–6357. Facsimile: (202) 307–2784.
Dated: September 6, 2002.

For Defendant,

Archer-Daniels-Midland Company:

David James Smith,
State of Illinois Bar No. 3128392, Vice President, Secretary & General Counsel, 4666 Faries Parkway, Decatur, IL 62526. Telephone: (217) 424–6183. Facsimile: (217) 424–6196.

For Defendant, Minnesota Corn Processors, LLC:

Joseph Bennett,
State of Minnesota Bar No. 0289991, Secretary and General Counsel, Minnesota Corn Processors, LLC, 901 North Highway 59, Marshall, MN 52658. Telephone: (507) 537–2674. Facsimile: (507) 537–2641.

Order

It is *so ordered,* this __ day of _____, 2002.

_____

United States District Court Judge.

Final Judgment

Whereas plaintiff, United States of America, having filed its Complaint herein, plaintiff and defendants, Archer-Daniels-Midland Company (''ADM'') and Minnesota Corn Processors, LLC (''MCP''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact of law;

And whereas, the defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, prompt and certain dissolution of CornProductsMCP Sweeteners LLC (''CPMCP'') is the essence of this agreement;

And whereas, the United States requires defendants to effect the dissolution of CPMCP for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that they will effect the dissolution of CPMCP as provided in this Final Judgment and that defedants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions on dissolution contained below:

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. ''ADM'' means defendant Archer-Daniels-Midland Company, a corporation organized and existing under the laws of the state of Delaware, with its principal offices in Decatur, Illinois, its successors and assigns, and its parents, subsidiaries, divisions, groups, and their officers, managers, agents, and employees.

B. ''CPI'' means Corn Products International, Inc., a corporation organized and existing under the laws of the state of Delaware, with its principal offices in Bedford Park, Illinois, its successors and assigns, and its parents, subsidiaries, divisions, groups, and their officers, managers, agents, and employees.

C. ''CPMCP'' means CornProductsMCP Sweeteners LLC, a joint venture between CPI and MCP, which serves as the exclusive sales and distribution outlet in the United States, Canada, and Mexico for CPI and MCP in designated product categories, including

corn syrup and high fructose corn syrup.

D. ''MCP'' means defendant Minnesota Corn Processors, LLC, a limited liability company organized and existing under the laws of the state of Colorado, with its principal offices in Marshall, Minnesota, its successors and assigns, and it parents, subsidiaries, divisions, groups, and their officers, managers, agent, and employees.

E. ''Transaction'' means ADM's proposed acquisition of MCP.

III. Applicability

This Final Judgment applies to ADM and MCP, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Dissolution of CPMCP

A. The defendants are hereby ordered and directed to effect the dissolution of CPMCP on or prior to December 31, 2002. Defendants are further ordered and directed to provide to the General Counsel of CPI in its Westchester, Illinois offices written notice of their election to dissolve CPMCP prior to or simultaneously with the closing of the Transaction.

B. On the same day that the defendants provide written notice to CPI's General Counsel, as required pursuant to Section IV(A) of this Final Judgment, the defendants shall in writing relieve CPI, effective immediately, of any and all obligations to defendants or CPMCP to the full extent necessary to permit CPI to conduct independent operations in competition with defendants and CPMCP.

V. Participation by the Defendants in the Operation of CPMCP Prior to the Effective Date of Dissolution

From the date the defendants provide CPI's General Counsel written notice of their election to dissolve CPMCP until the effective date of the dissolution of CPMCP, defendants shall refrain from selling, marketing, or pricing any products in cooperation or coordination with CPMCP or CPI and shall compete independently of CPMCP and CPI. Nothing in this Final Judgment affects or alters any obligations of defendants to facilitate or ensure that CPMCP completes the performance of any existing contracts or commitments to its customers.

VI. Affidavits

Twenty (20) calendar days from the date of the filing of this Final Judgment, and every thirty (30) calendar days thereafter until the final accounting after dissolution of CPMCP has been completed under this Final Judgment, the defendants shall deliver to the United States an affidavit as to the fact and manner of compliance with Sections IV and V of this Final Judgment. Assuming that the information set forth in the affidavit is true and complete, any objection by the United States to the information provided by the defendants, including limitations on the information, shall be made within fourteen (14) calendar days of receipt of such affidavit. Unit one year after the defendants have completed the final accounting, the defendants shall maintain full records of the dissolution of CPMCP.

VII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Public Interest Determination

Entry of this Final Judgment is in the public interest.

X. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

Date:_____

_____

United States District Court Judge

Case Number: 1:02CV02768.
Judge: John D. Bates.
Deck Type: Antitrust.

Competitive Impact Statement

Pursuant to Section 5(b) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act (codified at 15 U.S.C. 16(b)–(h) (''Tunney Act'')), the United States files this Competitive Impact Statement relating to the Proposed Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On September 6, 2002, the United States of American filed a civil antitrust Complaint alleging that the proposed acquisition by Archer-Daniels-Midland Company (''ADM'') of Minnesota Corn Processors, LLC (''MCP'') would violate Section 7 of the Clayton Act. 15 U.S.C.

18. The Complaint alleges that ADM and MCP are two of the largest corn wet millers in the United States and compete in the manufacture and sale of corn syrup and high fructose corn syrup (''HFCS'') in the United States and Canada. The Complaint further alleges that through its acquisition of MCP, ADM will eliminate this competition and increase concentration in the already highly concentrated corn syrup and HFCS markets, making anticompetitive coordination among the few remaining competitors more likely. The request for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing consummation of the merger agreement; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment that would permit ADM's acquisition of MCP, but would preserve competition by requiring, *inter alia*, the defendants to dissolve the marketing and sales joint venture that MCP formed with another corn wet miller, Corn Products International (''CPI'').[1] The defendants are required to provide written notice to CPI of their election to dissolve the joint venture no later than consummation of ADM's acquisition of MCP and to complete the dissolution of the joint venture no later than December 31, 2002. On the same day the defendants give written notice to CPI, the proposed Final Judgment also provides that the defendants are prohibited from selling, marketing, or pricing any products in cooperation or coordination with the joint venture or CPI, and they must notify CPI that it is relieved of all obligations under the joint venture that would prevent it from competing fully with the defendants. The proposed Final Judgment does not affect or alter any obligations of ADM and MCP to perform existing contracts or commitments to its customers.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce provisions of the proposed Final Judgment and to punish violations thereof.

[1] The defendants entered into a Stipulation (filed contemporaneously with the Final Judgment) in which they agreed to be bound by the proposed Final Judgment pending final determination of this matter by the Court.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

ADM is a Delaware corporation, with its principal offices located in Decatur, Illinois. ADM is engaged in the processing and sale of agricultural products, including corn syrup and HFCS, which are among the products it produces from corn through the wet milling process at domestic plants in Cedar Rapids Iowa, Clinton, Iowa, and Decatur, Illinois. Its net sales in 2001 were approximately $20 billion. Its sales of corn wet milled products in the United States in 2001 exceeded $1 billion, including HFCS sales of approximately $480 million and corn syrup sales of approximately $66 million.

MCP is a Colorado limited liability company, with its principal offices in Marshall, Minnesota. MCP is an agricultural processing and marketing business that operates corn wet milling facilities in Marshall, Minnesota and Columbus, Nebraska. MCP's net sales in 2001 were approximately $620 million. MCP's 2001 sales of corn wet milled products in the United States totaled approximately $402 million, with HFCS sales of approximately $153 million and corn syrup sales of approximately $56 million.

MCP sells its corn wet milled products through a joint venture that it formed in December 2000 with CPI. The joint venture, known as CornProductsMCP Sweeteners LLC (''CPMCP''), is the exclusive outlet for MCP's and CPI's corn syrup and HFCS products.

On July 11, 2002, ADM and MCP entered into an agreement under which ADM would acquire MCP. This transaction, which would increase concentration in the already highly concentrated corn syrup and HFCS markets precipitated the government's suit.

B. Corn Syrup and High Fructose Corn Syrup Markets

Corn syrup and HFCS are manufactured by wet mill processing of corn. In the wet milling process, corn kernels are first soaked in water, then ground and separated from other components of the kernel, producing a starch slurry. To manufacture corn syrup and HFCS, the corn wet millers add enzymes and/or acid that convert the starch slurry to sugars, such as dextrose and fructose.

Corn syrup is used as a sweetener in the preparation of assorted food products, including confectionery, baker, and dairy products, salad dressing, condiments, jams, and jellies, lunch meats, canned food, and vegetables. Specific applications require different grades of corn syrup with different sweetening effect. The corn wet millers that manufacture corn syrup can and do make most or all the various grades of corn syrup.

There are two grades of HFCS—HFCS 42 and HFCS 55—with the numbers referring to the percentage of fructose in the product. HFCS 42 is used as a sweetener in jam, jellies, baked goods, canned food, diary products, and some beverages. HFCS 55 is used mainly in the soft-drink industry as a substitute for sugar.

There are no realistic substitutes for corn syrup or HFCS to which customers could switch in the event of a small, but significant and non-transitory price increase. Corn syrup in its various grades. HFCS 42, and HFCS 55 are each distinct products without practical substitutes, differing from all other sweeteners and one another in their physical characteristics, means of production, many uses, and pricing. Although sugar is functionally interchangeable with corn syrup, HFCS 42 and HFCS 55 in many applications, it is significantly more expensive.

C. Harm to Competition as a Consequence of the Acquisition

The markets in the United States and Canada for corn syrup, HFCS 42 and HFCS 55 are already highly concentrated. ADM competes against only four other firms in the manufacture and sale of corn syrup, HFCS 42 and HFSCS 55 in the United States or Canada. In these markets, ADM accounts for about 10% of all corn syrup manufacturing capacity, 33% of all HFCS 42 manufacturing capacity, and 25% of all HFCS 55 manufacturing capacity. MCP, in its joint venture with CPI, accounts for more than 20% of all corn syrup manufacturing capacity, more than 15% of all HFCS 42 manufacturing capacity, and more than 15% of all HFCS 55 manufacturing capacity.

If ADM acquires MCP and succeeds to MCP's position in its joint venture with CPI, the markets in the United States and Canada for corn syrup, HFCS 42 and HFCS 55 will become substantially more concentrated. The number of independent competitors will be reduced from five to four, increasing the likelihood of anticompetitive coordination among the few remaining corn wet millers that manufacture and sell corn syrup and HFCS 42 and HFCS 55.

Entry by a new competitor would not be timely or likely to prevent this harm to competition. Successful entry into the manufacture and sale of corn syrup, HFCS 42 and HFCS 55 is difficult time consuming, and costly. Construction of an efficient corn wet milling facility likely would take more than two years from the time of site selection to production of commercial quantities of corn wet milled products.

As the Complaint alleges, the transaction would likely have the following effects, among others: actual competition between the defendants in the corn syrup and HFCS markets will be eliminated; competition generally in the manufacture and sale of corn syrup and HFCS throughout the United States and Canada will lessen substantially; the prices for corn syrup and HFCS will increase; and the amounts of corn syrup and HFCS produced will decrease.

III. Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects resulting from ADM's acquisition of MCP and succession to MCP's interest in the joint venture with CPI and to preserve competition in the manufacture and sale of corn syrup and HFCS. The proposed Final Judgment contains three principal forms of relief. First, it requires the defendants to dissolve the joint venture by December 31, 2002. This relief is intended to ensure that the acquisition does not reduce the number of independent competitors in the corn syrup and HFCS markets in the United States and Canada. Prior to the acquisition, there were five competitors and with the dissolution of CPMCP, there will still be five. Second, the proposed Final Judgment also requires that, prior to or simultaneously with the closing of ADM's acquisition of MCP, the defendants must provide CPI written notice of their election to dissolve CPMCP. Upon written notice of their election to dissolve CPMCP, the defendants are additionally required to provide CPI written notice that CPI is permitted to conduct independent operations in competition with the defendants and CPMCP. This relief is intended to ensure that, prior to accomplishment of the dissolution of CPMCP, CPI is permitted to independently market and sell corn syrup and HFCS. Third, the proposed Final Judgment further requires the defendants to complete independently of CPMCP and CPI. The proposed final Judgment does not affect or alter any obligations of ADM and MCP to facilitate or ensure that CPMCP completes the performance of any existing contracts or commitments to its customers.

Thus, the decree will ensure that there are at least five independent competitors in the corn syrup and HFCS markets, and will preserve and encourage ongoing competition between ADM and CPI.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in a federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to: Roger W. Fones, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 500, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States is satisfied, however, that the dissolution of the joint venture and other relief contained in the proposed Final Judgment will preserve competition in the production and sale of corn syrup and HFCS and that the proposed Final Judgment would achieve all of the relief that the government would have obtained through litigation, but avoids the time and expense of trial. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in this market. The dissolution of the joint venture will preserve the existence of five independent competitors, thus eliminating the likelihood that the acquisition would have facilitated industry coordination.

VII. Standard of Review Under the Tunney Act for Proposed Final Judgment

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the Court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e). As the Court of Appeals for the District of Columbia Circuit has held, the Tunney Act permits the Court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are

sufficient, and whether the decree may positively harm third parties. See *United States* v. *Microsoft,* 56 F. 3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [2] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Cas. ¶ 61,508 at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F. 3d 1448 (D.C. Cir. 1995). Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the pubioc in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added).[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.''' *United States* v. *American Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted), aff'd sub nom. *Maryland* v. *United States.* 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716 [4]

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and the Act does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459. Since ''[t]he court's authroity to review the decree depends entirely on the government's exercising its prosecurtorial discretion by bringing a case in the first place,'' it follows that the court ''is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States might have, but did not, pursue. Id. at 1459–60.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: September 13, 2002.

Respectfully submitted,

For Plaintiff United States of America:

Michael P. Harmonis,

Pennsylvania Bar No. 17994, Antitrust Division, U.S. Department of Justice, 325 7th Street, NW., Suite 500, Washington, DC 20530, Telephone: (202) 307–6357. Facsimile: (202) 307–2784.

Certificate of Service

I hereby certify that on this 13th day of September, 2002. I have caused a copy of the foregoing United State's Competitive Impact Statement to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this matter:

David James Smith,

Vice President, Secretary & General Counsel, Archer-Daniels-Midland Company, 4666 Faries Parkway, Decatur, IL 62526. Telephone: (217) 424–6183. Facsimile: (217) 424–6196. Counsel for Defendant Archer-Danbiels-Midland.

Joseph Bennett,

Secretary and General Counsel, Minnesota Corn Processors, LLC, 901 North Highway 59, Marshall, MN 56258. Telephone: (507) 537–2674. Facsimile: (507) 537–2641. Counsel for Defendant Minnesota Corn Processors, LLC.

Michael P. Harmonis,

Pennsylvania State Bar No. 17994, Attorney, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW., Suite 500, Washington, DC 20530. Telephone: (202) 307–6357. Facsimile: (202) 307–2784.

Certificate of Service

I hereby certify that on this 13th day of September, 2002, I have caused a copy of the foregoing United State's Competitive Impact Statement to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this matter:

David James Smith,

Vice President, Secretary & General Counsel, Archer-Daniels-Midland Company, 4666 Faries Parkway, Decatur, IL 62526. Telephone: (217) 424–6183. Facsimile: (217) 424–6196. Counsel for Defendant Archer-Daniels-Midland.

Joseph Bennett,

Secretary and General Counsel, Minnesota Corn Processors, LLC, 901 North Highway 59, Marshall, MN 56258. Telephone: (507) 537–2674. Facsimile: (507) 537–2641. Counsel for Defendant Minnesota Corn Processors, LLC.

Michael P. Harmonis,

Pennsylvania State Bar No. 17994, Attorney, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW., Suite 500, Washington, DC 20530. Telephone: (202) 307–6357. Facsimile: (202) 307–2784.

[FR Doc. 02–28333 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section

[2] 119 Cong. Rec. 24598 (1973); see also *United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and and that further proceedings would aid the court in resolving those issues. See H.R. 93–1463, 93d Cong. 2d Sess. 8–9, reprinted i (1974) U.S.C.C.A.N. 6535, 6538.

[3] See also *United States* v. *BNS, Inc.,* 858 F.2d at 463; *United States* v. *National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716; *United States* v. *American Cyanamid Co.,* 719 F.2d 558, 565 (2d Cir. 1983).

[4] See also *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (w.D. Ky. 1985).

1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on May 13, 2002, Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration to be registered as an importer of methamphetamine (1105), a basic class of controlled substance listed in Schedule II.

The firm plans to import the listed controlled substance to bulk manufacture controlled substance.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of this basic class of controlled substance may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administration, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than (30 days from publication).

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28312 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 21, 2002, Aldrich Chemical Company Inc., dba Isotec, 3858 Benner Road, Miamisburg, Ohio 45342–4304, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Aminorex (1585)	I
Gamma hydroxybutyric acid (2010).	I
Methaqualone (2565)	I
Lysergic acid dethylamide (7315)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
2,5-Dimethoxyamphetamine (7396).	I
3,4-Methylenedioxyamphetamine (7400).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxy-methamphetamine (7405).	I
4-Methoxyamphetamine (7411)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N-Ethyl-1-phenylcyclohexylamine (7455).	I
Dihydromorphine (9145)	I
Normorphine (9313)	I
Acetylmethadol (9601)	I
Alphacetylmethadol Except Levo-Alphacetylmethadol (9603).	I
Normethadone (9635)	I
3-Methylfentanyl (9813)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
1-Phenylcyclohexylamine (7460)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
1-Piperidinocyclohexane-carbonitrile (8603).	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Isomethadone (9226)	II
Meperidine (9230)	II
Meperidine intermediate-A (9232)	II
Merperidine intermediate-B (9233)	II
Methadone (9250)	II
Methadone intermediate (9254)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Levo-Alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Fentanyl (9801)	II

The firm plans to manufacture small quantities of the listed controlled substances to produce standards for analytical laboratories.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than January 6, 2003.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28314 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 28, 2002, Abbott Laboratories, DBA Knoll Pharmaceutical Company, 30 North Jefferson Road, Whippany, New Jersey, 07981, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Dihydromorphine (9145)	I
Hydromorphone (9150)	II

The firm plans to produce bulk product and finished dosage units for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than January 6, 2003.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28315 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on June 23, 2002, Noramco Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by renewal to the Drug Enforcement Administration to be registered as an importer of phenylacetone (8501), a basic class of controlled substance listed Schedule II.

The firm plans to import phenylacetone for the production of amphetamine.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of this basic class of controlled substance may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than (30 days from publication).

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28311 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated April 11, 2002, and published in the **Federal Register** on April 26, 2002, (67 FR 20828), Novartis Pharmaceutical Corporation, 59 Route 10, East Hanover, New Jersey 07936, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of methylphenidate (1724), a basic class of controlled substance listed in Schedule II.

The firm plans to manufacture finished product for distribution to its customers.

DEA has considered the factors in Title 21, United States Code, Section 823a and determined that the registration of Novartis Pharmaceutical Corporation to manufacture methylphenidate is consistent with the public interest at this time. DEA has investigated Novartis Pharmaceutical Corporation on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28316 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances Notice of Registration

By Notice dated April 11, 2002, and published in the **Federal Register** on April 26, 2002, (67 FR 20828), Organichem Corporation, 33 Riverside Avenue, Rensselaer, New York 12144, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Amphetamine (1100)	II
Pentobarbital (2270)	II
Methylphenidate (1724)	II
Meperidine (9230)	II

The firm plans to manufacture bulk products for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of Organichem Corporation to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Organichem Corporation to ensure that the company's registration is consistent with the public interest. The investigation included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk

manufacturer of the basic classes of controlled substances listed above is granted.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28317 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with section 1301.34 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on June 13, 2002, Research Triangle Institute, Kenneth H. Davis, Jr., Hermann Building, East Institute Drive, P.O. Box 12194, Research Triangle Park, North Carolina 27709, made application by renewal to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Marihuana (7360)	I
Cocaine (9041)	II

The firm plans to import small quantities of the listed controlled substances for the National Institute of Drug Abuse and other clients.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of these basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.43 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections or requests for a hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than December 9, 2002.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import the basic classes of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: October 25, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–28313 Filed 11–6–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

October 31, 2002.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation, contact Darrin King on (202) 693–4129 or e-Mail: *King-Darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for Department of Labor, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395–7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

AGENCY: Women's Bureau.

Type of Review: Extension of a currently approved collection.

Title: Women in Apprenticeship and Nontraditional Occupations (WANTO) Act Grant application and Reporting Requirements.

OMB Number: 1225–0080.

Frequency: Annually and Quarterly.

Affected Public: Not-for-profit institutions.

Number of Respondents: 55.

Requirement	Frequency	Estimated number of responses	Average response time (hours)	Estimated annual burden hours
Grant Application:				
Previous Applicant	Annually	40	6	240
New Applicant	Annually	15	12	180
Quarterly Reports:				
Previous Applicant	Quarterly	36	2	72
New Applicant	Quarterly	8	5	40
Final Report:				
Previous Applicant	Annually	9	4	36

Requirement	Frequency	Estimated number of responses	Average response time (hours)	Estimated annual burden hours
New Applicant	Annually	2	10	20
Totals		110		588

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: This collection of information is needed for the Department of Labor to select annual Women in Apprenticeship and Nontraditional Occupations (WANTO) grant awardees and to monitor awardees' administration of the grant.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 02–28379 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

October 25, 2002.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Marlene Howze at (202) 693–4158 or e-mail *Howze-Marlene@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ESA, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395–7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Type of Review: Extension of a currently approved collection.

Agency: Employment Standards Administration (ESA).

Title: Agreement and Undertaking.

OMB Number: 1215–0034.

Affected Public: Business or other-for-profit.

Frequency: On Occasion.

Number of Respondents: 300.

Number of Annual Responses: 300.

Estimated Time Per Response: 15 minutes.

Total Burden Hours: 75.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: Coal Mine Operators and Longshore companies desiring to be self-insurers are required by law (30 U.S.C. 933 BL and 33 U.S.C. 932 LS) to produce security in terms of an indemnity bond, security deposit, or for Black Lung only, a letter of credit or 501(c)(21) trust. The OWCP–1 is a joint use form (Longshore and Black Lung Programs) completed by employers to provide the Secretary of Labor with authorization to sell securities or to bring suit under indemnity bonds deposited by the self-insured employers in the event there is a default in the payment benefits. If this Agreement and Undertaking were not required, OWCP would not be empowered to utilize the company's security deposit to meet its financial responsibilities for the Coal Mine or Longshore benefits in case of default.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 02–28382 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–CF–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

October 30, 2002.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Marlene Howze at (202) 693–4158 or e-mail *Howze-Marlene@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, Office of Management and Budget, Room 10235, Washington, DC 20503 (202) 395–7316), within 30 days from the date of this publication to the **Federal Register**.

The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used:

• Enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Type of Review: Revision of a currently approved collection.

Agency: Bureau of Labor Statistics (BLS).

Title: Cognitive and Psychological Research.

OMB Number: 1220–0141.

Affected Public: Individuals or households.

Frequency: One-time.

Number of Respondents: 4,000.

Number of Annual Responses: 4,000.

Estimated Time Per Response: 1 hour.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: The Bureau of Labor Statistics' Behavioral Science Research Laboratory conducts psychological research focusing on the design and execution of the data collection process in order to improve the quality of data collected by the Bureau. The proposed laboratory research will be conducted from Fiscal Year (FY) 2003 through FY 2005 and is expected to: (1) Improve the data collection instruments employed by the Bureau; (2) increase the accuracy of the economic data produced by BLS and on which economic policy decisions are based; (3) increase the ease of administering survey instruments for both respondents and interviewers; (4) increase response rates in panel surveys as a result of reduced respondent burden; and (5) enhance BLS's reputation resulting in greater confidence and respect in survey instruments used by BLS.

Ira L. Mills,

DOL Clearance Officer.

[FR Doc. 02–28383 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–24–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

October 30, 2002.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13. 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Departmental Clearance Officer, Ira Mills (202) 693–4122) or by e-Mail to *Mills-Ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395–6881), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration (OSHA).

Title: Hazardous Waste Operations and Emergency Response (HAZWOPER) (29 CFR 1910.120).

OMB Number: 1218–0202.

Frequency: Varies (on occasion; annually).

Affected Public: Business or other for-profit; Not-for-profit institutions; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 37,762.

Estimated Time per Response: Varies from five minutes (.08 hour) to 64 hours.

Total Burden Hours: 1,404,369.

Total Annual Cost: $4,668,300.

Description: Section 126(e) of the ''Superfund Amendments and Reauthorization Act of 1986'' (SARA) (Pub. L. 99–499) which became law on October 17, 1986, required the Secretary of Labor, pursuant to Section 6(b) of the Occupational Safety and Health Act 1970 (the Act), to promulgate standards for the safety and health protection of employees engaged in hazardous waste operations and emergency response. Section 126(a) of SARA also specified that those standards were to become effective a year after publication. Section 126(b) lists 11 worker protection provisions that the Secretary of Labor had to include in OSHA's final standard. Those provisions require OSHA to address the preparation of various written programs, plans and records; the training of employees; the monitoring of airborne hazards; the conduct of medical surveillance; and the distribution of information to employees. The provisions also require the collection of information from employers engaged in hazardous waste operations and their emergency response to such operations. The final standard covers the provisions mandated in SARA.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 02–28384 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,761]

Glen Oaks Industries, Inc., Dallas, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 29, 2002, applicable to workers of Glen Oaks Industries, Marietta Sportswear Manufacturing Company, Inc., Dallas, Texas. The certification was amended on September 25, 2002, to include workers formerly employed at Marietta Sportswear Manufacturing Co., Inc., Marietta, Oklahoma. The notice will soon be published in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. New information provided by the company official shows that wages for the six workers engaged in the production of men's slacks at the Dallas, Texas, location were reported to the Unemployment Insurance (UI) tax account for Glen Oaks Industries in Oklahoma. The company official also reports that Marietta Sportswear Manufacturing Co., Inc., is no longer an entity of Glen Oaks Industries, and thus, not applicable to this worker group.

Also, the Department has learned from the State that all six workers have been separated from employment and there is no need to have the certification in effect for two years from the date of issuance.

Based on this new information, the Department is again amending the certification to limit coverage to workers producing men's slacks at Marietta Sportswear Manufacturing Co., Inc., Dallas, Texas, whose wages were reported to the State of Oklahoma under the UI tax account for Glen Oaks

Industries. Furthermore, the certification will expire October 4, 2002.

The amended notice applicable to TA–W–41,761 is hereby issued as follows:

Workers producing men's slacks at Glen Oaks Industries, Dallas, Texas, whose wages were reported to Glen Oaks Industries in Marietta, Oklahoma, who became totally or partially separated from employment on or after June 16, 2001 through October 4, 2002, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed in Washington, DC, this 4th day of October, 2002.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28385 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–42,193]

Vulcan Chemicals, Wichita, KS; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on September 30, 2002, in response to a petition filed by a company official on behalf of workers at Vulcan Chemicals, Wichita, Kansas.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 15th day of October, 2002.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28386 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–7582]

BBA Nonwovens Washougal, Inc., Washougal, WA; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called (NAFTA–TAA), and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 27, 2002, in response to a petition filed by Association of Western Pulp and Paper Workers, Local 5 on behalf of workers at BBA Nonwovens Washougal, Inc., Washougal, Washington.

The petitioner has requested that the petition be withdrawn. Consequently further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 21st day of October, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28393 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–7152]

Permit No. 64872Z, Dillingham, AK; Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, Permit #64872Z, Dillingham, Alaska.

The workers stopped fishing in July 2001, more than one year from the September 5, 2002, petition date. Section 223(b)(1) of the Trade Act of 1974, as amended, provides that a certification may not apply to a worker whose separation from employment occurred more than one year prior to the date the petition was filed.

Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 25th day of October 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28391 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–06414]

Harris Welco (Excluding the Plastics Department) Division of J.W. Harris Co., Inc., Kings Mountain, North Carolina; Amended Certification Regarding Eligibility To Apply for NAFTA Transitional Adjustment Assistance

In accordance with Section 250(A), Subchaper D, Chaper 2, Title II, of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification for NAFTA Transitional Adjustment Assistance on September 23, 2002 applicable to workers of Harris Welco, Division of J.W. Harris Co., Inc., Flux Department, Kings Mountain, North Carolina. The notice was published in the **Federal Register** on October 10, 2002 (67 FR 63160).

At the request of the company, the Department reviewed the certification for workers of the subject firm. Findings show that the Department limited its certification coverage to workers of the subject firm's Flux Department.

New information provided by the company show additional worker separations are scheduled and the remaining production of flux coated welding rods and support functions are being shifted to Mexico. The entire plant will close by the end of 2002.

Accordingly, the Department is amending the certification determination to properly reflect this matter.

It is the intent of the Department's certification to include all workers of Harris Welco who were adversely affected by a shift in production of flux coated welding rods to Mexico. Workers of the Plastics Department that was previously certified for NAFTA–TAA on June 24, 2002, remains in effect (NAFTA–6102).

The amended notice applicable to NAFTA—06414 is hereby issued as follows:

''All workers of Harris Welco, Division of J.W. Harris Co., Inc., excluding workers of the Plastics Department, Kings Mountain, North Carolina, who became totally or partially separated from employment on after July 26, 2001, through September 23, 2004, are eligible to apply for NAFTA–TAA under Section 250 of the Trade Act of 1974.''

Signed at Washington, DC this 23rd day of October, 2002.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28389 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–5171 and NAFTA–5171A]

Huntsman Polymers Corporation; Huntsman Polymers Corporation Utilities Division, Odessa, TX; Notice of Determinations on Reopening

The Department, on its own motion, reopened on September 3, 2002, the certification regarding eligibility for workers of the subject firm to apply for North American Free Trade Agreement-Transitional Adjustment Assistance (NAFTA–TAA), applicable to workers and former workers of the subject firm engaged in activities related to the production of styrene monomers (NAFTA–5171). The certification was issued on August 29, 2001, and was published in the **Federal Register** on September 11, 2001 (66 FR 47241).

The petition investigation was reopened because the Department failed to include a determination as to whether workers in the Utilities Division of Huntsman Polymers Corporation, Odessa, Texas are eligible to apply for NAFTA–TAA. The workers at Huntsman Polymers are separately identifiable by product produced at the plant.

The findings of the investigation on reopening show that workers of Huntsman Polymers Corporation, Utilities Division, Odessa, Texas, ''managed'' the water supply and other raw materials utilized in the various manufacturing processes performed at the subject firm.

The investigation revealed that the workers of the subject firm do not produce an article within the meaning of section 250(a) of the Trade Act of 1974. The Department of Labor has consistently determined that the performance of services does not constitute production of an article, as required by the Trade Act of 1974. Workers of the subject facility may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control.

The investigation revealed that the workers in the Utilities Division spent some of their time in support of the production of styrene monomers, but the majority of their work was in support of other production operations at the Odessa, Texas plant.

Conclusion

The certification applicable to workers engaged in activities related to the production of styrene monomers at Huntsman Polymers Corporation, Odessa, Texas (NAFTA–5171), remains in effect through August 29, 2003.

After careful review of the findings of the investigation on reopening, I conclude that workers of Huntsman Polymers Corporation, Utilities Division, Odessa, Texas (NAFTA–5171A), are denied eligibility to apply for NAFTA–TAA under section 250 of the Trade Act.

Signed in Washington, DC this 23rd day of October, 2002.

Edward A. Tomchick,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 02–28387 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–7592]

JSI Industries, Inc., Fort Atkinson, WI; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called (NAFTA–TAA), and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on October 7, 2002, in response to a petition filed on behalf of workers at JSI Industries, Inc, Fort Atkinson, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 16th day of October, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28394 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA—7573]

Pass & Seymour/Legrand, Whitsett, NC; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 24, 2002, in response to a petition filed by the company on behalf of workers at Pass & Seymour/Legrand, Whitsett, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 10th day of October, 2002.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28392 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–6108]

Peck Manufacturing Company of North Carolina, Inc.; Warrenton, NC; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on April 18, 2002 in response to a petition filed by the company on behalf of workers at Peck Manufacturing Company of North Carolina, Inc., Warrenton, North Carolina.

The Department of Labor was unable to locate an official of the company to obtain the information necessary to render a decision. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 18th day of October, 2002.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28388 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–06536]

Wisconsin Automated Machinery Corp., Oshkosh, WI; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called (NAFTA–TAA), and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 9, 2002, in response to a petition filed by the International Association of Machinists and Aerospace Workers Union, District #10 and a company official on behalf of workers at Wisconsin Automated Machinery Corporation, Oshkosh, Wisconsin.

The petitioners have requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 10th day of October 2002.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 02–28390 Filed 11–6–02; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 02–129]

NASA Advisory Council, Earth Science Technology Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of a NASA Advisory Council (NAC), Earth Systems Science and Applications Advisory Committee (ESSAAC).

DATES: Tuesday, November 12, 2002, 1 p.m. to 5 p.m.

ADDRESSES: Channel Inn Hotel, Suite 250, 650 Water Street SW, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Mr. Granville Paules, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0706.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Opening/Welcome
—Meeting Logistics
—Review of Agenda and Opening Comments
—Earth Science Enterprise Technology Strategy Update
—Science and Applications Roadmaps and Focused Technology Support
—Homeland Defense Initiatives
—Executive Summary and Actions

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

June W. Edwards,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 02–28332 Filed 11–6–02; 8:45 am]

BILLING CODE 7510–01–P

OFFICE OF NATIONAL DRUG CONTROL POLICY

Cancellation of Meeting of the Advisory Commission on Drug Free Communities

Federal Register Citation of Previous Announcement: October 29, 2002 (Volume 67, Number 209, page 66004).

AGENCY: Office of National Drug Control Policy.

ACTION: Notice of cancellation of meeting.

Previously Announced Time and Date of Meeting: November 13, 2002, 9 a.m. to 5 p.m.

Changes in the Meeting: The meeting has been cancelled.

FOR FURTHER INFORMATION CONTACT: Linda V. Priebe, (202) 395–6622.

Dated: November 1, 2002.

Linda V. Priebe,

Assistant General Counsel.

[FR Doc. 02–28295 Filed 11–6–02; 8:45 am]

BILLING CODE 3180–02–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Billing Instructions for NRC Cost Type Contracts.

2. *Current OMB approval number:* 3150–0109.

3. *How often the collection is required:* Monthly.

4. *Who is required or asked to report:* NRC Contractors.

5. *The number of annual respondents:* 55.

6. *The number of hours needed annually to complete the requirement or request:* 1,070 (754 hours-Billing Burden + 316 hours License Fee Recovery Cost Summary).

7. *Abstract:* The NRC Division of Contracts in administering its contracts provides Billing Instructions for its contractors to follow in preparation of invoices. These instructions stipulate the level of detail in which supporting data must be submitted for NRC review. The review of this information ensures that all payments made by NRC for valid and reasonable costs in accordance with the contract terms and conditions.

Submit, by January 6, 2003, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD

20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html*. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–6 E6, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *INFOCOLLECTS@NRC.GOV*.

Dated at Rockville, Maryland, this 1st day of November 2002.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 02–28361 Filed 11–6–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review for new collections approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Request for Non-Agreement States Information, as authorized by Section 274(a) of the Atomic Energy Act.

2. *Current OMB approval number:* New collection.

3. *How often the collection is required:* One-time or as-needed.

4. *Who is required or asked to report:* The 18 States that have not signed Section 274(b) Agreements with NRC (Non-Agreement States).

5. *The number of annual respondents:* 18 Non-Agreement States.

6. *The number of hours needed annually to complete the requirement or request:* 135 hours (18 responses per year × 7.5 hours per response).

7. *Abstract:* Occasionally, requests will be made of the Non-Agreement States for information similar to that requested from the Agreement States. Requests will be made on a one-time or as-needed basis, e.g., to respond to a specific incident, to gather information on licensing and inspection practices and other technical statistical information. These information requests will primarily refer to naturally occurring and accelerator-produced radioactive materials which may be subject to State regulations since they do not come under the purview of the Atomic Energy Act, as amended. The reason for requesting such information is that the information can assist the Commission in its considerations and decisions involving Atomic Energy Act materials programs in an effort to make the national nuclear materials programs more uniform and consistent.

Submit, by January 6, 2003, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–6 E6, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *INFOCOLLECTS@NRC.GOV*.

Dated at Rockville, Maryland, this 1st day of November 2002.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 02–28362 Filed 11–6–02; 8:45 am]

BILLING CODE 7590–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

November 14, 2002 Board of Directors Meeting

Time and Date: Thursday, November 14, 2002, 1:30 p.m. (Open Portion), 1:45 p.m. (Closed Portion).

Place: Offices of the Corporation, Twelfth Floor Board Room, 1100 New York Avenue, NW., Washington, DC.

Status: Meeting Open to the Public from 1:30 p.m. to 1:45 p.m. Closed portion will commence at 1:45 p.m. (approx.).

Matters to Be Considered:

1. President's Report.

2. Approval of September 12, 2002 Minutes (Open Portion).

Further Matters to Be Considered: (Closed to the Public 1:45 p.m.).

1. Finance Project in Russia and NIS.

2. Approval of September 12, 2002 Minutes (Closed Portion).

3. Pending Major Projects.

4. Reports.

Contact Person for Information: Information on the meeting may be obtained from Connie M. Downs at (202) 336–8438.

Dated: November 5, 2002.

Connie M. Downs,

Corporate Secretary, Overseas Private Investment Corporation.

[FR Doc. 02–28578 Filed 11–5–02; 3:58 pm]

BILLING CODE 3210–01–M

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

SUMMARY: In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and purpose of information collection: Survivor Questionnaire; OMB 3220–0032.

Under Section 6 of the Railroad Retirement Act (RRA), benefits that may be due on the death of a railroad employee *or* a survivor annuitant include (1) a lump-sum death benefit, (2) a residual lump-sum payment, (30 accrued annuities due but unpaid at death, and (4) monthly survivor insurance payments. The requirements for determining the entitlement of possible beneficiaries to these benefits are prescribed in 20 CFR 234.

When the RRB receives notification of the death of a railroad employee or survivor annuitant, an RRB field office utilizes Form RL–94–F, *Survivor Questionnaire,* to secure additional information from surviving relatives needed to determine if any further benefits are payable under the RRA. Completion is voluntary. One response is requested of each respondent.

The RRB proposes no changes to Form RL–94–F. The completion time for the RL–94–F is estimated at between 5 to 11 minutes. The RRB estimates that approximately 8,000 responses are received annually.

FOR FURTHER INFORMATION CONTACT: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092. Written comments should be received within 60 days of this notice.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 02–28286 Filed 11–6–02; 8:45 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27591]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 1, 2002.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by November 26, 2002, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After November 26, 2002, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

FirstEnergy Corp., et al. (70–10102)

FirstEnergy Corp. (''FirstEnergy''), a registered holding company, 76 South Main Street, Akron, Ohio, 44308, and GPU Diversified Holdings LLC (''GPUDH''), its wholly owned direct nonutility subsidiary, 300 Madison Avenue, Morristown, New Jersey 07962, have filed an application with the Commission under sections 9(a) and 10 of the Act and rule 54 under the Act.

By orders dated December 17 and December 26, 1996,[1] the Commission authorized GPU International, Inc.; (''GPUI''), which at the time was a wholly owned nonutility subsidiary of GPU, Inc. (''GPU''), a registered holding company, to invest up to $30 million to acquire: (1) Voting and preferred shares of Ballard Generation Systems Inc.; (''BGS''),[2] a joint venture with Ballard Power Systems Inc. (''BPS''), a nonassociate Canadian company; (2) options to acquire specified additional amounts of voting and preferred stock of BGS; and (3) warrants to purchase BPS stock (''BPS Warrants'').[3] The Prior Orders authorized GPUI to acquire 9.9% of the voting shares and twenty percent of the total equity of BGS, including shares obtained through the exercise of the purchased options. Correspondingly, GPUI made the following acquisitions of BGS stock: 300,001 voting and 290,300 preferred shares on December 24, 1996; 250,000 voting shares on October 24, 1997; 150,000 voting and 100,000 preferred shares on November 24, 1997; 300,000 voting and 100,000 preferred shares on June 12, 1998; and 400,000 preferred shares on March 29, 2000. In December of 2000, GPUDH acquired from GPUI all of its voting and preferred GBS stock, and GPU acquired the BPS Warrants from GPUI.[4] In June of 2001, GPUDH acquired an additional 425,000 voting shares of BGS stock. Currently, GPUDH owns 1,425,001 voting and 890,300 preferred shares of BGS stock (collectively, ''BGS Shares''), representing approximately 8.7% and 12.6% of BGS' outstanding voting and equity securities, respectively.

By order dated October 29, 2001,[5] the Commission authorized GPU to merge with and into FirstEnergy. GPU did not survive the merger, and FirstEnergy is its successor in interest.

Applicants now propose to restructure their investment. Specifically, they request authority for GPUDH to exchange the BGS Shares for a number of restricted shares [6] of BPS common stock that has a value equal to the value of the BGS Shares. For the purpose of this exchange, each BGS Share would be valued at $19.50, and exchanged for a number of BPS shares equal in value as determined by the current market value of BPS' common shares. As a result of the proposed investment, GPUDH will not own, directly or indirectly, ten percent or more of the outstanding BPS voting common shares.

The principal business of BPS and its associated companies is the development, manufacture and commercialization of proton exchange membranes (''PEM'') fuel cells and PEM fuel cell systems for use in transportation, stationary, portable and other power operations. All of BPS' sales revenue is derived from PEM fuel cell products.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–28328 Filed 11–06–02; 8:45 am]

BILLING CODE 8010–01–M

[1] HCAR No. 26631 and HCAR No. 26635, respectively (collectively, ''Prior Orders'').

[2] BGS is a Canadian company that develops, manufactures and markets stationary electric power systems employing fuel cell technology.

[3] The Commission reserved jurisdiction over GPUIs exercise of the warrants, pending completion of the record. *See* Prior Orders.

[4] Subsequently, GPUI was acquired by a nonassociate company.

[5] *See FirstEnergy Corp.,* HCAR No. 27459.

[6] All BPS shares issued to GPUDH would have a holding period of up to twelve months. Sales in the United States after one year would be limited by the constraints of rule 144 under the Securities Act of 1933, as amended. Sales in Canada would be restricted for four months, in accordance with Canadian provincial securities laws.

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: (67 FR 66433, October 31, 2002).

STATUS: Closed Meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

ANNOUNCEMENT OF CLOSED MEETING: Additional Meeting.

The Securities and Exchange Commission will hold an additional meeting during the week of November 4, 2002: An additional Closed Meeting will be held on Tuesday, November 5, 2002 at 4 p.m.

Commissioner Atkins, as duty officer, determined that no earlier notice thereof was possible. The subject matter of the Closed Meeting to be held on Tuesday, November 5, 2002, will be an investigation.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (6), (7), and (10) and 17 CFR 200.402(a)(5), (6), (7), and (10), permit consideration of the scheduled matter at the Closed Meeting.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: November 5, 2002.

Jonathan G. Katz,

Secretary.

[FR Doc. 02–28486 Filed 11–5–02; 12:26 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46750; File No. SR–AMEX–2002–19]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3, 4, and 5 Thereto Relating to Performance Evaluation Procedures for Specialists Trading Securities Pursuant to Unlisted Trading Privileges

October 30, 2002.

I. Introduction and Description of the Proposal

On March 14, 2002, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt Amex Rule 29, Market Quality Committee, to codify the Exchange's performance evaluation procedures for specialists trading securities admitted to dealings on an unlisted trading privileges (''UTP'') basis. On May 6, 2002, Amex filed Amendment No. 1 to the proposed rule change,[3] and, on May 28, 2002, Amex filed Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended by Amendment Nos. 1 and 2, was published in the **Federal Register** on July 19, 2002.[5] The Commission received no comment letters on the proposal. On July 29, 2002, the Amex filed Amendment No. 3 to the proposed rule change,[6] on October 11, 2002, the Amex filed Amendment No. 4 to the proposed rule change,[7] and, on October 15, 2002, the Amex filed Amendment No. 5 to the proposed rule change.[8] This order approves the proposed rule change, as amended. In addition, the Commission is publishing notice to solicit comment on and is simultaneously approving, on an accelerated basis, Amendment Nos. 3, 4, and 5 to the proposal.

The Exchange is proposing a new program to evaluate and regulate UTP specialist performance. Under the proposal, as amended, a new committee, the Market Quality Committee, would administer the Exchange's program to evaluate and enhance UTP specialist performance. The Committee is proposed to consist of seven persons: the Chief Executive Officer of the Exchange, three members of the Exchange's senior management selected by the Chief Executive Officer, and three members selected by the Chief Executive Officer from among Exchange Officials, Senior Floor Officials and Floor Governors. The Committee would regularly evaluate UTP specialists to determine whether they have fulfilled standards relating to: (1) Quality of markets, (2) competition with other market centers, (3) administrative matters, and (4) willingness to promote the Exchange as a marketplace. The Committee also would review transfers

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Geraldine Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission (May 3, 2002) (''Amendment No. 1'').

[4] *See* letter from Geraldine Brindisi, Vice President and Corporate Secretary, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission (May 24, 2002) (''Amendment No. 2'').

[5] *See* Securities Exchange Act Release No. 46196 (July 12, 2002), 67 FR 47579.

[6] *See* letter from William Floyd-Jones, Assistant General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission (July 26, 2002) (''Amendment No. 3''). In Amendment No. 3, the Exchange made non-substantive, technical corrections and changed the composition of the Amex Market Quality Committee to match that of the Amex UTP Allocations Committee (*See* Securities Exchange Act Release No. 45698 (April 5, 2002), 67 FR 18051 (April 12, 2002) (''UTP Allocations Committee Pilot Approval'')).

[7] *See* letter from William Floyd-Jones, Assistant General Counsel, Amex, to Kelly McCormick-Riley, Division, Commission (October 10, 2002) (''Amendment No. 4''). In Amendment No. 4, the Exchange made non-substantive, technical corrections, provided the Exchange's rationale for matching the composition of the Market Quality Committee with that of the UTP Allocations Committee, and clarified that the Chief Executive Officer of the Exchange will designate the members that serve on the Market Quality Committee. With respect to the rationale for matching the composition of the Market Quality Committee with that of the UTP Allocations Committee, the Amex noted that it believes that the two committees serve closely related functions and that it is desirable for them to have overlapping memberships. The Exchange also stated that it believes that the UTP Allocations Committee structure has worked well in practice and it wishes to ensure that persons serving on the UTP Allocations Committee are available to serve on the Market Quality Committee as well.

[8] *See* letter from William Floyd-Jones, Assistant General Counsel, Amex, to Kelly McCormick-Riley, Division, Commission (October 14, 2002) (''Amendment No. 5''). In Amendment No. 5, the Exchange specified that only Exchange Officials that do not spend a substantial portion of their time on the Floor may participate by telephone in meetings of the Market Quality Committee. These Exchange Officials that participate in meetings by telephone will be provided with all materials so that they can fully participate in Committee activities. See, *e.g.*, Amex Rule 21, Appointment of Floor Officials. *See also* Securities Exchange Act Release No. 46061 (June 11, 2002), 67 FR 41547 (June 18, 2002) (permitting Amex Performance Committee members to attend meetings by telephone).

of specialist registrations in UTP securities to ensure that the Exchange's institutional interests are protected. As proposed, the Market Quality Committee could take certain actions against a UTP specialist if it finds that a UTP specialist's performance is inadequate.

II. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange, and, in particular, with the requirements of section 6(b)[9] of the Act. Specifically, the Commission finds that approval of the proposed rule change is consistent with section 6(b)(5)[10] of the Act because it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest by encouraging good performance and competition among markets and specialists.

Specialists play a crucial role in providing stability, liquidity, and continuity to the trading of securities. Among the obligations imposed upon specialists by the Exchange, and by the Act and the rules thereunder, is the maintenance of fair and orderly markets in their designated securities.[11] To ensure that specialists fulfill these obligations, it is important that the Exchange develop and maintain procedures and policies for monitoring the performance of specialists. Furthermore, it is critical that these procedures and policies explicitly provide for the actions to be taken against specialists whose performance proves to be inadequate. The Commission believes that the proposed rules should provide the Amex with the ability to monitor specialists trading securities pursuant to UTP and take appropriate action in the event that such a specialist's performance proves to be inadequate.

Because the proposed rule change, as amended, institutes a new process for evaluating the performance of specialists that trade securities pursuant to UTP and because the Commission is approving amendments, which relate to the composition of the Market Quality Committee, on an accelerated basis, the Commission believes that the proposal should be approved on a pilot basis through April 5, 2003.[12] The Commission expects the Amex to report to the Commission about its experience with the new performance evaluation process in any future proposal it files to extend the effectiveness of the proposed rule or approve it on a permanent basis.

Moreover, the Commission, pursuant to section 19(b)(2)[13] of the Act, finds good cause for approving Amendment Nos. 3, 4, and 5 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission believes that granting accelerated approval to Amendment Nos. 3, 4, and 5, on a pilot basis, will enhance immediately the Amex's self-regulatory abilities for the benefit of investors generally. Enhancing such abilities in a timely fashion is critical because Amex UTP specialists currently are trading securities pursuant to UTP and the Amex should be enabled to regulate such activity effectively.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 3, 4, and 5, including whether the amendments are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2002–19 and should be submitted by November 29, 2002.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[14] that the proposed rule change (SR–Amex–2002–19), as amended, is hereby approved on a pilot basis through April 5, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–28331 Filed 11–6–02; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* 17 CFR 240.11b–1.

[12] The Commission notes that this is the date on which the UTP Allocations Committee Pilot will expire.

[13] 15 U.S.C. 78s(b)(2).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–2(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46757; File No. SR–NASD–2002–155]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend a Pilot That Permits SuperSOES to Trade Through the Quotations of UTP Exchanges That Do Not Participate in the Nasdaq National Market Execution Service

October 31, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 31, 2002, the National Association of Securities Dealers, Inc. (''NASD''), acting through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the NASD. The NASD filed the proposal pursuant to section 19(b)(3)(A)[3] of the Act, and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective on filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

There is no new language. The pilot rule language is as follows:

4710. Participant Obligations in NNMS

(a)–(e) No Change.

(f) UTP Exchanges.

(i) A UTP Exchange may voluntarily participate in the NNMS System according to the approved rules for the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Nasdaq asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b–4(f)(6)(iii), 17 CFR 240.19b–4(f)(6)(iii).

NNMS System if it executes a Nasdaq Workstation Subscriber Agreement, as amended, for UTP Exchanges.

(ii) If a UTP Exchange does not participate in the NNMS System, the UTP Exchange's quote will not be accessed through the NNMS, and the NNMS will not include the UTP Exchange's quotation for order processing and execution purposes.

(iii) For purposes of this rule the term ''UTP Exchange'' shall mean any registered national securities exchange that has unlisted trading privileges in Nasdaq-listed securities pursuant to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination Of Quotation and Transaction Information For Exchange-Listed Nasdaq/National Market System Securities Traded On Exchanges On An Unlisted Trading Privilege Basis (''Nasdaq UTP Plan'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose [6]

Nasdaq is proposing to extend an existing pilot, which specifies that if a UTP Exchange elects not to participate in SuperSOES, SuperSOES will not include the UTP Exchange's quotation for order processing and execution purposes.[7] Nasdaq believes that this will be the final extension of this pilot for the SuperSOES system because Nasdaq anticipates completing its transition to the Nasdaq Order Display and Collection Facility, commonly known as ''SuperMontage,'' in early December of 2002. Nasdaq seeks to extend the pilot until February 28, 2003, or until Nasdaq completes the transition of its execution systems from SuperSOES to SuperMontage whichever is earlier. Rule language effectuating this pilot program is already in place for SuperMontage.[8]

Background. On January 14, 2000, the Commission approved a rule change to establish the Nasdaq National Market Execution System (''NNMS'') and to modify Nasdaq's SelectNet Service with respect to Nasdaq National Market (''NNM'') securities.[9] On July 30, 2001, NNMS and the changes to SelectNet were implemented for all NNM issues. As approved and implemented, Nasdaq market participants can use two systems to trade NNM issues: a reconfigured Small Order Execution System (''SOES'')—the NNMS—and a reconfigured SelectNet system. SuperSOES is an automated execution system that allows the entry of orders for up to 999,999 shares.[10] By removing the size and capacity restrictions from its principal automatic execution system, Nasdaq intended for most of the orders executed through Nasdaq's systems to migrate to SuperSOES. Consistent with that approach, access to SelectNet was limited to certain types of non-liability orders that require negotiation with the receiving market participant.[11]

As was the case with SOES, Nasdaq market makers are required to participate in SuperSOES and, therefore, to accept automatic execution against their displayed quotations. However, UTP Exchanges are not required to accept automatic executions. Whereas Nasdaq can require, by rule, that its member ECNs provide immediate response to an inbound SelectNet order, it has no authority to extend that requirement to a UTP Exchange. As a result, without the implementation of the instant pilot, if a UTP Exchange was alone at the best bid/best offer for a particular security, that UTP Exchange could cause SuperSOES to stop processing orders in that security and hold those orders in queue for up to 90 seconds.

In such a case, if after 90 seconds, a SuperSOES market participant did not join the current best bid/best offer, or the UTP Exchange did not move its quote, SuperSOES would return the orders that were in queue and the system would shut down for that security. The system would only resume once the UTP Exchange moved its quote away from the inside. Nasdaq believes that such delays would adversely affect Nasdaq's ability to ensure the proper functioning of its market through a major Nasdaq market system, and to enable market participants to obtain executions for their customers.

Pilot Description. To address these problems, Nasdaq proposed, and the Commission approved, a pilot to amend NASD Rule 4710 to require that UTP Exchanges that choose to trade Nasdaq securities through Nasdaq market systems either participate fully in the automatic executions through SuperSOES, or have their quotations removed from the SuperSOES execution and order processing functionality. Specifically, if a UTP Exchange elects not to participate in SuperSOES, SuperSOES will trade through the UTP Exchange's quote. Nasdaq believes that this should prevent a UTP Exchange that is not otherwise accessible via SuperSOES from effectively shutting down the market in that security. [12]

UTP Exchanges that choose not to participate in SuperSOES would be accessible by telephone as contemplated in the Nasdaq UTP Plan,[13] or via a mutually agreed-upon alternative bilateral link created by the UTP Exchange.[14] Nasdaq welcomes the opportunity to explore the possibility of bilateral linkages, which Nasdaq anticipates could be formed via separate agreement between Nasdaq and the exchange(s).

Nasdaq proposed the pilot for a number of reasons. First, significant changes in market conditions have resulted in the need for Nasdaq, via SuperSOES, to increase the speed of

[6] The NASD requested that the Commission correct various verbiage inconsistencies and delete extraneous purpose language from the proposal. Telephone discussion between Jeffrey S. Davis, Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, and Christopher Stone, Attorney, Division of Market Regulation, Commission (October 31, 2002).

[7] The temporary approval of the pilot expires October 31, 2002. *See* Exchange Act Release No. 46016 (May 31, 2002), 67 FR 39457 (June 7, 2002).

[8] *See* Securities Exchange Act Release No. 46343 (August 13, 2002), 67 FR 53822 (August 19, 2002).

[9] *See* Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987 (January 25, 2000).

[10] SOES was limited to small agency orders for customers.

[11] As originally proposed, market participants were permitted to enter into the modified SelectNet only: (1) Those orders that specify a minimum acceptable quantity for a size that is at least 100 shares greater than the posted quote of the receiving market participant; or (2) All-or-None orders that are at least 100 shares in excess of the displayed bid/offer size. Since the original proposal, the SEC has also approved the entry of non-liability, inferior-priced orders through SelectNet.

[12] The Nasdaq UTP Plan governs the trading of Nasdaq-listed securities pursuant to unlisted trading privileges. Subsection (b) of Section IX of the Nasdaq UTP Plan states, in pertinent part, that Plan participants ''shall have direct telephone access to the trading desk of each Nasdaq market participant in each [e]ligible [s]ecurity in which the [p]articipant displays quotations.'' *See* Section IX, Market Access, of the Nasdaq UTP Plan.

[13] We note that this currently is the method that the Cincinnati Stock Exchange has elected to use for trading Nasdaq securities under the Nasdaq UTP Plan.

[14] This proposal would not preclude a UTP Exchange from forming a link with Nasdaq outside Nasdaq's market system or the parameters of an NMS plan.

executions and improve the access of all market participants to the full depth of a security's trading interest. The volume and speed at which trading occurs in Nasdaq have increased dramatically since SuperSOES was first proposed nearly two and a half years ago. Market participants demand and require the ability to access liquidity at the best prices instantaneously. SuperSOES is a significant improvement over prior Nasdaq execution systems, and has become the backbone of Nasdaq's marketplace by providing market participants with a more efficient trading platform as evidenced by faster executions, higher fill rates, larger orders, and prices at the best bid or best offer.

Nasdaq wants to ensure that the market in a particular security does not shut down—thereby harming investors and the market—if there is an unresponsive UTP Exchange setting the current best bid/best offer for that security. Nasdaq recognizes the importance of maintaining price priority and ensuring that market participants receive the best possible price in the market. As such, SuperSOES was originally designed not to trade through the best quote that appears in the Nasdaq montage. However, that premise assumed all quotes would be immediately accessible.[15] SuperSOES must be able to continue operating when a particular quote is not accessible by market participants. To that end, if a UTP Exchange chooses not to participate in SuperSOES, and that UTP Exchange sets the inside bid or ask, Nasdaq will enable SuperSOES not to include that UTP Exchange's quotation for order processing and execution.

Participation in SuperSOES by a UTP Exchange is a voluntary action by each exchange. Nasdaq is not obligated to provide UTP Exchanges with access to any of Nasdaq's proprietary systems. Nasdaq's voluntary action, designed to improve efficiency and maintain an orderly market, should not become an opportunity for a Nasdaq competitor to harm the ability of Nasdaq to improve its markets.

Overall, Nasdaq believes it was appropriate to alter the terms under which a UTP Exchange participates in The Nasdaq Stock Market to address all of the concerns described in this proposal. For the same reasons, it is important to continue the pilot program to preserve the status quo as additional UTP Exchanges prepare to commence trading Nasdaq securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[16] in that the proposal is designed to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, Nasdaq believes that modifying SuperSOES to trade through quotations of non-automatic execution UTP Exchanges is necessary for the fair and orderly operation of The Nasdaq Stock Market by helping to reduce the potential for order queuing or for system stoppages, when a UTP Exchange's quote is inaccessible and is alone at the best bid or best offer.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[17] and Rule 19b–4(f)(6), thereunder.[18] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes that waiving both the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will permit the NASD pilot to continue in operation without interruption. Nasdaq states that the pilot reduces the potential for a shut down in Nasdaq's automatic execution systems. Nasdaq's inability to maintain the status quo during that period would create unnecessary, harmful uncertainty. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[19]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2002–155 and should be submitted by November 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

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[15] Order Entry ECNs are not subject to inbound automatic executions in SuperSOES. However, as NASD members, Order Entry ECNs are subject to NASD Rules and the enforcement and disciplinary powers granted therein. As non-members, UTP Exchanges are not subject to the same regulatory infrastructure.

[16] 15 U.S.C. 78*o*–3(b)(6).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6).

[19] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46755; File No. SR–Phlx–2002–46]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Amending Various Phlx By-Laws and Rules to Remove References to the Secretary and Office of the Secretary to Properly Reflect Functions Performed by the Membership Services Department and its Director, the Director of the Examinations Department and the Floor Procedure Committee

October 31, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2002, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. On October 28, 2002, the Phlx filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.[4]

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx By-Law Article V, Section 5–7; Article XII, Sections 12–1(f)(1), (f)(2), (f)(4), (f)(5), (f)(8); 12–4(a), (d); Article XV, Sections 15–1, 15–11, 15–12; Article XVII, Sections 17–1, 17–3; and Phlx Rules 21, 404, 600, 601, 602, 949, and 1024 by removing references to Secretary and Office of the Secretary to properly reflect functions performed by the Phlx Membership Services Department and its Director, the Director of the Examinations Department and the Floor Procedure Committee.

The text of the proposed rule change, as amended, is available at the Office of the Secretary, the Phlx, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx proposes to substitute references to Office of the Secretary and the Secretary with references to the Membership Services Department and its Director, primarily, in the various Exchange By-Law Article sections and Exchange rules relating to the membership processing performed at the Phlx. The proposed amendments recognize the functional split of responsibilities and functions now performed by the Phlx's Membership Services Department as opposed to the Phlx's Office of the Secretary. The Phlx's Membership Services Department, among other things, processes applications for membership, maintains mail and membership lists, conducts the market for memberships and foreign currency options participations, registers inactive nominees as well as compiles and issues the Exchange's Bulletin.

Approximately a year ago, the Membership Services Department was created by the Phlx to align membership, foreign currency options participation, inactive nominee and approved lessor processing and functions in a single, dedicated department. Over time, the role of the Phlx's Office of the Secretary respecting these matters has been transferred. The Phlx's Office of the Secretary now relies on the Phlx's Membership Services Department to compile and keep current the membership, approved lessor, foreign currency options participant and inactive nominee lists. Thus, the Phlx represents that the purpose of the changes to Phlx Bylaw Article V, Section 5–7, and Phlx Rules 600 and 601 are to reflect this situation. In the course of performing the processing functions, the Phlx's Membership Services Department compiles and issues the Exchange's Bulletin. This function is codified and the Phlx is eliminating the reference to the Secretary's Weekly Bulletin in Phlx By-Law Article XII, Section 12–4(d), Article XV, Section 15–1, as well as in Phlx Rule 949. The proposed changes to the following membership provisions also reflect a transfer of such functions: Phlx By-Law Article XII, Sections 12–1(f) and 12–4(a), Article XV, Sections 15–11 and 15–12, as well as Phlx Rules 21, 602, 949 and 1024.

Additionally, with respect to the proposed amendment to Phlx By-Law Article XVII Section 17–3, Investigation of Insolvency, the reference to the Secretary is being substituted by the Director, Membership Services Department and the Director of the Examinations Department because the Phlx believes that they are the appropriate staff officials to contact respecting an investigation for insolvency of a member or member organization.

Similarly, the amendment to Phlx Rule 404 deletes the reference to the Secretary as the Exchange official referenced to officially close an Exchange contract in securities that has not been fulfilled according to its terms and substitutes the Floor Procedure Committee to perform that function because the Phlx believes that they are the appropriate entity to address the matter under the Exchange rules.[5]

The Phlx believes that the proposed amendments are administrative in function and were reviewed by various Phlx Standing Committees, the Phlx Board and the membership without comment.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Murray L. Ross, Vice President and Secretary, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated October 25, 2002 (''Amendment No. 1''). In Amendment No. 1, the Phlx made technical corrections to its proposal and replaced the filing in its entirety.

[4] For purposes of calculating the effective date and the 60-day abrogation period, the Commission considers the period to commence on October 28, 2002, the date that the Exchange filed Amendment No. 1.

[5] The Phlx represents that the Floor Procedure Committee is the appropriate entity to address this matter because, currently, under Exchange Rule 124, trading disputes occurring on or related to the trading floor, if not settled by an agreement between the members interested, will be settled by a vote of the members knowing of the transaction in question; and if the dispute is still not settled, then it will be settled by a Floor Official. Exchange Rule 124 also provides that Floor Official rulings are reviewable by the Exchange's Floor Procedure Committee. The Phlx also represents that this proposed amendment to current Exchange Rule 404 will not affect appeal or arbitration rights. Telephone conversation between Murray L. Ross, Vice President and Secretary, Phlx, and Sapna C. Patel, Attorney, Division, Commission, on October 31, 2002.

consistent with section 6(b) of the Act [6] in general, and section 6(b)(5) of the Act [7] in particular, in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and protect investors and the public interest by promoting the efficient processing and maintenance of the Exchange's membership, approved lessor, foreign currency options participation and inactive nominee lists and files.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change, as amended, has become effective on October 28, 2002, the date of filing of Amendment No. 1, pursuant to section 19(b)(3)(A)(iii) of the Act [8] and subparagraph (f)(3) of Rule 19b–4 thereunder [9] because it is concerned solely with the administration of the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2002–46 and should be submitted by November 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

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[6] U.S.C. 78f(b).

[7] U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(3).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46758; File No. SR–Phlx–2002–11]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Proposing to Amend Phlx Rule 201A(b), Alternate Specialist Assignment

October 31, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2002, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission''), the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Phlx. The Exchange filed Amendment No. 1 with the Commission on September 10, 2002.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 201A(b), Alternate Specialist Assignment, to delete restrictions on members, member organizations and persons affiliated with member organizations from acting as an alternate specialist while that member, member organization or person affiliated with member organization is either a specialist in the options overlying the equity issue or a Registered Options Trader (''ROT'') with an assignment in the overlying options. The text of the proposed rule change is set forth below. Deleted text is in brackets.

Rule 201A (a) No change.

(b) *Assignment.* The Allocation, Evaluation and Securities Committee may assign one or more alternate specialists in a particular equity issue and may assign an alternate specialist to one or more equity issues after consultation with the Floor Procedure Committee. [No alternate specialist shall be assigned in an equity issue in which the alternate specialist, or any person associated with the alternate specialist or the member organization with which the alternate specialist is affiliated, is either a specialist in the options overlying that equity issue, or a Registered Options Trader with an assignment in the overlying options].

(c) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to delete restrictions on assignment of members and member organizations as alternate specialists if the member, member organization or persons affiliated with the member is the options specialist or an assigned ROT in the options overlying the equity issue. The Phlx does not have any similar restrictions on registered equity specialists (*i.e.*, primary specialists), their members or affiliated persons of such member organizations, nor is there a Commission rule on point. The Phlx believes that in an era of intense

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On September 10, 2002, the Exchange filed a Form 19b–4, which replaced the original filing in its entirety (''Amendment No. 1''). In Amendment No. 1, the Exchange enhanced the purpose of the proposed rule change.

competitive market making in multiple market centers, with continued consolidation of broker-dealer specialist units operating on multiple markets, the restriction on *alternate* specialist privileges because a member organization has a ROT assigned in the overlying options or is the options specialist on the Phlx is no longer relevant or appropriate.

The instant restrictions were approved by the Commission in 1987.[4] According to the Phlx, the order makes only cursory reference to the restrictions and gives no rationale for them. Given the fact that there are no comparable restrictions on *primary* equity specialists at the Phlx, as well as the fact that appointments of alternate specialists and their association or affiliation with either a firm that is the specialist in the overlying option or with a ROT would be monitored by the Phlx's Market Surveillance Department to ensure compliance with Phlx and Commission rules, the Phlx does not believe the present restrictions are appropriate. The Phlx notes that its alternate specialist program allows existing registered Phlx equities specialists to provide liquidity on demand in the execution of customer orders in certain other securities traded on the Exchange and in other market centers.

The Phlx's Market Surveillance and Examinations Departments maintain and review any account activity of alternate specialists. Should the restrictions on appointment be deleted, the Phlx's Market Surveillance Department would coordinate their reviews of any corresponding options activity by an alternate specialist's member firm that may be a registered options specialist or have an affiliated ROT active in the related options to assure compliance with Phlx

The Phlx believes that deleting the restriction on alternate specialist appointment on the Phlx, generally a non-primary market for equities and other securities, would be consistent with the Commission's previous approval of proposals by several of the regional stock exchanges to allow stock specialists on those exchanges to take positions (not limited to hedging positions) in listed options on their specialty stock.[5] Specifically, the Phlx notes that the Commission staff Report of the Special Study of the Options Markets[6] cited the fact that the Commission determined to permit specialists and odd-lot dealers on the floors of the regional stock exchanges (Chicago Stock Exchange, Inc., Pacific Exchange, Inc., and the Phlx) to trade options on their specialty stocks and to allow floor traders on those exchanges to trade listed options with respect to underlying securities in which such floor traders held a position.[7] Further, in the Options Study, the staff noted that ''the Commission was of the view that the potential for manipulative activity that might result from such ''concurrent trading'' was ''relatively insignificant'' on the secondary stock exchanges due to the small percentage of stock order flow directed to them.''[8]

Further, the Phlx notes that Phlx *primary* equity specialists may already take non-hedged positions in overlying options directly and are not restricted from being associated with the options specialist or having an associated ROT trade in the overlying options. In addition, the Commission recently approved an American Stock Exchange LLC (''Amex'') proposal that permitted limited side-by-side trading and integrated market making in certain securities (specified Exchange-Traded Fund Shares (''ETFs'') or Trust Issued Receipts (''TIRs'')) and their related options under certain conditions, as well as allowed limited integrated market making by permitting specialists in securities admitted to dealings on an unlisted basis to act as specialists, or other registered market makers in the related options provided certain exchange-approved information barriers are established and enforced.[9]

The Phlx believes that a Phlx alternate specialist will have little or no competitive or market informational advantages accruing to him or his firm in part due to the physical separation of the Phlx options and equity trading floors. The Phlx alternate equity specialist in an underlying security is physically separated from where an options specialist unit or an associated ROT would trade options and therefore, the Phlx believes that alternate specialists would have limited opportunities or abilities to engage in any potential manipulative or other improper trading practices.

On the Phlx, an alternate specialist's primary function is to afford an opportunity to assist in providing liquidity on the Phlx market if requested by the Phlx registered equity specialist. The Phlx believes that it is, therefore, rather doubtful that any possible conflicts between stock and options market making obligations may arise.

The Phlx believes it is inappropriate to restrict alternate specialist assignment due to the affiliation with an options specialist unit or an associated ROT in an environment of multiple market centers participating in trading of the equities and overlying options when the Phlx primary equities specialist is allowed to have such affiliations.

2. Basis

The Phlx believes that proposed rule change is consistent with section 6 of the Act[10] in general, and with section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices and protect investors and the public interest by expanding the number of actively trading broker-dealers eligible to act as alternate specialists to increase liquidity and competitiveness of the Exchange's equities trading floor.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Phlx has neither solicited nor received written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Phlx consents, the Commission will:

[4] *See* Securities Exchange Act Release No. 24820 (August 19, 1987), 52 FR 32235 (August 26, 1987) (SR–Phlx–87–04).

[5] *See, e.g.*, Securities Exchange Act Release Nos. 13269 (February 16, 1977), 11 SEC Docket 1741 (March 1, 1977); 13270 (February 16, 1977); 11 SEC Docket 1742 (March 1, 1977), 13271 (February 16, 1977), 11 SEC Docket 1743 (March 1, 1977); and 13272 (February 16, 1977), 11 SEC Docket 1744 (March 1, 1977).

[6] *See* Report of the Special Study of the Options Markets to the Securities and Exchange Commission, H.R. Rep. No. IFC 3, 96th Cong. 1st sess. (Comm. Print 1978) (''Options Study'').

[7] *See supra* note 5.

[8] *See* Options Study, *supra* note 6 at pp. 872–873.

[9] *See* Securities Exchange Act Release No. 46213 (July 16, 2002), 67 FR 48232 (July 23, 2002) (SR–AMEX–2002–21).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

(A) by order approve such proposed rule change, or,

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2002–11 and should be submitted by November 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–28330 Filed 11–6–02; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 4201]

Culturally Significant Objects Imported for Exhibition Determinations: ''Einstein: Changing the World''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the object to be included in the exhibition ''Einstein: Changing the World,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner. I also determine that the exhibition or display of the exhibit objects at the American Museum of Natural History, New York, NY from on or about November 10, 2002 to on or about August 10, 2003, the Field Museum, Chicago, IL from on or about October 18, 2003 to on or about January 11, 2004, the Museum of Science, Boston, MA from on or about March 13, 2004 to on or about June 6, 2004, the Skirball Cultural Center, Los Angeles, CA from on or about September 9, 2004 to on or about May 29, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: (202) 619–6981). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: November 1, 2002.

Patricia S. Harrison,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 02–28397 Filed 11–6–02; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4200]

Culturally Significant Objects Imported for Exhibition Determinations: ''Great Asian Dinosaurs''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the object to be included in the exhibition ''Great Asian Dinosaurs,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner. I also determine that the exhibition or display of the exhibit objects at The Museum of Arts and Sciences, Daytona Beach, FL from on or about February 20, 2003 to on or about June 20, 2003, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (*telephone:* (202) 619–6981). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: November 1, 2002.

Patricia S. Harrison,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 02–28396 Filed 11–6–02; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4151]

Overseas Security Advisory Council (OSAC) Renewal

The Department of State has renewed the Charter of the Overseas Security Advisory Council. This advisory council will continue to interact on overseas security matters of mutual interest between the U.S. Government and the American private sector. The Council's initiatives and security publications provide a unique contribution to protecting American private sector interests abroad. The Under Secretary for Management has determined that the Council is necessary and in the public interest.

The Council consists of representatives from four (4) U.S. Government agencies and thirty (30) American private sector companies and organizations. The Council will follow the procedures prescribed by the Federal Advisory Committee Act (FACA) (Pub. L. 92–463). Meetings will be open to the public unless a determination is made in accordance with section 10(d) of the FACA, 5 U.S.C. 552b(c)(1) and (4), that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will be provided in the **Federal Register** at least 15 days prior to the meeting.

For more information contact Marsha Thurman, Overseas Security Advisory

[12] 17 CFR 200.30–3(a)(12).

Council, Bureau of Diplomatic Security, U.S. Department of State, Washington, DC 20522–1003, *phone:* (202) 663–0533.

Dated: November 1, 2002.

Peter E. Bergin,

Director of the Diplomatic Security Service, Department of State.

[FR Doc. 02–28395 Filed 11–6–02; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[USCG 2002–13126]

Information Collection Under Review by the Office of Management and Budget (OMB): 2115–0141

AGENCY: Coast Guard, DOT.

ACTION: Request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard has forwarded one Information Collection Report (ICR) abstracted below to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) for review and comment. Our ICR describes the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before December 9, 2002.

ADDRESSES: To make sure that your comments and related material do not enter the docket [USCG 2002–13126] more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001. (b) By mail to OIRA, 725 17th Street NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard. Caution: Because of recent delays in the delivery of mail, your comments may reach the Facility more quickly if you choose one of the other means described below.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Docket Management Facility at 202–493–2251 and (b) OIRA at 202–395–5806, or e-mail to OIRA at *oira_docket@omb.eop.gov* attention: Desk Officer for the Coast Guard.

(4)(a) Electronically through the Web Site for the Docket Management System at *http://dms.dot.gov.* (b) OIRA does not have a website on which you can post your comments.

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL–401 (Plaza level), 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at http://dms.dot.gov.

Copies of the complete ICR are available for inspection and copying in public dockets. They are available in docket USCG 2002–13126 of the Docket Management Facility between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays; for inspection and printing on the internet at *http://dms.dot.gov;* and for inspection from the Commandant (G–CIM–2), U.S. Coast Guard, room 6106, 2100 Second Street SW., Washington, DC, between 10 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Barbara Davis, Office of Information Management, 202–267–2326, for questions on this document; Dorothy Beard, Chief, Documentary Services Division, U.S. Department of Transportation, 202–366–5149, for questions on the docket.

SUPPLEMENTARY INFORMATION

Regulatory History

This request constitutes the 30-day notice required by OIRA. The Coast Guard has already published (67 FR 54009, August 20, 2002) the 60-day notice required by OIRA. That notice elicited no comments.

Request for Comments

The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collection; (2) the accuracy of the Department's estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collection; and (4) ways to minimize the burden of collection on respondents, including the use of automated collection techniques or other forms of information technology.

Comments, to DMS or OIRA, must contain the OMB Control Number of the ICR addressed. Comments to DMS must contain the docket number of this request, USCG 2002–13126. Comments to OIRA are best assured of having their full effect if OIRA receives them 30 or fewer days after the publication of this request.

Information Collection Request

Title: 46 CFR Subchapter Q; Lifesaving, Electrical, and Engineering Equipment, Construction, and Materials.

OMB Control Number: 2115–0141.

Type of Request: Extension of a currently approved collection.

Affected Public: Manufacturers of safety equipment and materials.

Form: C6HQ–10030.

Abstract: The Coast Guard needs to collect this information so it can ensure compliance with rules governing specific types of safety equipment and material installed on commercial vessels and pleasure craft. Manufacturers must submit drawings, specifications, and laboratory test reports to the Coast Guard before it grants any approval.

Annual Estimated Burden Hours: The estimated burden is 16,880 hours a year.

Dated: October 31, 2002.

J.E. Evans,

Acting Director of Info & Tech.

[FR Doc. 02–28241 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Advisory Circular (AC) 43–HAB, Hot Air Balloon Inspection and Repair: Acceptable Methods, Techniques, and Practices

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability and request for comments on the proposed AC.

SUMMARY: This notice announces a proposed AC to be used by the Hot Air Balloon community as acceptable methods, techniques, and practices associated with the inspection and repair of Hot Air Balloons. This notice is necessary to give all interested persons the opportunity to present their views on the proposed AC. Hot air balloons derive lift from self-contained, generated heated air and are considered

by definition a lighter-than-air aircraft. The owner or operator of a hot air balloon is primarily responsible for maintaining the balloon in an airworthy condition. The persons performing maintenance are responsible for the manner of performance and the approval for return to service after work is completed.

DATES: Comments must be received on or before January 6, 2003.

ADDRESSES: Send all comments on the proposed AC to: DOT/FAA, Standardization Branch, AFS–640, *Attn:* George Torres, 6500 S. MacArthur Boulevard, ARB Room 304A, Oklahoma City, Oklahoma 73125, or electronically to *george.torres@faa.gov.*

FOR FURTHER INFORMATION CONTACT: George Torres, AFS–640, at the address above, *by telephone:* (405) 954–6923, *by fax:* (405) 954–4104, or by *e-mail: george.torres@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The proposed AC is available on the FAA Web site at *http://www1.airweb.faa.gov/Regulatory__and__Guidance__Library/rgDAC.nsf/MainFrame?OpenFrameSet,* under AC No. 43–HAB. A copy of the proposed AC may be obtained by contacting the person named above under **FOR FURTHER INFORMATION CONTACT**. Interested persons are invited to comment on the proposed AC by submitting such written data, views, or arguments, as they may desire. Please identify AC 43–HAB, Hot Air Balloon Inspection and Repair: Acceptable Methods, Techniques, and Practices, and submit comments, either hard copy or electronically, to the appropriate address listed above. Comments may be inspected at the above address between 9 a.m. and 4 p.m. weekdays, except Federal holidays.

Issued in Washington, DC, on November 1, 2002.

Louis C. Cusimano,

Deputy Director, Flight Standards Service.

[FR Doc. 02–28372 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular No. 00–62, Internet Communications of Aviation Weather and NOTAMs

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability and disposition of comments.

SUMMARY: This notice announces the availability of Advisory Circular No. 00–62, Internet Communications of Aviation Weather and NOTAMs, and disposes of comments received on an earlier proposed draft.

FOR FURTHER INFORMATION CONTACT: Steven R. Albersheim, Aerospace Weather Policy Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, (202) 385–7704, or *steven.albersheim@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 14, 2002 the FAA issued a draft Advisory Circular (AC) on Internet Communications of Aviation Weather and NOTAMs. The FAA requested comment on all aspects of the proposed AC. This AC sets forth the process to become a Qualified Internet Communications Provider (QICP) and addresses issues that relate to accessing aviation weather and NOTAM information from approved QICPs.

Disposition of Comments

Comments were submitted from industry, special interest groups, and private individuals. The comments covered various issues, but were principally concerned with how a vendor would meet the provisions of reliability, accessibility, and security to be approved as a QICP by the FAA. The following addresses the issues raised by the commenters:

Several commenters questioned and/or did not support that the AC does not address the quality of a QICP's service or the quality of the QICP's data. As stated in the draft AC and reiterated here, the FAA does not intend to provide quality control of QICP data or approve the data accessed from a QICP. While the FAA requires air carriers certificated under 14 CFR parts 121 and 135 to use an FAA-approved source for weather information, the FAA does not approve the information supplied to these carriers, or to pilots conducting operations under part 91. This AC does not change the agency's current position on approving quality of data, or sources for other than part 121 and 135 carriers. A fundamental change such as approving data and/or sources for part 91 operations would require rulemaking with a public process for notice and comment. While these comments are noted, the purpose and goal of this AC are not to add these requirements. The FAA finds value in ensuring that the provider's facility, as an approved source for part 121 and 135 operators, is reliable, accessible and secure. This value may be realized by part 91 operators utilizing QICP vendors, if they so choose. To further clarify that an approved QICP does not include FAA approval of data source or quality, the FAA has added as part of the approval process, the provider's agreement to display a label on its internet site with the following recommended language. Failure to display this label may result in losing QICP status.

This Qualified Internet Communication Provider's (QICP) servers and communication interfaces are approved by the FAA as secure, reliable, and accessible in accordance with AC 00–62.

(1) This QICP does not ensure the quality and currency of the information transmitted to you.

(2) You assume the entire risk related to the information and its use.

Several commenters questioned the nature of the Quality of Service (QOS) agreements. Each approved QICP's maintenance plan has a QOS agreement with each user that addresses how the provider will meet measures of accessibility, reliability, and security. The QOS agreement should at most, only reference the standards and provide for complaint procedures if they are not maintained, allowing the parties to freely negotiate appropriate remedies and limitations of liability in the event the standards cannot be met for some period of time.

Comments were received on the use of standard security technology to ensure site authentication/data integrity. Specifically, a commenter disagreed with the use of Secure Sockets Layer (SSL) because SLL is not a formal standard and there are known bugs in early versions of SSL that allow an attacker to defeat any authentication and integrity assurances that it might provide, with a similar effort to altering data from an unsecured HTTP session.

The FAA agrees with this comment and has changed the AC to reflect that approved QICP's should maintain a security system that is applicable to current state-of-the-art technology. This also allows the applicant greater flexibility in implementing a system that complies with the AC while serving its customers and minimizing costs. In addition, it is noted that this change assists in preventing unauthorized access to or modification of provider data, software and hardware.

One commenter states that this AC inadequately describes the disaster recovery and contingency measures. The FAA does not believe it is necessary to provide specific details on every possible incident that could occur and believes that the AC provides guidance

to applicants in devising individual security plans. The applicants need to demonstrate in their application that their security plans will maintain the integrity of the data. It is up to each applicant to show how they will maintain their operation 24 hours per day, seven days a week during any event that could disrupt service.

One commenter states that the FAA's response to an Application or a Letter of Denial following a Capability Demonstration should clearly define the standards/requirements to be met to allow the applicant to have its Application accepted and move on to the Capability Demonstration, or to have its Capability Demonstration completed successfully and qualify as a QICP.

In the event that a vendor's application is unsuccessful initially, the FAA will recommend revisions and inform the applicant of any needed changes. Similarly, a Letter of Denial will indicate the reasons for the denial so that the vendor could make appropriate changes to successfully complete its Capability Demonstration.

A commenter suggested that the approval period last for one or two years with a mandatory performance review of any extension and conduct interim review upon request.

The FAA finds that a six-month review is appropriate. QICPs are to provide facility performance statistics semiannually or upon request. This review assists in ensuring that QICPs are meeting the criteria of this AC.

One commenter argued that the required time for a QICP to respond to a user's Quality of Service complaints should be reduced from 14 calendar days to one business day following receipt.

The FAA maintains the 14-calendar day response period because while some complaints may be resolved in a very short time frame, other complaints may be more difficult to address. Each QICP has the option of implementing a more stringent response period in its QOS agreement. However, the agency finds that at a minimum, some latitude is necessary and that 14 calendar days provides that latitude.

One comment questioned the necessity for QICPs to authenticate users and limit access to authorized users, in order to provide users with information that is publicly available to anyone via other sources. This commenter contends that user authentication can increase the costs of providing such services.

User authentication is only a recommended practice. The significant aspect is that digital authentication is used so that the user knows that he/she has signed on to an approved QICP site. The FAA does not discourage those vendors who choose to provide a value-added service with password restriction to their customers. In accordance with this AC, QICPs are to meet the minimum-security protocol, which is to verify the authenticity of the source of information.

Comments were received on the need to further address the provisions of reliability and accessibility, in that the measures are too stringent. FAA disagrees with this position. In order to meet the purpose of this AC, a QICP's server and communication interface should have very little down time. In developing this measure of service, the FAA consulted with industry and the National Weather Service and believes this is achievable and easily maintained and consistent with current industry practices. FAA did not receive any comments on the burden of meeting the criteria in the AC in response to the solicitation for comments addressing reports requirements under the Paper Work Reduction Act of 1995.

A commenter recommends that the FAA consider the feasibility of requiring a certificate of authority for providers of aviation information, or that other means be identified to provide authentication and integrity protection.

It is recognized that no form of Internet security is totally risk free. The agency's intent with this AC is to reduce the risk to an acceptable level. The use of server digital certificates is consistent with current business practices, which the FAA finds to be an acceptable level. However, a QICP and user have the option of agreeing upon the use of a specific server certificate of their choice if they believe greater security linkage is warranted.

On September 17, 2002 the FAA published a proposed Revision to Operations Specifications (OpSpecs) A010, Aeronautical Weather Data in the **Federal Register**, which proposed a new requirement for 14 CFR part 121 and part 135 certificate holders that obtain approved weather data via the public Internet for use in flight operations. Under this proposal, these carriers must use a QICP for Internet communications of aviation weather and NOTAMs. OpSpec A010, would be amended to read as follows:

''For Internet communications of aviation weather and NOTAMS used in flight operations, all part 121 and 135 operators are required to use an approved Qualified Internet Communications Provider (QICP):

(1) The QICPs used by the operator must be listed in OpSpec A010.

(2) The QICP used must be obtained from the approved list provided by the FAA.

(3) For more detailed information with regard to QICPs, refer to the appropriate AC pertaining to Internet Communications of Aviation Weather and NOTAMs and Volume 3, Chapter 7, Section 5, of this Order.''

In response to this Notice, the Air Transport Association commented that it supports the proposal and one air carrier requested clarification as to when a Part 121 operator could use an Internet provider for aviation weather services.

The Internet AC addresses measures to be taken by a QICP to assure the security, availability, and accessibility of Internet communications link for providing weather and NOTAM information. Some of the service providers that become QICP will likely provide a very comprehensive service while others will provide a narrower service focus. FAA will approve QICP status to both types of providers who meet the communications capabilities in the interest of enabling providers of weather and NOTAM service to use the public Internet.

Availability of the Advisory Circular

Aviation weather information is available on the public Internet from a variety of government and vendor sources with minimal quality control. Users of the National Airspace System, dispatchers, pilots and air traffic controllers/specialists have expressed interest in the ability to utilize the public Internet to retrieve aviation weather text and graphic products for operational decision-making. The FAA issued Advisory Circular 00–62 ''Internet Communications of Aviation Weather and NOTAMS'' on November 1, 2002 and is available on the FAA Web page at, *http://www.faa.gov/ats/ars/qicp.*

Issued in Washington, DC, on November 1, 2002.

James H. Washington,

Director, Air Traffic System Requirements Service.

[FR Doc. 02–28371 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Advisory Circular (AC) 145–MAN, Guide for Developing and Evaluating Repair Station and Quality Control Manuals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability of a proposed AC and request for comments.

SUMMARY: This notice announces the availability of a proposed AC which provides an acceptable means, but not the only means, of developing manuals that are required by regulation for aeronautical repair stations. This notice is necessary to give all interested persons the opportunity to present their views about the proposed AC.

DATES: Comments about the proposed AC must be received on or before November 22, 2002.

ADDRESSES: Send comments about the proposed AC to Diana L. Frohn, General Aviation and Commercial Branch (AFS–340), Room 827, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–7027; *e-mail: diana.frohn@faa.gov.* You can also submit comments electronically using the Internet on the ''Draft AW documents'' page at *http://www.opspecs.com.* Comments may be inspected at the above office between 9 a.m. and 4 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Diana L. Frohn at the above address, e-mail address, or telephone number.

Availability of the Proposed Advisory Circular

You can get a copy of the proposed AC by contacting the person named under **FOR FURTHER INFORMATION CONTACT.** You can also get an electronic copy of the proposed AC using the Internet on the ''Draft AW documents'' page at *http://www.opspecs.com* or on the FAA's ''Regulatory Guidance Library'' page at *http://www1.airweb.faa.gov/Regulatory__and__Guidance__Library/rgDAC.nsf/MainFrame?OpenFrameSet.*

Comments Invited

Interested persons are invited to comment about the proposed AC by sending written data, views, or arguments. Commenters should indicate AC 145–MAN, Guide for Developing and Evaluating Repair Station and Quality Control Manuals, in the comment and send comments to the address specified above. The Continuous Airworthiness Maintenance Division will consider all comments before issuing the final AC.

Background

This proposed AC is the result of an amendment to part 145 of Title 14, Code of Federal Regulations (14 CFR), published in the **Federal Register** on August 6, 2001. The final rule changed procedures and requirements for aeronautical repair stations and requires repair stations to develop a repair station manual and a quality control manual. The current AC (AC 145–3, dated February 13, 1981) does not incorporate these new procedures and requirements, nor does it reflect industry practices used by certificated repair stations today. FAA, therefore, finds it necessary to discard current guidance material and proposed new guidance material. This proposed AC would replace AC 145–3.

The proposed AC incorporates several examples of quality systems that repair stations may choose from to determine which best suits their individual needs. The proposed AC also incorporates several ''checklists'' to determine if the repair station has fully considered all its options and requirements. Further, this AC aids in the development of procedures and programs to assist the harmonization efforts of FAA with the European Joint Aviation Authority and other regulatory authorities.

FAA will consider each comment about the proposed AC and incorporate appropriate changes. This proposed AC will be reviewed in conjunction with the regulatory requirements of 14 CFR parts 43, 65, and 121, as applicable. This proposed AC would not change, add, or delete any requirement or authorize any deviation from part 43, 65, or 121.

Dated: Issued in Washington, DC, on October 29, 2002.

Louis C. Cusimano,

Deputy Director, Flight Standards Service.

[FR Doc. 02–28376 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Third Party War Risk Liability Insurance

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of extension of Aviation Insurance.

SUMMARY: This notice contains the text of a memo from the Secretary of Transportation to the President regarding the extension of the provision of aviation insurance coverage for U.S. flag commercial air carrier service in domestic and international operations.

DATES: Dates of extension from October 16, 2002 through December 15, 2002.

FOR FURTHER INFORMATION CONTACT: Helen Kish, Program Analyst, APO–3, or Eric Nelson, Program Analyst, APO–3, Federal Aviation Administration, 800 Independence Ave., SW, Washington, DC 20591, telephone 202–267–9943 or 202–267–3090. Or online at FAA Insurance Web site: *http://insurance.faa.gov.*

SUPPLEMENTARY INFORMATION: On October 15, 2002, the Secretary of Transportation authorized a 60-day extension of aviation insurance provided by the Federal Aviation Administration as follows:

Memorandum to the President

''Pursuant to the authority delegated to me in paragraph (3) of Presidential Determination No. 01–29 of September 23, 2001, I have extended that determination to allow for the provision of aviation insurance and reinsurance coverage for U.S. Flag commercial air carrier service in domestic and international operations for an additional 60 days.

Pursuant to section 44306(c) of Chapter 443 of 49 U.S.C., Aviation Insurance, the period for provision of insurance shall be extended from October 16, 2002, through December 15, 2002.''

/s/Norman Y. Mineta

Affected Public: Air Carriers who currently have Third Party War-Risk Liability Insurance with the Federal Aviation Administration.

Issued in Washington, DC, on October 30, 2002.

Nan Shellabarger,

Deputy Director, Office of Aviation Policy and Plans.

[FR Doc. 02–28375 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Extension of Scoping Comment Period, Until December 9, 2002, on the Notice of Intent To Prepare Draft and Final Environmental Impact Statements for a Replacement Airport at St. George, UT

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

The Northwest Mountain Region, Airports Division, Federal Aviation Administration (FAA), announces it has extended, until December 9, 2002, the scoping comment period pertaining the FAA Notice of Intent to prepare Draft and Final Environmental Impact Statements (EIS) for the construction of a replacement airport at St. George, Utah.

Background

On January 30, 2001, the Federal Aviation Administration (FAA) issued a Record of Decision/Finding of No Significant Impact document for the construction of a replacement airport at St. George, Utah. On December 22, 2001, the Grand Canyon Trust filed suit against the FAA in the U.S. Circuit Court of Appeals for the District of Columbia Circuit. On May 24, 2002, the court issued it's decision on the issues. In summary, the court found that ''the FAA must evaluate the cumulative impact of noise pollution of the Park (Zion National Park) as a result of construction of the proposed replacement airport in light of air traffic near and over the Park, from whatever airport, air tours near or in the Park, and the acoustical data collected by the NPS in the Park in 1995 and 1998 mentioned in comments on the draft Environmental Assessment (EA)''. The court remanded the case [to the FAA] ''because the record is insufficient for the court to determine whether an EIS is required''.

The purpose of the Draft and final EIS's will be to address the court's issues and any other environmental issues that have changed since issuance of the final environmental assessment in January of 2001.

In previously issued notices (**Federal Register** and *The Specturm Newspaper,* St. George, Utah) some misunderstanding may have existed regarding the use of the word ''Park'' in the Background text. This notice clarifies that the Park in question is Zion National Park. Further, the FAA has extended the scoping comment period until December 9, 2002, to insure an adequate comment period with a clear understanding that the ''Park'' is Zion National Park.

Proposed Action and Alternatives

The proposed action is the construction of a replacement airport at St. George, Utah. Alternatives to be evaluated include:

a. No-Build (continue using the existing airport as is).

b. Build a replacement airport at the preferred site (which is a combination of alternative sites 1 and 1A), and

c. Alternative sites 1, 1A, and 2 as described on pages 32–40 of the final EA.

Scoping Process

The proposed action was the subject of a Final Environmental Assessment (FEA) report prepared in January 2001. Persons wishing to review the FEA in order to better understand the proposed action or provide comments regarding environmental concerns may review the FEA at the following locations:

Federal Aviation Administration, Airports Division, ANM–600, 1601 Lind Avenue, SW., Renton, Washington, 98055–4056.

Denver Airports District Office, 26805 E. 68th Ave., Suite 224, Denver, CO 80249–6361.

City of St. George, Public Works Office, 175 East 200 North, St. George, UT 84770.

Washington County Library, St. George Branch, 50 S. Main, St. George, Utah.

In order to insure that all significant issues related to the proposed action are identified and given consideration, letters containing environmental concerns must be received by Dennis Ossenkop, 1601 Lind Ave. SW., Suite 315, Renton, WA 98055–4056 by December 9, 2002.

Release of Draft EIS

Approximate Release of Draft EIS: Unknown at this time.

Point of Contact for Information

Dennis Ossenkop, 1601 Lind Ave. SW., Suite 315, Renton, WA 98055–4056, Telephone: 425 227 2611.

Dated: October 29, 2002.

Lowell H. Johnson,

Manager, Airports Division, Northwest Mountain Region.

[FR Doc. 02–28377 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 03–10–C–00–BNA To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Nashville International Airport, Nashville, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Nashville International Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before December 9, 2002.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Memphis Airports District Office, 3385 Airways Boulevard, Suite 302, Memphis, Tennessee 38116–3841.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Raul Regalado, President of the Metropolitan Nashville Airport Authority at the following address ONe Terminal Drive, Suite 501, Nashville, Tennessee, 37214. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Metropolitan Nashville Airport Authority under section 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Cynthia K. Wills, Program Manager, Memphis Airports District Office, 3385 Airways Boulevard, Suite 302, Memphis, Tennessee 38116–3841, (901) 544–3495. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Nashville International Airport under the provisions of the 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On October 29, 2002, the FAA determined that the application to impose and use the revenue from a PFC submitted by Metropolitan Nashville Airport Authority was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 11, 2003.

The following is a brief overview of the application.

Proposed charge effective date: October 1, 2004.

Proposed charge expiration date: March 31, 2007.

Level of the proposed PFC: $3.00.

Total estimated PFC revenue: $8,883,800.

Brief description of proposed project(s): Land Acquisition (East Side); Land Acquisition (Extended Runway Approach Areas), Public Address System, Security Enhancements, Airfield Pavement Rehabilitation, Widen Three (3) Taxiway Fillets, Airport Vehicle Driving Simulator.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Part 135, Air Taxi.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports office located at: Southern Region Headquarters, 1701 Columbia Avenue, College Park, Georgia, 30337

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Metropolitan Nashville Airport Authority.

Dated: Issued in Memphis, Tennessee on October 29, 2002.

LaVerne F. Reid,

Manager, Memphis Airports District Office, Southern Region.

[FR Doc. 02–28378 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Shelby County, TN

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Shelby County, Tennessee.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Doctor, Field Operations Team Leader, Federal Highway Administration, 640 Grassmere Park Suite 112, Nashville, Tennessee 37211, Telephone: (615) 781–5788.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Tennessee Department of Transportation, will prepare an environmental impact statement (EIS) on a proposal to improve and extend North Second Street from Interstate 40 to the State Route 300/U.S. 51 (Thomas Street) interchange in Memphis. This proposed transportation improvement project is identified in the Memphis Metropolitan Area Long Range Transportation Plan as a Priority One facility. The main project purpose is to provide a transportation facility that improves accessibility and promotes economic development opportunities for the north Memphis, Frayser, and downtown Memphis communities.

Alternatives to be considered are: (1) Taking no action; (2) improve existing North Second Street and North Third Street as one-way pairs from I–40 to Henry Avenue and widen North Second Street north of Henry Avenue as a two-way street with three-lanes in each direction; (3) improve existing Auction Avenue and U.S. 51 (Thomas Street) as a six-lane facility; and (4) other alternatives that may arise from public and agency input.

Initial coordination letters describing the proposed action and soliciting comments were previously sent to appropriate Federal, State and local agencies, and to private organizations and citizens who have previously expressed or are known to have an interest in this proposal. Two public information meetings and two preliminary inter-agency scoping meetings have been held for the project and a public hearing will be scheduled upon completion of the Draft EIS. Public notice will be given of the time and place of the hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: October 28, 2002.

Mark A. Doctor,

Field Operations Team Leader, Tennessee Division, Nashville, Tennessee.

[FR Doc. 02–28335 Filed 11–6–02; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34264]

Connotton Valley Railway, Inc.—Lease and Operation Exemption—Wheeling & Lake Erie Railway Company

Connotton Valley Railway, Inc. (CVR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease and operate, pursuant to an agreement with Wheeling & Lake Erie Railway Company (W&LE), approximately 10.4 miles of rail line. The line extends from milepost 5.1 in Cleveland, OH, to milepost 15.5 at Falls Junction, in Glenwillow, OH (including access to the yard at Falls Junction and all existing siding and run-around tracks within and between said points). CVR certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier, and further certifies that its projected annual revenues will not exceed $5 million.

The parties report that they intend to consummate the transaction on or after the effective date of the exemption. The earliest the transaction could have been consummated was October 15, 2002 (7 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34264, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Barbara Williams, 14 South Main Street, PO Box 261, West Salem, OH 44287.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 30, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 02–28072 Filed 11–6–02; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Proposed Collection; Comment Request; Currency Transaction Report by Casinos (''CTRC'').

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comment on a proposed extension of an existing information collection requirement contained in the form, ''Currency Transaction Report by Casinos (CTRC).'' This request for comments is being

made pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments are welcome and must be received on or before January 6, 2003.

ADDRESSES: Written comments should be submitted to: Office of Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, Virginia 22183, Attention: PRA Comments—CTRC Form. Comments also may be submitted by electronic mail to the following address: *regcomments@fincen.treas.gov*, again with a caption, in the body of the text, ''Attention: PRA Comments—CTRC Form.''

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400.

FOR FURTHER INFORMATION CONTACT: Leonard Senia, Senior Regulatory Program Specialist; or Russell Stephenson, Regulatory Program Analyst, Office of Compliance and Regulatory Enforcement, FinCEN, at (202) 354–6015; and Judith R. Starr, Chief Counsel and Christine L. Schuetz, Attorney-Advisor, Office of Chief Counsel, FinCEN, at (703) 905–3590.

SUPPLEMENTARY INFORMATION:

Title: Currency Transaction Report by Casinos (CTRC).

OMB Number: 1506–0005.

Form Number: 8362.

Abstract: The statute generally referred to as the ''Bank Secrecy Act,'' Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5332, authorizes the Secretary of the Treasury, inter alia, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1] Regulations implementing Title II of the Bank Secrecy Act appear at 31 CFR part 103. The authority of the Secretary to administer the Bank Secrecy Act has been delegated to the Director of FinCEN.

Section 5313(a) authorizes the Secretary to issue regulations that require a report when ''a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes.'' Regulations implementing section 5313(a) are found at 31 CFR 103.22. In general, the regulations require the reporting of transactions in currency in excess of $10,000 a day. Casinos as defined in 31 U.S.C. 5312(a)(2)(X) and 31 CFR 103.11(n)(7)(i) are financial institutions subject to the currency transaction reporting requirement. Card clubs, as defined in 31 CFR 103.11(n)(8)(i), are casinos subject to currency transaction reporting. (*See* 63 FR 1919, January 13, 1998.) The Currency Transaction Report by Casinos, IRS Form 8362, is the form casinos and card clubs use to comply with the currency transaction reporting requirements.

Type of Review: Extension of a currently approved information collection.

Affected public: Business or other for-profit institutions.

Frequency: As required.

Estimated Burden: Reporting average of 19 minutes per response.[2] Form record keeping average of 5 minutes per response, for a total of 24 minutes.

Estimated number of respondents=550.

Estimated Total Annual Responses=237,000.

Estimated Total Annual Burden Hours: 94,800.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the Bank Secrecy Act must be retained for five years.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected: (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: October 31, 2002.

James F. Sloan,

Director, Financial Crimes Enforcement Network.

[FR Doc. 02–28287 Filed 11–6–02; 8:45 am]

BILLING CODE 4810–02–P

[1] Language expanding the scope of the Bank Secrecy Act to intelligence or counter-intelligence activities to protect against international terrorism was added by Section 358 of the Uniting and strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (the ''USA Patriot Act''), Public Law 107–56.

[2] This burden relates to the completion of the CTRC form only. The recordkeeping burden of 31 CFR 103.22 is reflected in the final rule requiring casinos and card clubs to file currency transaction reports of suspicious activity.

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 02–61]

Recordation of Trade Name: ''ORTHOTEC''

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name ''ORTHOTEC''. The trade name is owned by Orthotec, LLC, a Delaware Limited Liability Company organized and created in the State of Delaware, 9595 Wilshire Blvd., Suite 502, Beverly Hills, California 90212.

The application states that the trade name is used on medical devices, more specifically, surgical implants made of stainless steel or titanium for spinal surgery, comprised of hooks, bolts, screws, rods, instruments and containers to hold the goods and instruments.

The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the **Federal Register**.

This item previously appeared in the Customs Bulletin on October 23, 2002. The time for public comments has since

been extended to 60 days from the date of this publication in the **Federal Register**.

DATES: Comments must be received or on before January 6, 2003.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Office of Regulations & Rulings, Intellectual Property Rights Branch, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Savoy, Intellectual Property Rights Branch, 1300, Pennsylvania Avenue, NW., Washington, DC 20229, (202) 572–8710.

Dated: November 4, 2002.

Joanne Roman Stump,

Chief, Intellectual Property Rights Branch.

[FR Doc. 02–28347 Filed 11–6–02; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Fee Schedule for the Transfer of U.S. Treasury Book-Entry Securities Held on the National Book-Entry System

AGENCY: Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury is announcing a new fee schedule for the transfer of book-entry securities maintained on the National Book-Entry System (NBES). This fee schedule will take effect on January 2, 2003. The basic fee for the transfer of a Treasury book-entry security will decrease from $.49 to $.27, a 45 percent fee reduction from CY 2002. Concurrent with Treasury's fee reduction, the Federal Reserve will be decreasing the fee for the movement of funds from $.06 to $.05. These changes will result in a combined fee of $.32 for a Treasury security transfer. This represents a $.23 fee reduction from CY 2002.

In addition to the basic fee, off-line transfers have a surcharge. The surcharge for an off-line Treasury book-entry transfer in CY 2003 will be $25.00, unchanged from CY 2002.

EFFECTIVE DATE: January 2, 2003.

FOR FURTHER INFORMATION CONTACT:

Edward C. Leithead, Director, Primary & Secondary Market Fixed Income Securities (Financing), Bureau of the Public Debt, Suite 3014, 26 Federal Plaza, New York, NY 10278, telephone (212) 264–6358.

John M. Lilly, Financial Systems Analyst, Bureau of the Public Debt, Room 510, 999 E Street NW., Washington, DC 20239–0001, telephone (202) 691–3550.

SUPPLEMENTARY INFORMATION: On October 1, 1985, the Department of the Treasury established a fee structure for the transfer of Treasury book-entry securities maintained on NBES.

Based on the latest review of book-entry costs and volumes, Treasury will decrease its basic fee from the levels currently in effect. Effective January 2, 2003, the basic fee will decrease from $.49 to $.27 for each Treasury securities transfer and reversal sent and received, a 45 percent fee reduction from CY 2002. The surcharge for an off-line Treasury book-entry transfer in CY 2003 will be $25.00, unchanged from CY 2002.

The basic transfer fee assessed to both sends and receives is reflective of costs associated with the processing of a security transfer. The off-line surcharge reflects the additional processing costs associated with the manual processing of off-line securities transfers.

The Treasury does not charge a fee for account maintenance, the stripping and reconstituting of Treasury securities, original issues, or interest and redemption payments. The Treasury currently absorbs these costs and will continue to do so.

The fees described in this notice apply only to the transfer of Treasury book-entry securities held on NBES. The Federal Reserve System assesses a fee to recover the costs associated with the processing of the funds component of Treasury book-entry transfer messages, as well as the costs of providing book-entry services for government agencies on NBES. Information concerning book-entry transfers of government Agency securities, which are priced by the Federal Reserve System, is set out in a separate **Federal Register** notice published by the Board of Governors of the Federal Reserve System in this issue of the **Federal Register** (Federal Reserve Docket No. R–1133).

The following is the Treasury fee schedule that will take effect on January 2, 2003, for the book-entry transfers on NBES:

TREASURY-NBES FEE SCHEDULE [1]

[Effective January 2, 2003, (in dollars)]

Transfer type	Basic fee	Off-line Surcharge	Funds [2] movement fee	Total fee
On-line transfer originated	.27	.00	.05	.32
On-line transfer received	.27	.00	.05	.32
On-line reversal transfer originated	.27	.00	.05	.32
On-line reversal transfer received	.27	.00	.05	.32
Off-line transfer originated	.27	25.00	.05	25.32
Off-line transfer received	.27	25.00	.25	25.32
Off-line account switch received	.27	.00	.05	.32
Off-line reversal transfer originated	.27	25.00	.05	25.32
Off-line reversal transfer received	.27	25.05	25	25.32

[1] The Treasury does not charge a fee for account maintenance, the stripping and reconstituting of Treasury securities, original issues, or interest and redemption payments. The Treasury currently absorbs these costs and will continue to do so.

[2] The funds movement fee is not a Treasury fee, but is charged by the Federal Reserve for the cost of moving funds associated with the transfer of a Treasury book-entry security.

Authority: 31 CFR 357.45

Dated: October 23, 2002.

Donald V. Hammond,

Fiscal Assistant Secretary.

[FR Doc. 02–28117 Filed 11–6–02; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Branch Offices

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Branch Offices.

OMB Number: 1550–0006.

Form Number: OTS Forms 1450 and 1558.

Regulation requirement: 12 CFR 545.92 and 545.95.

Description: 12 CFR 545.92 and 545.95 require Federally-chartered institutions proposing to establish a branch office or to change the location of a branch office to file an application or notice with OTS.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 1,089.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 1.5 hours.

Estimated Total Burden: 1,634 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28261 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Charter Conversions

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Application for conversion from: (a) OTS-regulated, state-chartered savings association to Federal savings association; (b) national bank, commercial bank, state savings bank, or credit union to Federal savings association.

OMB Number: 1550–0007.

Form Number: OTS Forms 1582.

Regulation requirement: 12 CFR 543.8, 543.9, and 552.2–6.

Description: Section 5(i) of the Home Owners' Loan Act and 12 CFR 543.8 and 552.2 require OTS to act on requests by state-chartered institutions and credit unions proposing to convert to Federal savings association charters.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 18.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 4 hours.

Estimated Total Burden: 72 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28262 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Outside Borrowings

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Outside Borrowings.

OMB Number: 1550–0061.

Form Number: N/A.

Regulation requirement: 12 CFR 563.80.

Description: Information is collected from savings associations that do not meet capital requirements. These institutions must give ten days' prior notification before making long-term borrowings. Information submitted by the institutions is used to monitor their safety and soundness.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 1.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 4 hours.

Estimated Total Burden: 4 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28263 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Request for Service Corporation Activity

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Request for Service Corporation Activity.

OMB Number: 1550–0013.

Form Number: N/A.

Regulation requirement: 12 CFR 545.74 and 559.12.

Description: 12 CFR 545.74 requires savings associations to obtain approval or notify OTS prior to engaging in activities through a service corporation that are not preapproved by regulation. It also contains a recordkeeping requirement for securities brokerage activities. 12 CFR 559.12 governs the issuance of securities. These requirements allow OTS to review service corporation activities and to ensure that they will not adversely affect an institution's safety and soundness.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 114.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 2 hours.

Estimated Total Burden: 228 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28264 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Change of Control

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Change of Control.

OMB Number: 1550–0032.

Form Number: OTS Form 1622.

Regulation requirement: 12 CFR part 574.

Description: 12 CFR part 574 contains filing requirements for change of control applications. Section 1818(j) of the Federal Deposit Insurance Act requires a notice to be filed with OTS when an insured institution undergoes a change of control.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 29.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 34.5 hours.

Estimated Total Burden: 1,000.50 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28265 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Notice of Hiring or Indemnifying Senior Executive Officers or Directors

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 6, 2003.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Nadine Washington, Information Systems, Administration & Finance, (202) 906–6706, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Notice of Hiring or Indemnifying Senior Executive Officers or Directors.

OMB Number: 1550–0047.

Form Number: OTS Forms 1624, 1623, and 1606.

Regulation requirement: 12 CFR 545.121(c)(iii).

Description: Congress requires agency notification and approval for new senior executive officers and directors of financial institutions. Forms 1624 and 1623 are used to evaluate the competence, experience, and integrity of individuals considered for directorships and senior executive positions. Form 1606 is an Applicant Certification as to lack of criminal background.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 41.

Estimated Frequency of Response: Event-generated.

Estimated Burden Hours per Response: 39.5 hours.

Estimated Total Burden: 1,619.50 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 31, 2002.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 02–28266 Filed 11–6–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0458]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0458.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0458'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Certification of School Attendance or Termination, VA Form 21–8960 and VA Form 21–8960–1.

OMB Control Number: 2900–0458.

Type of Review: Extension of a currently approved collection.

Abstract: The information collected on the forms is necessary to determine continued eligibility for benefits for a child between the ages of 18 and 23 years old who is attending school.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 7, 2002, at pages 51323–51324.

Affected Public: Individuals or Households.

Estimated Annual Burden: 11,667 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 70,000.

Dated: October 15, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28268 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0108]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8130, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0108.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0108'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Report of Income from Property or Business, VA Form 21–4185.

OMB Control Number: 2900–0108.

Type of Review: Extension of a currently approved collection.

Abstract: The form is used to derive net income from property or business. The information is used to determine whether the beneficiary is eligible for VA benefits and, if eligibility exists, to determine the proper rate of benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 30, 2002, at pages 49391—49392.

Affected Public: Individuals or households.

Estimated Annual Burden: 29,500 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 59,000.

Dated: October 15, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28269 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0061]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0061.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New

Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0061'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Titles: Request for Supplies (Chapter 31—Vocational Rehabilitation), VA Form 28–1905m.

OMB Control Number: 2900–0061.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 28–1905m is used to request supplies for veterans in rehabilitation facilities. The official at the facility providing rehabilitation services to the veteran completes the form and certifies that the veteran needs the supplies for his or her program and that the veteran does not have the requested item in his or her possession. The veteran also certifies that he or she is not in possession of any of the supplies listed on the form.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 19, 2002, at page 47632.

Affected Public: Not-for-profit institutions, individuals or households, business or other for-profit.

Estimated Annual Burden: 1,000 hours.

Estimated Average Burden Per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,000.

Dated: October 15, 2002.

By direction of the Secretary:

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28270 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0548]

Agency Information Collection Activities Under OMB Review

AGENCY: Board of Veterans' Appeals, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Board of Veterans' Appeals (BVA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030 or FAX (202) 273–5981 or *e-mail: denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0548.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0548'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for Board of Veterans' Appeals Customer Satisfaction with Hearing Survey, VA Form 0745.

OMB Control Number: 2900–0548.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Abstract: The presiding official at hearings conducted by the BVA will, at the conclusion of the proceeding, present the appellant with a Customer Satisfaction with Hearing Survey, VA Form 0745 to complete. The appellant is informed that participation is voluntary, anonymous and will have no bearing on the outcome of the hearing. BVA will use the information to assess the effectiveness of current procedures used in conducting hearings and to develop better methods of serving veterans.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 19, 2002 at pages 47631—47632.

Affected Public: Individuals or households.

Estimated Annual Burden: 600 hours.

Estimated Average Burden Per Respondent: 6 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 6,000.

Dated: October 21, 2002.

By direction of the Secretary.

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28271 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or *e-mail: denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–New.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–New'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Questionnaire For Coroners and Medical Examiners, VA Form 21–0766.

OMB Control Number: 2900–New.

Type of Review: New collection.

Abstract: VA Form 21–0766 is used by medical examiners and coroners to help identify unclaimed decedents as veterans who are entitled to burial benefits. The information collected is needed to determine how often medical examiners and coroners attempt to verify veteran status, how long records of decedents are maintained and who the medical examiners and coroners contact to verify veteran status.

An agency may not conduct or sponsor, and a person is not required to

respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 14, 2002, at page 53046.

Affected Public: State, Local or Tribal Government.

Estimated Annual Burden: 525 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,158.

Dated: October 15, 2002.

By direction of the Secretary:

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28272 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0107]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0107.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0107'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Certificate as to Assets, VA Form 21–4709.

OMB Control Number: 2900–0107.

Type of Review: Extension of a currently approved collection.

Abstract: VA is required to supervise benefits paid to fiduciaries on behalf of beneficiaries who are incompetent or under legal disability. Supervision includes a requirement that the fiduciary account periodically for the funds he/she has received on behalf of the beneficiary. VA Form 21–4709 is used by estate analysts employed by VA to verify investments in saving bonds and other securities reported in the beneficiary's estate.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published July 30, 2002, at page 49391.

Affected Public: Individuals or households, Business or other for-profit, Not-for-profit institutions, Federal Government and State, Local or Tribal Government.

Estimated Annual Burden: 863 hours.

Estimated Average Burden Per Respondent: 12 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 4,316.

Dated: October 15, 2002.

By direction of the Secretary:

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28273 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0399]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 9, 2002.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0399.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0399'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Student Beneficiary Report—REPS (Restored Entitlement Program For Survivors), VA Form 21–8938.

OMB Control Number: 2900–0399

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8938 is used to verify that an individual who is receiving REPS (Restored Entitlement Program for Survivors) benefits based on schoolchild status is in fact enrolled full-time in an approved school and is otherwise eligible for continued benefits. The form is released each March and sent to all student beneficiaries.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 23, 2002, at page 54698.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,767 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 5,300.

Dated: October 22, 2002.

By direction of the Secretary:

Ernesto Castro,

Director, Records Management Service.

[FR Doc. 02–28274 Filed 11–6–02; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register

Vol. 67, No. 216

Thursday, November 7, 2002

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent to Prepare a Draft Environmental Impact Statement for the PCS Phosphate Mine Continuation, Aurora, Beaufort County, NC

Correction

In notice document 02–27720 beginning on page 66386 in the issue of Thursday, October 31, 2002, make the following corrections:

1. On page 66386, in the third column, under the heading **FOR FURTHER INFORMATION CONTACT**, in the sixth line, ''DC'' should read, ''NC''.

2. On page 66387, in the first column, in the table, in the column ''Proposed impacts'', in number 5., ''Scrub-Scrub'' should read, ''Scrub-Shrub''.

[FR Doc. C2–27720 Filed 11–6–02; 8:45 am]

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Thursday,
November 7, 2002

Part II

Department of Agriculture

Agriculture Marketing Service

7 CFR Parts 1000, et al.

Milk in the Northeast and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreement and to Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126,1131, and 1135

[Docket No. AO–14–A69, et al.: DA–00–03]

Milk in the Northeast and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Final Decision.

7 CFR part	Marketing area	AO Nos.
1001	Northeast	AO–14–A69.
1005	Appalachian	AO–388–A11.
1006	Florida	AO–356–A34.
1007	Southeast	AO–366–A40.
1030	Upper Midwest	AO–361–A34.
1032	Central	AO–313–A43.
1033	Mideast	AO–166–A67.
1124	Pacific Northwest	AO–368–A27.
1126	Southwest	AO–231–A65.
1131	Arizona-Las Vegas	AO–271–A35.
1135	Western	AO–380–A17.

SUMMARY: This decision adopts revised product-price formulas for establishing Class III and Class IV milk prices. The formulas are applicable to all Federal milk marketing orders. The orders amended by this decision require producer approval. Referenda will be conducted in two markets, and dairy farmer cooperatives will be polled in the other nine markets to determine whether dairy farmers approve the issuance of the orders as amended.

This final decision differs from the recommended decision by modifying the Class III and IV formulas to include farm-to-plant component losses. Modifications are adopted to the butterfat price formula, the protein price formula, the other solids price formula, and the nonfat milk solids price formula. Additionally, this decision converts the Class III and IV formula divisors to multipliers in order to simplify and promote consistency with all end-product pricing formulas.

FOR FURTHER INFORMATION CONTACT: Clifford M. Carman, Associate Deputy Administrator, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Stop 0231, Room 2968, South Building, 1400 Independence Avenue, Washington, DC 20250–0231, (202) 720–6274, e-mail address *clifford.carman@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and therefore is excluded from the requirements of Executive Order 12866.

These proposed amendments have been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. If adopted, this proposed rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department will rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Analysis

This final decision responds to a Congressional mandate to reconsider the Class III and Class IV pricing formulas included in the final rule for the consolidation and reform of Federal milk orders. The mandate was included in the Consolidated Appropriations Act, 2000 (Pub. L. 106–113, 115 Stat. 1501).

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this regulatory flexibility analysis. When preparing such analysis an agency shall address: The reasons, objectives, and legal basis for the anticipated proposed rule; the kind and number of small entities which would be affected; the projected recordkeeping, reporting, and other requirements; and federal rules which may duplicate, overlap, or conflict with the proposed rule. Finally, any significant alternatives to the proposal should be addressed. This regulatory flexibility analysis considers these points and the impact of this proposed regulation on small entities. The legal basis for this action is discussed in the preceding section.

The RFA seeks to ensure that, within the statutory authority of a program, the regulatory and informational

requirements are tailored to the size and nature of small businesses. For the purpose of the RFA, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

USDA has identified as small businesses approximately 62,240 of the 65,464 dairy producers (farmers) that have their milk pooled under a Federal order. Thus, small businesses constitute approximately 95 percent of the dairy farmers in the United States. On the processing side, there are approximately 1,621 plants associated with Federal orders, and of these plants, approximately 928 qualify as ''small businesses,'' constituting about 57 percent of the total.

During January 2002, there were approximately 410 fully regulated handlers (of which 148 were small businesses), 75 partially regulated handlers (of which 39 were small businesses), and 46 producer-handlers (of which 24 were considered small businesses) for the purpose of this regulatory flexibility analysis. In addition, there were ninety-three exempt handlers with Class I sales of less than 150,000 pounds during the month.

Producer deliveries of milk used in Class I products (mainly fluid milk products) totaled 4.085 billion pounds in January 2002, representing 37.7 percent of total Federal order producer deliveries. The volume of milk pooled under Federal orders represents 76 percent of all milk marketed in the U.S. and is estimated at 78 percent of the milk of bottling quality (Grade A) sold in the country. More than 200 million Americans reside in Federal order marketing areas, representing approximately 81 percent of the total U.S. population (2001).

In order to accomplish the goal of imposing no additional regulatory burdens on the industry, a review of the current reporting requirements was completed pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). In light of this review, it was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because these would remain identical to the current Federal order program. No new forms have been proposed, and no additional reporting would be necessary.

This proposed rule does not require additional information collection that requires clearance by the OMB beyond the currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall upon the dairy industry as a result of overlapping Federal rules. This proposed rulemaking does not duplicate, overlap or conflict with any existing Federal rules.

Consideration of Impacts on Small Businesses

To ensure that small businesses are not unduly or disproportionately burdened based on these proposed amendments, consideration was given to mitigating negative impacts.

A comment filed in regard to the tentative final decision by the managing partner of a large dairy farm argued that dairy producers selling less than 326,000 pounds of milk per month may comprise the majority of dairy farms, but not the majority of milk sold. The comment further stated that it is not appropriate to identify one sector and imply that they are most in need of protection and preservation.

Under the Regulatory Flexibility Act, the definition of a ''small'' dairy farm has been redefined from a business having an annual gross revenue of less than $500,000 to a business having an annual gross revenue of less than $750,000. Therefore, the production guideline of 326,000 pounds per month has been increased to 500,000 pounds per month in identifying ''small'' dairy farms.

The production guideline of 500,000 pounds per month in identifying ''small'' dairy farms is an attempt to relate a measure of size for which data is available (pounds of production per farm) with the criteria specified by the Small Business Administration (revenue from sales), for which data is not readily available to USDA on an individual farm basis. The Regulatory Flexibility Analysis does not represent an attempt to create special privileges for farms defined as small, but to examine the regulations to assure that they do not create a disproportionate burden or competitive disadvantage for such farms.

As was stated in the RFA in the recommended decision, one of the principal issues considered at the hearing was the source of price data that should be used to generate prices for milk components and, thereby, prices to be paid to producers. The options considered were the National Agricultural Statistics Service (NASS) surveys of selling prices of manufactured dairy products, Chicago Mercantile Exchange (CME) prices, and producer costs of production. The recommended decision selected the NASS-reported prices as the most appropriate for use in determining product prices because of the considerably larger volume of product represented in those price series than in the CME price data. Producer cost of production was not included in the calculation of prices because assuring dairy farmers that their costs of production will be covered addresses only the milk supply side of the market and ignores factors underlying demand or changes in demand for milk and milk products.

Various proposals to reduce or increase the levels of the manufacturing (make) allowances of butter, nonfat dry milk, cheddar cheese and dry whey were considered. The present method adjusted these make allowances from the levels adopted under Federal order reform on the basis of data and testimony contained in the hearing record. Most of the adjustments are minimal. Primarily, manufacturing cost surveys performed by USDA's Rural Cooperative Business Service (RBCS) and the California Department of Food and Agriculture (CDFA) were used to determine the most appropriate levels of make allowance for the products used in calculating Federal order class prices.

The only other actual collection of manufacturing cost data for cheddar cheese and dry whey that was cited in the hearing record was a survey of cheddar cheese and dry whey manufacturing costs arranged for by the National Cheese Institute (NCI). This survey was conducted by persons unfamiliar with the dairy industry among cheese processors who did not

testify about the data that they submitted for the survey and was entered into the hearing record by a witness who had no firsthand knowledge of the data included. As a result, the NCI survey should be relied upon to a lesser degree than the two studies used to determine the cheddar cheese make allowance. In the case of the RBCS study, the person who gathered the data testified about its collection and what it represented. In the case of the CDFA-collected data, a manual detailing the method by which the data was collected and presented was made available, and several witnesses familiar with the survey testified about it.

In addition, one nonfat dry milk manufacturer testified to costs of manufacture that exceeded those of the two studies by a significant amount, mostly in the areas of return on investment and marketing costs. The data did not include any information about the pounds of product manufactured and could not have been weighted with the data from the two other studies.

Several proposals to change the factor reflecting the yield of nonfat dry milk from nonfat solids in milk would have increased the nonfat solids price and the Class IV skim price, but ignored the need to reflect the generally lower price and higher manufacturing cost of buttermilk powder that also must be considered in calculating the Class IV nonfat solids price. Testimony and data in the record were used to determine a factor more representative of nonfat dry milk yield and the effect of buttermilk powder price and cost. The alternatives to the formula adopted either did not include consideration of the price, cost, and volume of buttermilk powder relative to those of nonfat dry milk or gave those factors too great an influence.

Proposals were made to reduce the butter and cheese product prices used in calculating the butterfat price and the Class III component prices. The record of this proceeding continues to support the use of the product prices adopted in the final rule in the Federal milk order reform process as representing accurately the values of these products. In the case of adjusting the Grade AA butter price to reflect the value of Grade A butter, the record fails to reveal any source of information for obtaining current prices for Grade A butter. In the case of proposals to remove the 3-cent adjustment between the barrel and 40-pound block cheese prices, there was no testimony about the actual difference in cost between the two types of packaging that overcame testimony that 3 cents is the actual cost difference, or any data that indicates that the customary price difference is not at least 3 cents.

Proposals to reconsider the class price relationships in the orders were considered, although a proposal to use a weighted average of the Class III and Class IV prices as a Class I price mover was not noticed for hearing in this proceeding. The hearing record supports the continued relationships between the Class IV and Class II prices and between the higher of the manufacturing class prices and the Class I price.

A proposal that the Class II differential be changed to negate any changes in the Class IV price formula that would affect the current price relationship between nonfat dry milk and Class II failed to consider that the Class II–Class IV price difference adopted in Federal order reform is based on the difference in the value of milk used to make dry milk and the value of milk used to make Class II products.

Proposals that any increases resulting from changes to the Class III and Class IV price formulas not be allowed to result in increases in Class I prices did not address the rationale for the current Class I price differentials above the manufacturing price levels for the purpose of obtaining an adequate supply of milk for fluid (drinking) use.

The changes to the Class III and Class IV price formulas included in the recommended decision would have had no special impact on small handler entities. All handlers manufacturing dairy products from milk classified as Class III or Class IV would remain subject to the same minimum prices regardless of the size of their operations. Such handlers would also be subject to the same minimum prices to be paid to producers. These features of minimum pricing are required by the Agricultural Marketing Agreement Act and should not raise barriers to the ability of small handlers to compete in the marketplace. It is similarly expected that small producers would not experience any particular disadvantage to larger producers as a result of any of the proposed amendments.

An analysis was performed on the effects of the alternatives selected and is summarized below.

Final Decision Analysis

In order to assess the impact of changes in Federal order milk pricing formulas, the Department conducted an economic analysis. While the primary purpose of this decision is to amend the product pricing formulas used to price milk regulated under Federal milk marketing orders and classified as either Class III or Class IV milk, these product price formulas also affect the prices of regulated milk classified as Class I and Class II.

The modifications in this decision are analyzed simultaneously as a change from the set of Court-ordered formulas as implemented in January 2001. This analysis focuses on impacts on milk marketed under Federal milk marketing orders. Milk marketed in California, milk marketed under other state regulations, and unregulated milk are treated separately.

Scope of Analysis

Impacts are measured as changes from the model baseline as adapted from the USDA baseline developed in June 2002 for the mid-session budget review. The baseline projections are a Departmental consensus on a long-run scenario for the agricultural sector. Included is a national, annual projection of the supply-demand-price situation for milk. The mid-term review reflects the provisions of the Farm Security and Rural Investment Act of 2002. Baseline assumptions for dairy are: (1) The price support program will extend through December 31, 2007, supporting the price of milk (3.67 percent butterfat) at $9.90; (2) the Dairy Export Incentive Program will continue to be utilized; (3) the Federal Milk Marketing Order Program will continue as reformed on January 1, 2000, as modified by the Select, *et al.* vs. Veneman decision in January 2001, and (4) the National Dairy Market Loss Program will make payments to dairy farmers when the Class I price in Boston is less than $16.94 per cwt.

In the model the U.S. is divided into 14 milk marketing regions, 11 that generally correspond to the Federal order areas, California, other West, and Alaska-Hawaii. The 11 Federal orders share of the U.S. milk marketings is about 70 percent. About 83 percent of all fluid milk and about 65 percent of all manufactured milk is marketed under Federal order regulations. Given the prominence of Federal order marketings, prices paid for both fluid and manufactured milk outside of the order system are generally aligned with prices paid in the Federal order system. California stands out as the state with the highest production and has its own set of comprehensive market regulations similar to the Federal order system. California milk marketings are estimated as a function of the California pool price. Milk marketed through the Federal order system is the predominant subset of milk marketings in the United States. Fluid grade milk prices for the 11 Federal order regions are estimated as functions of Federal order minimum prices and dairy product prices. The regional all-milk prices, which are used

in the regional milk supply responses, are in turn estimated from the regional fluid grade milk price and the national dairy product prices.

Demands for fluid milk and manufactured dairy products are functions of per capita consumption and population. Per capita consumption for the major milk and dairy products are estimated as functions of own prices, substitute prices, and income. Retail and wholesale margins are assumed unchanged from the baseline. The regional demands for fluid milk and soft manufactured products are satisfied first by the eligible supply of milk. The milk supply for manufacturing hard products is the volume of milk marketings remaining after satisfying the volumes demanded for fluid and soft manufactured products. Milk is manufactured into cheese or butter/nonfat dry milk according to returns to manufacturing in each class. Wholesale prices for cheese, butter, nonfat dry milk, and dry whey reflect national supply and demand for these products. These prices underlie the Federal order pricing system.

Summary of Results

The impacts of the changes to the Class III and Class IV formulas that are adopted in this decision are summarized using annualized five-year, 2003–2007, average changes from the model baseline. The results presented for the Federal order system are in the context of the larger U.S. market. In particular, the Federal order price formulas use national manufactured dairy product prices.

The formula changes increase the protein prices and reduce the prices for butterfat and nonfat solids. The results are higher Class III prices, lower Class IV and Class II prices, and lower Class I prices. The advanced Class I base price is the higher of the Class III or Class IV advance pricing factors. The Class I base price is the Class IV price in all years of the analytical period for the baseline, while Class III becomes the Class I base price in 2003 through 2005 under this decision. The Class I price falls in 2003, 2006 and 2007. The resulting increases in Class I and Class II demand for nonfat and fat solids, sufficiently absorbs production increases to very slightly increase cheese and butter prices and only slightly decrease nonfat dry milk prices.

Producers. Over the five-year period, the Federal order minimum Class price for milk at test increases about $0.06 per hundredweight. The average fluid grade price for Federal order regions, which includes premiums, increases by about $0.03 per hundredweight. Federal order marketings increase by an average 58 million pounds annually due to the production increase in response to higher producer prices. Federal order milk cash receipts increase by an average $47.2 million annually (0.28 percent) from baseline receipts of $16,729 million.

The distribution of the 2003–2007 annual average changes in the Federal order minimum blend prices across the 11 orders range from (–)$0.05 to (+)$0.08 per hundredweight, reflecting declines in premiums associated with Class III milk. Estimates of annual average price and quantity changes by order are provided in the economic analysis for this decision.

The five-year annual average U.S. all-milk price increases by $0.03 per hundredweight over the baseline. U.S. milk marketings increase by an average 73 million pounds annually (0.04 percent), yielding an average cash receipts increase of $67.2 million annually (0.29 percent) from average baseline receipts of $23,535 million.

Milk Manufacturers and Processors. Annual Class IV and Class II skim milk prices decline each year for an average of $0.07 per hundredweight (1.0 percent) for the 2003–2007 period. This decline results from changing the conversion factor for nonfat dry milk to nonfat solids from 1.0 to 0.99. The minimum butterfat prices decline from baseline levels by an average of 2.1 cents per pound. This decline is the result of recognizing farm-to-plant losses of milk which reduce the yield factor from the equivalent of 1.22 pounds of butter per pound of butterfat to 1.20. The Class IV price at test (about 8.45 percent butterfat) declines by an average of $0.26 per hundredweight, and the Class II price at test (7.92 percent butterfat) declines by an average $0.23 per hundredweight over 2003–2007.

The annual average Class III price increase at test (3.52 percent butterfat) is about $0.23 over baseline (1.9 percent), increasing steadily from $0.15 in 2003 to $0.34 in 2007. The increase is the result of the protein price increase of $0.14 per pound, ranging from $0.10 to $0.18 per pound. The increase in the protein price is the result of reducing the impact of the butterfat price on the protein price. The butterfat price effect is reduced by multiplying the butterfat price by 0.90, reflecting a 90 percent butterfat retention rate in the cheese, and replacing the 1.28 factor with 1.17 reflecting the butterfat to protein ratio of milk standardized at 3.5 percent butterfat and 2.99 percent protein.

The Class I base price shifts from the Class IV to the Class III price in 2003–05. The Class I skim milk price increases over baseline levels on average by nearly $0.04 cents per hundredweight, ranging from increases of about 18 cents in 2004–05 to declines of about 7 cents in 2006–07. The Class I price at test (about 2 percent butterfat) declines by an average $0.01 per hundredweight from the baseline, and is similar to the skim milk price change pattern, ranging from 13-cent increases to 12-cent declines.

Consumers. The expected $0.01 per hundredweight decrease in the minimum Class I price for 2003–2007 results in an average $0.001 decrease in the price per gallon of fluid milk for consumers. Annual consumer costs for fluid milk over 2003–2007 are estimated to decrease on average by about $3.25 million in the Federal order system and by $4.1 million in the U.S.

The price for manufactured dairy products are estimated to increase over baseline by an average $0.004 per pound for butter and $0.001 per pound of cheese. Average annual consumer expenditures over the five-year period are estimated to increase over baseline levels by $5.6 million on butter, and by $4.1 million on American cheese.

A complete Economic Analysis for the Final Decision on Class III and Class IV Price Formulas is available upon request from Howard McDowell, Senior Economist, USDA/AMS/Dairy Programs, Office of the Chief Economist, Room 2753, South Building, U.S. Department of Agriculture, Washington, DC 20250, (202) 720–7091, e-mail address *howard.mcdowell@usda.gov*.

Civil Rights Impact Statement

This final decision is based on the record of a public hearing held May 8–12, 2000, in Alexandria, Virginia, in response to a mandate from Congress included in the Consolidated Appropriations Act, 2000, that required the Secretary of Agriculture to conduct a formal rulemaking proceeding to reconsider the Class III and Class IV milk pricing formulas included in the final rule for the consolidation and reform of Federal milk orders. The consolidated orders were implemented on January 1, 2000. A tentative final decision on the issues considered at the hearing was issued November 29, 2000 (65 FR 76832), and an interim final order (65 FR 82832) became effective January 1, 2001. A preliminary injunction enjoining portions of the interim final order was granted in the U.S. District Court for the District of Columbia on January 31, 2001.

Pursuant to Departmental Regulation (DR) 4300–4, a comprehensive Civil Rights Impact Analysis (CRIA) was

conducted and published with the final decision on Federal milk order consolidation and reform. That CRIA included descriptions of (1) the purpose of performing a CRIA; (2) the civil rights policy of the U.S. Department of Agriculture; and (3) basics of the Federal milk marketing order program to provide background information. Also included in that CRIA was a detailed presentation of the characteristics of the dairy producer and general populations located within the former and current marketing areas.

The conclusion of that analysis disclosed no potential for affecting dairy farmers in protected groups differently than the general population of dairy farmers. All producers, regardless of race, national origin, or disability, who choose to deliver milk to handlers regulated under a Federal order will receive the minimum blend price. Federal orders provide the same assurance for all producers, without regard to sex, race, origin, or disability. The value of all milk delivered to handlers competing for sales within a defined marketing area is divided equally among all producers delivering milk to those handlers.

The issues addressed at the May 2000 hearing are issues that were addressed as part of Federal milk order consolidation and reform. Establishing representative make allowances in the formulas that price milk used in Class III and Class IV dairy products is an issue that affects the obligations of handlers of those products to the Federal milk order pool, and similarly the pool obligations of Class I and Class II handlers. The decision should result in no differential benefits in dividing the pool among all producers delivering milk to those regulated handlers. Therefore, USDA sees no potential for affecting dairy farmers in protected groups differently than the general population of dairy farmers.

Decisions on proposals to amend Federal milk marketing orders must be based on testimony and evidence presented on the record of the proceeding. The hearing notice in this proceeding invited interested persons to address any possible civil rights impact of the proposals being considered in testimony at the hearing. No such testimony was received.

Copies of the Civil Rights Impact Analysis done for the final decision on Federal milk order consolidation and reform can be obtained from AMS Dairy Programs at (202) 720–4392; any Milk Market Administrator office; or via the Internet at: *http://www.ams.usda.gov/dairy/*.

Prior documents in this proceeding:

Notice of Hearing: Issued April 6, 2000; published April 14, 2000 (65 FR 20094).

Tentative Final Decision: Issued November 29, 2000; published December 7, 2000 (65 FR 76832).

Interim Final Rule: Issued December 21, 2000; published December 28, 2000 (65 FR 82832).

Recommended Decision: Issued October 19, 2001; published October 25, 2001 (66 FR 54064).

Extension of Time: Issued November 26, 2001; published November 29, 2001 (66 FR 59546).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this final decision with respect to proposed amendments to the tentative marketing agreements and orders regulating the handling of milk in the Northeast and other marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The Hearing Notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. To the extent that this issue was raised, it is considered in the following findings and conclusions.

This final decision responds to a Congressional mandate to reconsider the Class III and Class IV pricing formulas included in the final rule for the consolidation and reform of Federal milk orders. The mandate was included in the Consolidated Appropriations Act, 2000 (Pub. L. 106–113, 115 Stat. 1501). The findings and conclusions set forth below are based on the record of a public hearing to consider proposals submitted by the industry to change the pricing formulas in the marketing agreements and the orders regulating the handling of milk in the Northeast and ten other marketing areas held in Alexandria, Virginia, on May 8–12, 2000. Notice of such hearing was issued on April 6, 2000, and published on April 14, 2000 (65 FR 20094).

The recommended decision responded to comments received on the tentative final decision (issued November 29, 2000; 65 FR 76832) on the above hearing and was consistent with the injunction issued by the U.S. District Court for the District of Columbia on January 31, 2001. This final decision responds to comments received on the recommended decision (issued October 19, 2001; 66 FR 54064).

Material Issues to Class III and IV Formulas

As instructed by the legislation requiring this proceeding, the Class III and IV pricing formulas and all of the elements of the formulas were re-considered in developing the tentative final decision, the recommended decision, and this final decision.

The material issues on the record of the hearing relate to:

1. Role of producer costs of production.
2. Commodity prices (CME vs. NASS).
3. Commodity and component price issues.
   a. General approaches on make allowances.
   b. Class IV butterfat and nonfat solids prices.
   c. Class III butterfat, protein, and other nonfat solids prices.
   d. Effects of changes to Class III and Class IV price formulas.
4. Class price relationships.
5. Class I price mover.
6. Miscellaneous and conforming changes.
   a. Advance Class I butterfat price.
   b. Classification.
   c. Distribution of butterfat value to producers.
   d. Inclusion of Class I other source butterfat in producer butterfat price computation.
7. Reopening of hearing or issuance of a final decision.

Summary of Changes to the Interim Amendments

The recommended decision differed from the tentative final decision in several respects and included summaries of comments submitted on each of the issues within the discussion of the issue. The key changes that were made to the interim order amendments in the recommended decision were as follows:

1. In Issue 3c, changes were made to the formulas for calculating the protein and other solids prices, and the Class III butterfat price would be the same as that calculated for Class IV on the basis of butter.

2. In Issue 3d, the changes made in the Class III component price formulas would result in different effects on Class III component, skim, and hundredweight prices.

3. In Issue 6b, the classification of frozen cream, plastic cream and anhydrous milkfat would be changed back to Class III.

4. In Issue 6c, butterfat values would be pooled for the purpose of calculating

producer butterfat prices in the orders in which producers are not paid on a component basis. In orders under which producers are paid on a multiple component basis, however, the producer butterfat price would be the same as that for butterfat used in Classes III and IV.

5. In Issue 6d, the butterfat in other source milk used in Class I is included in calculating the producer butterfat price in marketwide pools that do not use multiple component pricing, but would continue to be included in the producer price differential calculation in multiple component pricing pools.

6. Issue 7 was changed to explain the reasons for issuing a recommended decision at this point in this proceeding, instead of a final decision.

Summary of Changes to the Recommended Decision by This Final Decision

The changes to the recommended decision formulas by this final decision are primarily the result of incorporating a farm-to-plant product loss:

1. In issue 3a, an adjustment to the component price formula yield factors to account for farm-to-plant component losses is added.

2. In issue 3b, changes are made to the yield factor used for computing both the nonfat solids price and the Class III and Class IV butterfat price to reflect farm-to-plant component losses. In addition, the yield factor used for computing the nonfat solids price and the butterfat price is converted from a divisor to a multiplier.

3. In issue 3c, the yield factors used to compute the protein price are adjusted to account for farm-to-plant component losses and to reflect a reevaluation of the quantity of casein retained in the cheese making process. The other solids yield factor is adjusted to account for farm-to-plant component losses. In addition, the yield factor used for computing the other solids price is converted from a divisor to a multiplier.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Role of Producer Cost of Production

Proposal 29 in the hearing notice proposed that producers' costs of production be incorporated into the Class III and Class IV pricing formulas. A number of dairy farmer witnesses testified that, just as manufacturing processors are assured that their costs of processing milk products will be covered, dairy farmers should also have some assurance that they will be able to continue to operate their dairy farms without losing money. Under the current system, according to the National Farmers Union (NFU) witness, incorporating a make allowance for processors but not for producers leaves dairy farmers to bear the entire burden of changes in supply and demand.

Support for using cost of production in the Class III and IV pricing formulas was reiterated in the comments received in response to the tentative final decision issued November 29, 2000, and the recommended decision of October 25, 2001. The NFU comments expressed disappointment that no portions of the milk pricing formulas were based on producer cost of production. The American Raw Milk Producers Pricing Association suggested that the USDA ignored existing law as written in the 1937 Agricultural Agreement Act, section 608c(18). Two dairy farmers also mentioned their concern about the need to follow 608c(18). Another dairy farmer advocated a producer-influenced supply control/price control system.

Comments filed by the Maine Dairy Industry Association (MDIA) in response to the recommended decision joined in supporting cost of production as a part of the pricing formulas. They expressed the opinion that cost of production should be included because their producers' costs are higher than the price received. The MDIA also voiced the unfairness of processors' being assured some ability to offset their costs through product make allowances while producers are not able to receive such adjustment. Comments received from Schreiber Foods indicated agreement with the recommended decision to not use the cost of production in setting Class prices.

As explained in both the proposed rule and final decision under Federal order reform and in the tentative final decision and the recommended decision in this proceeding, assuring producers that their costs of production will be covered addresses only the milk supply side of the market and ignores factors underlying demand or changes in demand for milk and milk products. As noted by the Dairy Farmers of America (DFA) witness, although pricing proposals incorporating cost of production have been noticed and reviewed several times in the last decade without success, if a sound mechanical concept could be advanced that overcomes the objections relative to supply and demand, it should be considered.

The proposals by NFU and National Farmers Organization (NFO) that advocated adoption of make allowances that would be adjusted for changes in indexes reflecting dairy farmers' production costs are discussed under Issue 3a, General Approaches on Make Allowances.

In this final decision, consideration has again been given to cost of production proposals. As noted by the NFO witness, the current pricing system uses the interaction of supply and demand for milk products as an indirect method of meeting the pricing requirements of the Agricultural Marketing Agreement Act of 1937 (the Act) for milk. According to the recommended decision, the record contained no new dairy farmer cost of production data that could be used to reflect both the supply and demand sides of the market for dairy products. The recommended decision continued to state that there was no evidence in the record that either USDA's Economic Research Service or the CDFA costs of production had ever been used to price milk.

The Act stipulates that the price of feeds, the availability of feeds, and other economic conditions which affect market supply and demand for milk and its products be taken into account in the determination of milk prices. This requirement currently is fulfilled by the Class III and Class IV component price calculations. If conditions increase supply costs, the quantity of milk produced would be reduced due to lower profit margins. As the milk supply declines, plants buying manufacturing milk would pay a higher price to maintain an adequate supply of milk to meet their needs. As the resulting farm profit margins increase, so should the supply of milk. Likewise, the reverse would occur if economic conditions reduce supply costs. The price of feed is not directly included in the determination of the price for milk, but rather is one economic condition which may cause a situation in which the price of milk may increase or decrease. A change in feed prices may not necessarily result in a change in milk prices. For instance, if the price of feed increases but the demand for cheese declines, the milk price may not increase since milk plants would need less milk and therefore would not bid the price up in response to lower milk supplies. Also, other economic conditions could more than offset a change in feed prices and thus not necessitate a change in milk prices.

The pricing system, according to the recommended decision, accounted for changes in feed costs, feed supplies, and other economic conditions, as explained above. The product price formulas adopted in the recommended decision would reflect accurately the market

values of the products made from producer milk used in manufacturing. As supply costs increase with a resulting decline in production, commodity prices would increase as manufacturers secure additional milk to meet their needs. Such increases in commodity prices would mean higher prices for milk. The opposite would be true if supply costs were declining. Additionally, since Federal order prices are minimum prices, handlers may increase their pay prices in response to changing supply/demand conditions even when Federal order prices do not increase.

Additionally, the pricing formulas contained in the recommended decision and this final decision are applicable to handlers, since handlers are the regulated parties under Federal milk order regulation. The formulas are used to establish minimum prices for milk used in making particular dairy products, not for determining payments to dairy farmers.

2. Commodity Prices (CME vs. NASS)

As adopted in the interim final rule in this proceeding (published on December 28, 2000 (65 FR 82832)), commodity prices determined by surveys conducted by USDA's National Agricultural Statistics Service (NASS) continue to be used in the component price formulas that replaced the BFP. The recommended decision proposed no changes in the source of product price data. Likewise, this final decision adopts no changes in the source of product price data.

Several proposals (1, 5, 10 and 19) were considered during the current proceeding that recommended using prices reported by the Chicago Mercantile Exchange (CME) instead of the NASS surveys to determine commodity prices. Both the CME and the NASS surveys were supported by testimony at the hearing and in briefs. Several comments to the recommended decision supported continuing to use the NASS surveys.

The CME is a cash market where speculators, producers, and processors can buy and sell products. It is a mechanism for establishing prices on which the dairy industry relies. Thus, many contracts to buy and sell dairy products are based on CME prices. A USDA witness testified that he is unaware of any other indices used to price cheese in the U.S. According to several witnesses, cheese and butter processors generally base their contract sales on CME prices.

The NASS price survey gathers selling prices of cheddar cheese, Grade AA butter, nonfat dry milk, and dry whey from a number of manufacturers of these products nationwide. At the time the proposed rule on Federal order reform was published (January 30, 1998), the NASS survey included prices for cheddar cheese only. This survey began in March 1997. In September 1998, before the final decision was published in April 1999, NASS began surveys of Grade AA butter prices, dry whey prices, and nonfat dry milk prices. In developing these commodity surveys, input was obtained from the dairy industry on appropriate types of products, packaging, and package sizes to be included for the purpose of obtaining unbiased representative prices. A sale is considered to occur when a transaction is completed, the product is shipped out, or title transfer occurs. In addition, all prices are f.o.b. the processing plant/storage center, with the processor reporting total volume sold and total dollars received or price per pound. NASS Dairy Product Prices reports wholesale cheddar cheese prices for both 500-pound barrels and 40-pound blocks, USDA Grade AA butter, USDA Extra Grade or USPH Grade A non-fortified dry milk, and USDA Extra Grade edible non-hygroscopic dry whey. A more detailed description of the surveys can be found in the final decision of April 2, 1999 (64 FR 16093).

The proponents of proposal 1, Western States Dairy Producers Trade Association, *et al.* (WSDPTA), a group of several trade associations and cooperatives, proposed that the NASS commodity prices for butter, cheese, and nonfat dry milk that currently are used for computing the Federal order component prices be replaced with prices determined by trading on the CME. Dry whey was not included in the proposal because there is no dry whey cash contract traded on the CME. A witness from WSDPTA did not oppose the collection and reporting of NASS data, but expressed the opinion that while it serves an important function as information, it should not be used to establish prices. The proponents presented several benefits of using the CME over the NASS survey for commodity prices.

Proponents explained that by using CME prices in the formulas, prices would be known immediately rather than a week later when the NASS prices are published, reflecting more quickly the supply-demand conditions for dairy products. The one-week delay is caused by the time necessary to collect data. A witness for NFO noted that interested persons are able to check the CME value of products on a daily basis and use the reported prices as a factor in establishing what they will pay, or what they will be paid, for cheese.

A witness from WSDPTA went on to explain that buyers, sellers, and speculators trade the CME, trying to obtain a price in their favor, while the price actually is determined by supply and demand forces. He described the rules as fair and the results as transparent, with participants having a number of interests. The witness continued by noting that the CME price result is instant and results cannot be altered. In contrast, he stated, NASS prices are reported by sellers only, who are not disinterested parties. He argued that NASS respondents can modify their numbers or file an initial report after calculating the price impact of the latest reports.

The proponents also concluded that the urging by many hearing participants that the NASS price series include mandatory participation and be audited proves that the NASS series is not reliable enough to be used as a price–discovery method.

Finally, the witness from WSDPTA expressed the view that the NASS price series would feed on itself and result in price setting, not price discovery. He continued by noting that plants and their buyers will obtain prices one week and sell the commodity in the following week at a price derived in large part from the price obtained in the prior week. The witness compared the NASS survey to the CDFA survey of powder prices which, he claimed, results in a circular pricing system that is mathematically incapable of fully reflecting the top of the market price for powder because so little of the survey volume is priced off of the spot market. Proponents expressed the belief that this circularity causes prices to remain lower than they would without it and that prices would increase more slowly and decrease more rapidly than would prices on the CME, causing overall lower prices for dairy farmers.

In the comments filed on the tentative final decision, the proponents of changing from NASS to CME prices commented only that USDA should reconsider the use of NASS prices. A partner/manager of a dairy farm stated that there is little correlation between the NASS and wholesale prices, and questioned the accuracy of NASS survey numbers. He also stated that block and barrel cheese is traded only between manufacturers and that they therefore have an influence on setting the price, especially if the percentage of the product traded is very low. He argued that a fair price would reflect retail prices or at least true wholesale price,

not the value of the last pound of product produced.

Opponents of changing from NASS to CME prices to compute component prices included International Dairy Foods Association (IDFA), DFA, and National Milk Producers Federation (NMPF). Witnesses for these parties argued that the NASS survey includes pricing based on a significantly larger volume of product than does the CME. In the case of the nonfat dry milk market, the table of 1999 monthly CME Cash Markets data from the 1999 Annual Dairy Market Statistics showed that there were no sales reported for either extra grade or Grade A in the year 1999.

According to a witness from IDFA, the volume of cheddar cheese in the NASS survey is equal to 26.4 percent of all cheddar cheese production in the U.S. for the period September 1998 through February 2000. During the same period, the CME volume of cheddar cheese traded represented only 1.7 percent of U.S. cheddar cheese production. The witness stated that for the same 18-month period, the NASS survey volumes represented 14.4 percent of all U.S. butter production while CME trading consisted of only 2.6 percent. He also noted that switching from the NASS survey data to the CME data would result in a change from a very broad to an extremely thin representation of actual product transactions.

Opponents to the proposal to use CME prices also pointed out that prices at the CME are Chicago or Midwest prices based on the delivery location specification of the contract. Therefore, they argued, the scope of the reported prices for cheese, butter, and nonfat dry milk are not national. A witness for Kraft noted that reliance on the CME alone would exclude the substantial and growing volume of cheese produced in the western United States (U.S.), particularly California. A witness for Northwest Dairy Association suggested that a transportation credit would need to be used with CME prices, at least in the West, to reduce the value of the CME to a more representative level. Opponents went on to explain that since the NASS survey contains data from plants located all over the United States, NASS prices represent a national scope of the prices of each of the particular commodities.

Several of the comments filed in response to the tentative final decision supported use of the NASS price series to determine product prices. Furthermore, there were several comments filed on the recommended decision and they all supported using NASS prices. The Michigan Milk Producers Association (MMPA) comment noted that NASS ''provides the broadest range of price information and is representative of the product prices realized by the dairy industry.'' In response to the recommended decision, DFA indicated that legislation enacted subsequent to the recommended decision improved the reliability, completeness, and integrity of the NASS price surveys. On November 22, 2000, the Dairy Market Enhancement Act of 2000 was enacted thereby authorizing mandatory and verifiable price reporting.

According to the testimony in the record and a number of the briefs, cheese and butter sellers and buyers look to the CME to identify the most current price levels. As a result, prices move in response to supply and demand conditions in the marketplace as reflected at the CME. Since the transaction prices of commodities are based off of the CME, it is difficult to see how the NASS survey can cause, or result in, circularity. The NASS prices reflect the CME prices with a short lag but are based on a much greater volume, enhancing the stability of the price series. Continued use of the NASS price survey appears to be the best method of obtaining reliable data about commodity prices.

As stated in the final decision on Federal order reform, NASS data traditionally has been collected via a survey with voluntary participation. The price information, like most NASS data, has not been audited. NASS, however, applies various statistical techniques and cross-checking with other sources to provide the most reliable information available. The issue of mandatory and audited NASS data was not within the scope of the rulemaking and could not be addressed on the basis of the hearing record. At the time of the hearing NASS was not authorized to conduct such activities. As noted above, however, the Dairy Market Enhancement Act of 2000 authorized mandatory and verifiable price reporting.

3. Commodity and Component Price Issues

a. General Approaches on Make Allowances

Make Allowances. Changes to the make allowances for each of the product formulas used in calculating component prices were proposed and discussed at length during this proceeding. Except in the case of dry whey, make allowances adopted in the component price formulas in the recommended decision were calculated using a weighted average of the most recent California Department of Food and Agriculture (CDFA) study and the Rural Business Cooperative Service (RBCS) study. A marketing cost of $0.0015 per pound is added to both the CDFA costs and the RBCS costs, and the CDFA value for return on investment is used to adjust the RBCS cost. This is generally the same approach used to determine the appropriate make allowances under Federal order reform, and results in values that differ little from the formulas adopted at that time.

For the calculation of the Class III ''other nonfat solids'' price, neither the CDFA nor RBCS studies included information on the cost of making dry whey. The tentative final decision determined that the make allowance for dry whey should remain the same as that for nonfat dry milk. However, the results of a survey conducted for this proceeding under the auspices of IDFA were included in the recommended decision to determine the make allowance for dry whey.

A number of the proposals considered in this proceeding would change the manufacturing, or make, allowances adopted for the pricing formulas under Federal order reform. There was considerable testimony on the appropriate factors to be considered in establishing make allowances, and several sources of data were cited as the most accurate to use for such a purpose.

Two surveys of product manufacturing costs that were averaged for use in calculating make allowances under Federal order reform were the CDFA study, which is done annually and includes nearly 100 percent of dairy products manufactured in California, and the RBCS study, which is conducted annually by USDA as an in-plant benchmark study for participating cooperative associations. These two surveys had both been updated since earlier versions had been used in determining the manufacturing allowances used in the component pricing formulas adopted under Federal order reform. In addition, the National Cheese Institute (NCI), an affiliate of International Dairy Foods Association (IDFA), contracted with a third party to conduct a survey of the costs of manufacturing cheese and whey powder for use in this proceeding.

A witness for National Milk Producers Federation (NMPF) stated that make allowances should reflect the costs incurred by average plants manufacturing the particular dairy product used in the component/Class price formulas: butter, nonfat dry milk, cheese, and dry whey. The witness went

on to explain that the procedure used by the Department for determining the make allowances under Federal order reform, using an average of the CDFA cost of production studies and the RBCS study, was sound and that the same procedure should be used as a result of this hearing, using the updated data from both surveys. In calculating an appropriate make allowance, the witness supported the addition of a marketing cost of $0.0015 per pound to both the CDFA costs and the RBCS costs, as under Federal order reform, and the CDFA value for return on investment used to adjust the RBCS costs under Federal order reform. The witness explained that both of these factors should be included as they are legitimate and necessary costs incurred in operating manufacturing plants. The witness for IDFA supported inclusion of the CDFA cost studies in the computation of the make allowance; however, the witness stated that the appropriate procedure for computing the make allowance for cheese was to compute a weighted average of the CDFA cost studies and the NCI survey. The witness explained that the RBCS study does not include all the necessary costs that must be recovered in the make allowance and that the NCI survey is needed to determine what the additional cost values should be. The costs that the IDFA witness pointed out—those which are not included in the RBCS survey but which are included in the NCI survey—are general plant administrative costs, such as the plant manager's salary and corporate overhead, return on investment or capital costs, and marketing costs.

The IDFA representative testified that the danger inherent in regulated prices is setting the manufacturing allowance at a level too low to assure that manufacturers will be able to recover their costs of manufacturing finished products and to have the money needed to invest in new plants. The witness pointed out that an inadequate make allowance would force manufacturers either to move to areas that do not have regulated pricing or go out of business. At the very least, the witness explained, the manufacturers would not invest in new plants and equipment, which in the long run would cause a decline in the productivity of the dairy industry. A number of briefs filed on the basis of the hearing transcript emphasized the importance of covering all handlers' costs of manufacturing and not just average costs.

The IDFA witness explained that if make allowances are established at too low a level, proprietary plants are placed at a competitive disadvantage relative to cooperative-owned plants. The witness explained that since cooperatives do not have to pay their producers the minimum order price, as proprietary plants are required to do, cooperative plants can reduce the prices paid to member producers to make up the difference in cost.

The IDFA witness explained further that the problem with a make allowance established below the amount needed to cover plant costs occurs because the plant sells the finished product at the same price that is used in the formula for establishing the minimum price the plant must pay for the raw material (milk). The manufacturing allowances are the only place the plant has the opportunity to cover its costs, and those allowances are fixed in the formula that determines the raw material price.

The witness for IDFA asserted that there is very little risk in setting a make allowance too high. He explained that if the make allowance is established at a level above plant costs, the additional revenue stream will be corrected through market forces by requiring the plant operators to pay competitive over-order premiums to milk suppliers to obtain an adequate supply of milk.

A witness for WSDPTA explained that the most important part of determining a manufacturing allowance is to pick a method and stick with that method. The witness testified that the appropriate method is to use the results of the RBCS study with adjustments to include factors for marketing costs and for capital costs. The witness pointed out that use of the RBCS study is appropriate because the study is voluntary and represents the costs of making the particular commodities, and the plants are geographically widely dispersed. The WSDPTA witness stated that including the results of the CDFA study in the computation of the make allowance for pricing Federal order milk is inappropriate since there is no logical reason for considering the manufacturing costs of plants that do not procure any of the milk that would be priced using those costs.

Witnesses testifying on behalf of NFU and NFO both supported the concept of variable make allowances, in which changes in dairy farmer production cost indexes would be used to adjust handler make allowances. The NFU proposal would use an average national cost of production, presumably as published by USDA's Economic Research Service, and the NFO proposal would use the CDFA milk production cost index. The witnesses supported such an approach as a means of addressing the problem of manufacturers being insulated from changes in supply and demand by their fixed make allowances.

The NFU and NFO witnesses explained that a fixed make allowance, as contained in the current pricing system, does not vary with market conditions and creates a situation in which manufacturers will not respond to market signals since the manufacturers will receive a profit no matter what the supply and demand is for the finished products. The witnesses testified that as long as the make allowance allows manufacturers a sufficient return, the manufacturers will continue to produce the finished product even if there is limited demand for the product, thus resulting in a continued low price paid to producers for their milk. As a result, they argued, producers are left to bear the burden of changes in supply and demand. The NFO witness characterized a variable make allowance tied to the cost of producing milk as a market-oriented system.

The NFU witness described the California milk pricing system, in which manufacturers' production costs are covered through the make allowance, as an example of the problems encountered by producers with the use of product price formulas incorporating make allowances. He testified that California continues to produce a large quantity of lower-valued products because the pricing system makes the manufacturer immune to the supply of and demand for the products. The witness blamed the California make allowance system for the traditionally low milk prices in California that, he claimed, result in expansion of dairy herds to make up for reduced cash flow. The witness predicted that if the Federal order system follows the same pricing path, the same production patterns as witnessed in California would follow in the rest of the United States.

In comments filed in response to the tentative final decision, NFU stated that producers, as well as processors, will fail if they don't attain their costs of production. NFU also argued in its comments that under a variable make allowance, processors can avoid reduced make allowances by increasing product prices.

The NFU comment overlooks the fact that the make allowances included in the component price formulas do not cover all of the costs of all processors, and probably allow for greater costs than are experienced by some processors. In this sense, the margins experienced by processors under product price formulas are variable between plants. Also, it is likely that processors share some of their margin

with producers in the form of over order prices. The degree to which this sharing occurs certainly may vary with producers' cost/price situations, as perceived by processors. Although increased product prices would have the effect of increasing manufacturing margins, the ability of processors to increase prices while maintaining sales is limited by the fact that the marketplace in which they sell their products is competitive.

There appears to be no logical or economic reason for changing make allowances for processing plants because of a change in the cost of producing milk. If milk is to clear the market, plants must be willing to accept it. Make allowances that decline as a result of increasing milk production costs would squeeze plant margins, and manufacturers will have to choose between not receiving milk, refusing to receive pooled milk, or paying less than order prices to cooperative associations for milk used in manufactured products. None of these outcomes would be in the best long-term interests of dairy farmers, processors, or consumers. Many dairy farmers, facing increased costs of production, would have to find alternative outlets for their milk. Decisions on the part of many processors to cease operating, use only nonpool milk, or buy milk below order prices likely would result in very disorderly conditions among dairy farmers looking for outlets for their milk.

Most hearing participants agreed that the make allowance should cover the cost of converting milk to a finished manufactured dairy product. However, several participants disagreed with the IDFA contention that there is very little risk in setting the make allowance too high. They argued that if the make allowance is set in excess of the cost to manufacture finished products, the additional revenue would be kept by the manufacturing plants as higher profits and not distributed to the producers supplying milk to the plant. They explained that in many parts of the country there is little if any competition for the dairy farmers' milk and therefore no incentive for a plant to pay above the minimum Federal order price. These plants, according to the witnesses, could be expected to keep the extra make allowance for themselves. Comments filed by Michigan Milk Producers Association (MMPA) on the tentative final decision and the recommended decision continued to urge caution against logic that suggests a low risk of setting make allowances too high. The cooperative stated that not all of its 2,700 members might survive a market adjustment period if make allowances were set too high, even if theoretically greater premiums might be returned to producers.

Several witnesses opposed the idea of setting make allowances at levels that guarantee plants a profit, or at least a return on investment, when the dairy farmers supplying milk to the manufacturing plants have no similar assurances for covering the costs of producing milk. These witnesses pointed to the Agricultural Marketing Agreement Act of 1937, sec. 608c(18), as justification for setting a lower make allowance for plants, resulting in higher milk prices that would come closer to covering dairy farmers' costs of producing milk.

As supported by most of the hearing participants, the make allowances incorporated in the component price formulas under the Federal milk orders should cover the costs of most of the processing plants that receive milk pooled under the orders. In part, this approach is necessary because pooled handlers must be able to compete with processors whose milk receipts are not priced in regulated markets. The principal reason for this approach, however, is to assure that the market is cleared of reserve milk supplies.

In comments on the tentative final decision, IDFA continued to argue that some legitimate manufacturing costs are excluded from the RBCS survey and attacked the data gathered as ''inherently suspicious and unreliable.'' IDFA also stated that the survey is not taken seriously by some of its participants. Both IDFA and Leprino Foods Company argued in comments on the tentative final decision that adding factors for costs excluded in the RBCS study constitutes a less accurate result than if those costs were included in a comprehensive study. IDFA also commented that the need to allow for changes in cost factors that might occur over time (such as recent increases in energy costs) also supports the need for a make allowance that is too high rather than one that is too low.

Several comments filed on the recommended decision indicated opposition to establishing make allowances based on an average of plant manufacturing costs. Agri-Mark Dairy Cooperative argued that using an average manufacturing cost in the pricing formulas would result in half of all handlers having higher manufacturing costs. IDFA noted in their comments that mechanically adopting a make allowance survey ''would by definition mean that the one-half of cheese produced in plants with greater than average costs would be forced out of business.'' Comments received from Northwest Dairy Association and Westfarm Foods, Inc., stated that USDA's use of ''a simple average risks half the industry.''

This final decision finds that continuing to use an average make allowance of dairy manufacturing plants' costs is appropriate. Reliance on product-price formulas necessitates the need to reflect and to offset the manufacturing costs incurred and is supported by the record even though there is disagreement on exactly how to accomplish this. Using an average make allowance provides a reasonable measure to reflect and offset manufacturing costs and is the only reasonable measure that can be supported by the record evidence.

Although the RBCS survey does not include such costs as general plant administrative costs, return on investment or capital costs, and marketing costs, it is a survey that has been done for sixteen years with the same fundamental methodology and with some continuity of participants. Because the survey is done for the benefit of the participating organizations (cooperatives) to help them identify their costs and compare them with those of their peer group, there is every reason to believe that the costs provided are as accurate as possible. In addition, the years of experience with the survey have enabled USDA to shape the questions to obtain more accurate results.

When the RBCS survey results are adjusted to include the factors that were mentioned above as not included by using the values for those factors from the CDFA survey, the two surveys' costs are comparable, especially considering that the RBCS survey represents manufacturing plants with a wide distribution around the U.S., while the CDFA survey includes only California plants. The CDFA survey is also done every year and is done according to a published procedure manual, with the costs being audited by personnel employed by the State for that purpose. Although no CDFA employee was available to respond to questions about the conduct of the survey, official notice was taken of the procedure manual and of California publications associated with manufacturing cost data. In addition, several witnesses who are deeply involved with the California dairy industry testified regarding the perceived reliability of the survey results.

The use of manufacturing plant data from California plants that do not procure any of the milk that would be priced using those costs should not

cause concern. The costs of manufacturing dairy products may vary slightly by region, but adoption of representative make allowances in product price formulas should not fail to use a well-documented study that includes a large amount of audited data, such as the CDFA survey.

In contrast to the RBCS and CDFA surveys, the survey of cheese and whey powder manufacturing costs arranged for by NCI was developed solely for the purpose of establishing costs to be used in determining make allowances for this proceeding. The survey was conducted by persons unfamiliar with the dairy industry among cheese processors who would benefit from the adoption of overgenerous make allowances. No one who actually conducted the survey was made available to testify, and although the IDFA witness stated that survey participants would testify regarding their responses to the survey later in the hearing, none of the participating firms' witnesses would respond to questions about their firms' results.

Although less weight must be given the NCI survey than either the RBCS or the CDFA surveys for the reasons stated above, the NCI survey's resulting manufacturing costs for cheese are not considerably different from a weighted average of the RBCS and the CDFA surveys. In fact, although the IDFA hearing participants went to great lengths to discredit the RBCS study for use in identifying an appropriate level of manufacturing costs, the hearing record reflects that the NCI survey of cheese and dry whey manufacturing costs used the RBCS 1996 survey results to identify outliers (plus or minus 10 percent) in the study commissioned by NCI.

In comments filed regarding the tentative final decision, IDFA urged that USDA use the NCI and CDFA studies for use in determining make allowances for cheese and whey powder rather than using the RBCS and CDFA studies. IDFA stated that the RBCS study was neutral and was not developed or commissioned for use in this proceeding. Cooperative associations attending the National Milk Producers Federation annual meeting were encouraged to participate in the survey so the results could be used in this proceeding. Since the RBCS study was developed and has continued for sixteen years for purposes other than establishing make allowances, and the methodology did not change from past years for the study used in the hearing, it is unlikely that it was designed for any purpose other than the one for which it was developed and has been used for that period. If the comment is intended to raise concerns that cooperative associations generally favor lower make allowances, it should be noted that only manufacturing cooperatives were surveyed. The record contains ample evidence that many manufacturing cooperatives desire make allowances just as generous as those favored by proprietary manufacturers.

A comment filed on behalf of the Association of Dairy Cooperatives in the Northeast (ADCNE), some of which are national in scope, argued that use of the NCI data would demean the importance of sworn first-hand testimony that is subject to cross-examination.

As a result of the differences in conduct of the three surveys, manufacturing costs used to determine appropriate make allowances for cheddar cheese, butter, and nonfat dry milk in this proceeding are calculated primarily from a weighted average of the RBCS and CDFA surveys, with a check against the NCI survey cost of manufacturing cheddar cheese. Since the record lacks any other data regarding the cost of making whey powder, the NCI survey results are used for the make allowance in the other solids formula.

One proposal included in the hearing notice would have eliminated any marketing allowance from the make allowances, and a number of witnesses' testimony objected to the inclusion of return on investment. The American Farm Bureau witness questioned the need for a marketing allowance since producers already pay a 15-cent assessment for promotion and research. A brief filed by the proponent of eliminating the marketing allowance stated that the allowance appears to be an ''adjustment'' or a ''hedge,'' since it is not defined in the final decision in the Federal order reform process.

There was general agreement among those testifying that a marketing allowance should be included in manufacturing costs, but no consensus about the appropriate number. Some of the costs covered by the marketing allowance include maintaining and staffing warehouses, supporting a marketing and sales staff, and transporting product to market, as well as accounting costs associated with the sale of products. The NCI survey identified a marketing cost of $0.0011 per pound of product, while the DFA witness stated that DFA's costs were approximately $0.0018. The DFA witness testified that because the costs included in the activities designated as marketing generally fall within a common department under common management, it is appropriate to apply the same allowance to each product.

A witness for Northwest Dairy Association (NDA), a cooperative association in the Pacific Northwest, stated that NDA's marketing costs are $0.0026 but identified costs associated with the aging of cheese as included in that number. Since the NASS survey price does not include cheese intended for aging, the marketing allowance certainly should not include costs of aging cheese. The Associated Milk Producers, Inc. (AMPI), witness used a $0.0024 marketing allowance in the calculation of AMPI's proposed make allowance for nonfat dry milk. The witness for Agri-Mark, Inc., a large Northeast cooperative association with several processing plants, stated that Agri-Mark's estimates of marketing costs ranged from $0.0025 to $0.005 per pound.

The costs identified as those included in a marketing allowance are necessarily incurred in getting a product to market and are not related to the consumer education and advertising activities covered by the National Dairy Board assessment. The recommended decision stated that since the marketing cost determined by NCI was the only estimate included in the hearing record that was supported by a survey. It varies from the $0.0015 rate included in Federal order reform by only 4 one-hundredths of a cent and applies only to cheese and dry whey. The recommended decision concluded that there was no basis for making any change to the marketing allowance.

Some producer witnesses objected to the inclusion of any allowance for return on investment in manufacturing allowances on the basis that dairy farmers are assured of no such return. The CDFA manufacturing cost surveys include allowances for depreciation, which is included in the non-labor processing costs; and for return on investment, which represents the opportunity cost of the processors' resources invested in the business. These costs are supported by audited data.

Both the marketing allowance and return on investment factors should be included in the manufacturing allowances provided in the component price formulas at the rates supported by the CDFA data. If processors are not provided enough of a manufacturing allowance to market the product they process, or to earn any return on investment, they will not continue to provide processing capacity for producers' milk. At the same time, the manufacturing allowances incorporated in the formulas will not provide enough of an allowance to assure that every processor, no matter how inefficient or

high-cost, will earn a profit. Allowances set at such a level certainly could result in the situation warned of by producer groups in which processors manufacture greater volumes of product than the market demands because they are guaranteed a profit on all their production. As a result, the only way to market all of the product would be to reduce prices, with a profit to processors still locked in through the make allowance, which would result in decreasing prices paid to producers. In addition, manufacturers who are assured a profit on all of their output would have a lesser incentive to make a sufficient quantity of milk available for fluid use—a basic goal of the Federal milk order program.

Farm-to-plant losses. One area addressed by several hearing participants in testimony and in briefs as appropriate to consider in establishing make allowances or yields was the loss of milk components during manufacturing processes.

Two cheese manufacturers, IDFA and Land O'Lakes (LOL), continued to argue in their comments on the tentative final decision that make allowances should be increased, or yields reduced, to reflect shrinkage between farms and warehouses.

The tentative final decision and the recommended decision stated that orders have always provided an allowance for shrinkage and that inflating costs of production or reducing yield factors to reflect shrinkage would not properly reflect the value of producers' milk used in manufactured products. The recommended decision also stated that processing costs determined by surveys underlie the manufacturing costs incorporated in the pricing formulas and were expressed in cents per pound of end product manufactured, not in the cost per hundredweight of converting milk to manufactured products. The recommended decision went on to state that the component pricing formulas were based on the content of those components in the finished products for which a manufacturing cost per pound had been established. The recommended decision concluded that both the CDFA and RBCS cost surveys allocated all plant costs to actual end products and that the yield factors in the formulas referred to the amount of finished product resulting from the processing of a given volume of input or to the amount of component present in the finished product.

Comments on the recommended decision from Kraft Foods, Inc., Leprino Foods Company, IDFA, Hilmar Cheese Company, Agri-Mark Dairy Cooperative, Davisco Foods International, Glanbia Foods, Inc., Winger Cheese, Inc., and Northwest Dairy Association and WestFarm Foods (NDA) expressed concern that the Class III and IV milk pricing formulas offered in the recommended decision do not sufficiently address the costs incurred in the assembly, transportation, and delivery of milk and its components. Kraft, Leprino, Hershey, Dairy Farmers of America (DFA), and Dr. David Barbano of Cornell University testified at the hearing as to the need to specifically account for the losses in milk solid components that occur between moving milk from the farm or diverting plants and the receiving manufacturing plant. The witnesses and comments provided testimony that these losses are inherent in the handling of milk and that this issue was inadequately addressed in the recommended decision. This final decision finds the arguments for specific consideration of the impact of shrinkage in the product price formula persuasive.

The hearing testimony as well as comments to the recommended decision provide sufficient evidence to conclude that the recommended decision formulas do not properly consider farm-to-plant losses that occur. Testimony indicates that these losses are 0.25 percent on all milk solids, and that butterfat solid losses are an additional 0.015 pounds per hundredweight of milk. These losses need to be represented in the pricing formula, according to these claimants, to account for the out-of-plant losses that occur prior to processing raw milk into finished products such as cheese or butter/powder.

Witnesses for Kraft, Leprino, DFA, and Hershey, among others, testified that the difference between the quantity of milk, including components, received at the plant should be accounted for in the price formulas, since the formulas are based on yields attributable to components received at the plant. Milk unrecoverable in the movement from farm-to-plant cannot yield finished product.

Comments received from Select Milk Producers, Inc., and Continental Dairy Products, Inc., supported the Class III and IV pricing formulas as offered in the recommended decision, offering that including an adjustment for farm-to-plant loss would cause confusion.

As indicated earlier, Federal orders have always contained provisions for ''shrinkage.'' Since handlers have to account for all receipts and utilization, the shrinkage provision allows assigning a value to milk losses at the lowest priced class, providing explicit recognition that some milk loss is inevitable in farm-to-plant movement. If, however, the loss exceeds the allowable level, the excess shrinkage is priced at Class I. This ''shrinkage,'' as discussed above, refers to milk losses associated with how the order classifies and pools milk. Current shrinkage provisions are associated with pool distributing plants that produce fluid milk products. In this context, shrinkage provisions also provide fluid milk handlers the ability to assign milk losses to a lower class use value within certain parameters.

The loss allowances in the Class III and IV formulas are intended to reflect actual losses that are beyond the processing handler's ability to control. In addition, farm-to-plant losses cannot be assigned to a lower class value since the milk solids unavailable for processing effectively have no value in the Class III and IV formulas.

The price formulas in the recommended decision included typical plant losses associated with the conversion of raw milk to the final dairy product and relied on Federal order reform findings that the value of Class III and IV milk would be determined from the NASS survey prices collected on butter, cheese, dry whey, and nonfat dry milk. Pricing formulas generally include both yield factors and make allowances which together account for the entire conversion of raw milk to a final dairy product. Comments received on the recommended decision indicated that milk solid losses between the farm and the receiving plant are real, unavoidable, and common.

Prior to Federal order reform, milk pricing for all Federal milk marketing orders relied on the Grade B Minnesota-Wisconsin (M–W) price series and later the Basic Formula Price (BFP). These prices were determined by manufacture milk plant survey reports of Grade B milk purchases free of government price regulation and represented a competitive pay price for milk. The competitive pay price factored the entire cost of processing milk purchased from farms into finished dairy products. In contrast to the competitive pay prices, Federal order reform could no longer rely on a competitive pay price and purposefully chose NASS surveys of end-product prices and sales to establish Class III and IV prices with product price formulas. Many of the plants reporting to NASS purchase large quantities of milk from individual producer cooperatives. The end-product pricing formulas developed under reform were based in part upon the cost to process raw milk into finished dairy products.

After reevaluation of the hearing testimony and comments, this final decision reverses the recommended decision by including an adjustment for farm-to-plant losses of butterfat and nonfat solids. It is necessary to include such an adjustment in using end-product pricing formulas for determining component prices. Since the handlers receiving milk from producers pay the producers on the basis of farm weights and tests, handlers do not receive all of the milk components due to farm-to-plant losses. An adjustment to the price formulas to account for the difference in milk components paid for versus components actually received is appropriate. Based on the hearing record and comments filed by numerous parties, the farm-to-plant adjustment will reflect a 0.25 percent loss of nonfat solids, including protein and other solids, and a 0.25 percent loss of butterfat plus a 0.015 pounds loss of butterfat. These adjustments are reasonable and are reflected in the respective yield factors used for computing the milk component prices.

These loss allowances are adopted into the Class III and IV pricing formulas. The farm-to-plant losses are reflected on the end-products that result from Class III and IV milk, namely, cheese, dry whey, nonfat dry milk, and butter. They are reflected in this way to ease the concerns raised by Select Milk and Continental Dairy who indicated that reflecting farm-to-plant losses on the front-end of the product formulas (based on farm milk) may cause confusion.

A detailed description of the amendments to each of the respective pricing formulas is provided below. This final decision incorporates an adjustment to the respective yield coefficients of each milk component. The adjustment is based on an overall factor of 0.25 percent loss of each milk component and an additional 0.015 pounds of butterfat lost between the farm and the receiving plant.

In-plant losses. Several handlers commented that in-plant losses should be included in the formulas used for computing the component prices. In this regard in-plant losses represent milk that cannot be processed into dairy products due to the handling of milk by the plant. This final decision does not include an adjustment for in-plant losses because a manufacturing plant has control over the magnitude of in-plant losses and therefore should not be compensated for such losses, unlike the farm-to-plant loss which is outside the control of the plant operator. This adjustment is reflected by recognizing that the cost of converting 100 pounds of milk into a finished product is not significantly affected by the quantity of finished product produced. For example, if it costs $20 to convert 100 pounds of milk into 10 pounds of cheese assuming absolutely no losses, the make allowance would be $2 per pound. However, if there is a loss of a half pound of cheese prior to the final packaging of the cheese, only 9.5 pounds of cheese is ''produced.'' In this example, the make allowance would be $2.11 per pound of finished product. Thus the make allowance based on pounds of product produced does account for at least a portion of in-plant losses.

Ratemaking. In comments received to the recommended decision, Kraft, joined by NDA, argued that including make allowances in the pricing formulas was ''ratemaking.'' Kraft stated that the make allowances formulated and used in the Class III and Class IV formulas have not followed the standards needed to comply with ratemaking. Kraft stated that the make allowances are not constitutionally valid because they do not ensure that manufacturing costs provide for a reasonable rate of return for manufacturers.

In seeking to characterize the provisions of make allowances in Class III and Class IV pricing formulas as ratemaking, the commentors are ignoring the unique and longstanding treatment of the milk pricing provisions, including make allowances, in Federal milk marketing order regulations. The make allowances in the Class III and Class IV pricing formulas do not constitute ratemaking despite arguments that they do. The make allowances adopted are used in establishing minimum prices for milk under the authority and requirements of the Agricultural Marketing Agreement Act and are different in kind from the ratemaking referred to by the commentors.

Other issues. A comment filed by Lamers Dairy to the tentative final decision argued that using make allowances to calculate Class III and Class IV prices but not Class I and Class II prices constitutes unequal treatment. The comment disregarded that make allowances in the Class III and Class IV price calculations are used to determine prices for milk used in those classes, and that the prices for milk used in Classes I and II are based on those milk prices. The Class I and II prices are determined for the purpose of valuing milk in uses that are alternatives to manufacturing uses. Once the Class III and IV prices have been established, the Class I and II prices can be calculated using differentials from the base prices. No further comments on this issue were received.

b. Class IV Butterfat and Nonfat Solids Prices

Butterfat Price. This final decision continues to use the NASS price for Grade AA butter in calculating the butterfat price to be used in Class IV, and uses the current and the recommended decision's make allowance of $0.115. However, this final decision changes the use of a 0.82 divisor in the price formula to a multiplier of 1.20 in order to provide consistency to price formulas and to account for farm-to-plant milk losses.

The recommended decision continued to use the NASS price for Grade AA butter for calculating the butterfat price to be used in Class IV, and it continued to change the manufacturing allowance in the butterfat formula by 1/10 of a cent per pound of butter from the allowance used under Federal order reform. The recommended decision also recommended that the 0.82 divisor in the price formula be unchanged. The make allowance change is the same as that included in the tentative final decision, and neither it nor the other factors were affected by the injunction. However, the injunction resulted in the same butterfat price formula being used to value both Class III butterfat and Class IV butterfat.

Several proposals were heard that would reduce butterfat prices, either by reducing the butter price used in the computation of the butterfat prices for all classes or by subtracting a fixed amount from the butterfat price computed for Class IV. Proposals also were made that would change the make allowance used in calculation of the butterfat prices. There were no proposals to change the butterfat divisor of 0.82, although one witness representing a western cooperative association suggested that it be reconsidered as he felt it did not include a shrinkage factor.

Product Price (Butter). This final decision continues to use the NASS price for Grade AA butter in calculating the butterfat price to be used in Class IV. Several witnesses for proprietary processor proponents of the proposal to deduct six cents from the butter price before computing the butterfat price stated that historically the value of butterfat in the Federal milk orders has been based on the price of Grade A butter. The witnesses explained that an equivalent price determination had been issued in 1998 (when the CME discontinued trading Grade A butter)

where nine cents would be subtracted from the Grade AA butter price for use in calculating Federal order butterfat prices. This equivalent price, according to the witnesses, was found to be ''essential'' to the continued operation of the Federal milk order program. Further, they argued that its adoption continued the policy of basing butterfat pricing under the Federal milk orders on a value below that of Grade AA butter.

The witnesses complained that under Federal order reform the butterfat value is determined by using the NASS Grade AA price of butter, which effectively increases the butterfat value under Federal milk orders. According to proponents' calculations, the increase does not amount to a full nine cents but is tempered by the use of the NASS Grade AA price, which has averaged approximately three cents below the CME Grade AA price, in the butterfat pricing formula. Therefore, they stated, the actual increase in the butter price used to calculate butterfat prices is approximately six cents. According to the witnesses, subtraction of six cents from the NASS butter price would return the relationship between the butterfat value under the orders and the selling price of butter to the relationship that existed prior to Federal order reform.

Several witnesses explained that when handlers must pay for butterfat on the basis of the Grade AA butter market they cannot then sell cream or finished products at a price that would allow them to recover their costs. They testified that cream is sold at a price that is termed a ''multiple'' of the butter price, and that the multiples used when the butterfat price was calculated from the Grade A butter price have not adjusted to the new pricing formula using Grade AA butter.

The IDFA witness pointed out that the IDFA proposal to subtract six cents from the NASS Grade AA butter price would apply not only to the butterfat formula for Class II, Class III, and Class IV but would apply to the advance butterfat formula used for computing the Class I butterfat price. The witness testified that by applying the same formula to all classes of butterfat, the current relationship between the class prices would be maintained. The witness contended that there is no justification for changing the relationships between the class prices, particularly if the adjustment would widen the class price spreads or, in effect, increase the Class I and Class II differentials.

Witnesses for NMPF and several large cooperative associations testified in support of NMPF's proposal to reduce the calculated butterfat price by six cents, with the reduction applied to Class IV butterfat only. Under this proposal, the computation of the butterfat prices for other classes would not contain the six-cent adjustment. Several witnesses representing cooperative associations that process butter explained that butter manufacturers incur additional costs when procuring cream used for manufacturing butter as opposed to the cost of converting producer milk to butter. The witnesses explained that these additional costs include transportation, additional handling, and additional pasteurization. The witness for LOL testified that the additional costs amounted to 4.57 cents per pound of butterfat for transportation and 0.4 cents per pound for receiving, storing, and repasteurization. A witness for Agri-Mark stated that Agri-Mark's transportation costs are slightly less than LOL's, probably due to the proximity of the Agri-Mark plant to the sources of cream, but that the other additional costs are slightly higher than the LOL costs, at 0.5 cents per pound of butterfat.

The proponents of reducing the Class IV butterfat value also referred to the computation of the California Class 4a butterfat price, which involves a subtraction of 4.5 cents per pound from the CME Grade AA butter price to adjust for the costs of moving butter from the west coast to the Midwest.

Those parties who favored reducing the butter price before using the butterfat price formula to calculate any of the butterfat prices disagreed vehemently with the proposal to reduce only the Class IV butterfat price. They argued that such a reduction would distort the relationship between the Class II and Class IV prices, resulting in a greatly-increased price for Class II butterfat in relation to Class IV butterfat. Specifically, the projected increase in the Class II–Class IV butterfat price difference was cited as 6.7 cents per pound (from the current difference of 0.7 cents). These parties argued that butterfat values would most appropriately be reduced by the same degree in all classes.

The price to be used for butterfat in Class III and Class IV should be computed by subtracting a make allowance of 0.115 dollars per pound from the monthly average NASS Grade AA butter price and dividing the result by 0.82 since 1.2213 pounds of butter can be made from 1 pound of butterfat. The Class II butterfat price should continue to be the Class IV butterfat price plus 0.007 cents, while the Class I butterfat price will be the advance butterfat price plus the applicable Class I differential.

Contrary to the belief stated by some witnesses, the use of the Grade AA butter price for computing the butterfat price under Federal order reform was not an ''oversight.'' Trading of Grade A butter on the CME ended June 26, 1998 (not by USDA, as implied in one brief, but by the CME) because the volume of Grade A butter traded was not great enough to warrant maintaining a trading venue. One brief argued that the Grade A butter price represents a minimum price, and that there is no need for concern that there will not be an available market for Grade A and Grade B butter. However, with the end of trading in Grade A butter on the CME, there is no published (or any other known) source for obtaining a price for Grade A butter.

The use of the Grade AA butter price for establishing butterfat prices is appropriate since that is the only grade of butter that has significant enough trading volume to warrant a publicly-reported price. Grade AA butter prices are the only butter prices regularly available and represent the vast majority (about 95 percent) of the butter sold. Although the ''multiples'' of the butter price apparently had not adjusted to the use of the Grade AA price during the first 4 months of experience under the revised orders and probably should not be expected to adjust during the period in which this proceeding is under consideration, the marketplace should, in time, make the needed adjustments.

Various witnesses estimated that Grade A and Grade B butter combined make up 3–7 percent of the butter in the U.S. Although a witness noted that the Minnesota-Wisconsin (M–W) price for non-Grade A milk continued to be surveyed even after the percentage of milk eligible for the survey had fallen below a 5 percent level, it was widely recognized for some time that a pricing alternative to the M–W must be found because the M–W eventually would no longer provide a representative price for a large volume of unregulated milk. Similarly, with the decline of Grade A butter (and the unavailability of prices for that product), the only alternative available for determining price is Grade AA butter. A finding in the equivalent price determination that a Grade A butter price was ''essential'' to continued operation of the orders referred solely to the fact that the Grade A price was specified in all of the orders at that time, not that the butterfat value under Federal milk orders could never be based on any other price.

Making an adjustment to a clearly valid price series to approximate a price

series that has been discontinued for several years due to insufficient volume for trading is inappropriate. Comments to the tentative final decision from IDFA and Schreiber Foods continued to encourage the use of an estimate of the discontinued Grade A price series for the current formulas. Since it has been about four years since a publicly-traded price for Grade A butter has been available, it is impossible to determine what the current difference between these prices would be because there are no reports of the Grade A price available. The vast majority of butter made and sold in the U.S. is Grade AA, and that is the appropriate product to which to base a value of butterfat used in producing butter.

The 3-cent average difference between the CME and NASS butter prices makes up ⅔ of the 4.5-cent adjustment made by CDFA in calculating the value of butterfat used in butter. An additional 6 cents deducted from the butterfat price calculated from the NASS price would much more than make up the remaining 1.5-cent difference. Also, the 4.5-cent CDFA adjustment is made for the purpose of reflecting the cost of moving butter from California to Chicago. The butterfat price calculated under the Federal order program is not intended to apply to only one state. The NASS price is a nationwide survey and likely includes a significant representation of California butter prices. If there are additional costs involved in making butter, they would more appropriately be included in the make allowance for butter.

Make Allowance (Butter). This final decision continues to use the current and the recommended decision's make allowance of $0.115. The make allowance factor in the butterfat price formula should be derived from a combination of the manufacturing costs determined by CDFA and by RBCS, as they were in the tentative final and recommended decision. The CDFA cost data is divided into two groups representing high cost and low cost butter plants, with the four plants in the high cost group manufacturing, on average, about the same average number of pounds of butter as the seven plants in the RBCS study. Use of the data for the CDFA high-cost group of butter plants is more appropriate than use of the weighted average cost for all of the California plants because it is more likely that the high-cost plants, like the plants in the RBCS survey, serve a predominately balancing function.

When the RBCS data is adjusted for packaging cost, general and administrative costs, and return on investment with the CDFA data for the high cost group, and with a marketing allowance of $0.0015 added to both sets of data, the weighted average of the two data sets is $0.115. This butter manufacturing allowance was very close to the Federal order reform allowance of $0.114. As adopted in the tentative final decision, the make allowance of $0.115 continues to represent the costs of making butter in plants that serve a balancing function.

The increased costs of making butter, not including transportation, cited by the proponents of reducing the butterfat price are expected to be included in this manufacturing allowance, which exceeds the low cost group in the CDFA survey by 3 cents per pound. The only class of use for which adjustments for transportation have regularly been included under Federal order regulation is Class I. Assuring that the order provides an allowance for moving milk used in manufactured products would interfere with provisions designed to assure an adequate supply of milk for fluid use.

Comments to the recommended decision from IDFA again encouraged lowering the Grade AA butter price by subtracting six cents from the NASS Grade AA butter price before computing the Class III and Class IV butterfat prices. IDFA added that if the Grade AA butter price was not reduced then the make allowance should be increased by 4.5 cents.

For the same reasons as stated above in response to comments on the tentative final decision and the recommended decision, this final decision will continue to use the NASS Grade AA butter price to compute the ClassIII and Class IV butterfat price.

Yield (Butter). As discussed above, this final decision provides an allowance for butterfat lost in moving milk from the farm to the processing plant. In response to the recommended decision, numerous Class III and IV processors provided comments expressing concern that the Class III and IV milk pricing formulas did not allow for general and common losses associated with the assembly, transportation, and delivery of milk and its components. The record supports concluding that the Class III and IV butterfat losses from the farm-to-the plant be computed as follows:

Class III & IV Fat Loss = (Fat Pounds × 0.0025) + 0.015

The loss allowance for butterfat will be reflected by adjusting the 0.82 divisor in the butterfat price formula. Testimony and comments indicate that farm-to-plant losses on all milk solids is 0.25 percent (0.0025) with butterfat incurring an additional loss of 0.015 per 100 pounds of milk. The butterfat price formula is determined as follows:

- For every pound of butterfat, 0.0025 pounds is lost in the farm-to-plant transfer (1.000 − 0.0025 = 0.9975).
- In addition, for every pound of butterfat, there is an additional 0.0150 farm-to-plant loss on butterfat solids (0.9975 − 0.0150 = 0.9825 pounds of butterfat).
- Dividing 0.9825 by 0.82 results in a butterfat factor of 1.20 (0.9825/0.82 = 1.20).
- Therefore, the Class III and IV butterfat value per pound is computed as follows:

(NASS butter price − 0.115) × 1.20

This final decision chooses to multiply the NASS butter price by 1.20 instead of dividing the NASS butter price by 0.82. This change in the formula from division to multiplication is made to simplify and provide consistency in the pricing formulas used for all milk components and includes an allowance for farm-to-plant losses.

Although one witness suggested that the divisor in the butter price formula that reflects the butterfat content of butter be reconsidered, he did not indicate any number more appropriate than the 0.82 divisor used in the current formula. There was no other testimony in the record questioning the butter content factor. In fact, the only data in the record applicable to the issue was a CDFA report on butter and powder yields at California plants in 1996 that was included in an exhibit. This report shows a 1.2213 weighted average butter yield (1 pound of butterfat results in 1.2213 pounds of butter), which corresponds to the use of the 0.82 divisor.

The record does not support adoption of a Class IV butterfat price that is not reflected directly in the Class II butterfat price. There was testimony from several witnesses that the current Class IV–Class II price relationship is rational and appropriate, and an adjustment to the Class IV butterfat price that is not reflected in the Class II butterfat price would disrupt the current relationship. In addition, it would seem reasonable that some of the extra costs claimed by butter manufacturers, such as transportation costs for supplemental cream supplies, butterfat standardization of outside cream sources, and additional pasteurization would be as applicable for Class II manufacturers of high-fat products using surplus cream as for butter makers. Accordingly, reduction of the Class IV butterfat price only is not considered appropriate.

This final decision modifies the Class III and IV butterfat price formula as follows:

(NASS AA Butter Price $-0.115) \times 1.20$

Class IV Nonfat Solids Price. This final decision maintains the use of the NASS survey price reported for nonfat dry milk and maintains the make allowance of 14 cents per pound of nonfat dry milk as indicated in the previous decisions issued in this proceeding. This final decision also changes the divisor from 1 to 0.99 in order to account for farm-to-plant losses of nonfat solids and to simplify and provide consistency to price formulas. Nonfat milk solids in buttermilk are removed from the computation of the Class IV nonfat solids price.

The tentative final decision eliminated the 1.02 divisor in the nonfat solids price formula to reflect the incorporation of dry buttermilk (with a lower product price and higher make allowance).

Six proposals to change some part of the nonfat solids price formula were considered at the hearing. Three of the proposals dealt with the manufacturing allowance for nonfat dry milk (NFDM), with two of the proposals advocating use of the RBCS survey results and one proposal supporting an increase in the make allowance. The other three proposals supported changes in the yield factor of the nonfat solids price formula that would reflect greater powder yield from a pound of nonfat solids. Two of the proposals to change yield factors included using CME NFDM prices instead of the NASS survey. As discussed in the recommended decision, the product prices used in the component pricing formulas will continue to be obtained from the NASS survey.

Product Price (Nonfat dry milk). This final decision maintains the use of the NASS survey price reported for nonfat dry milk. No proposals were considered that would have changed the product price used in the nonfat solids price formula, and the record contains no basis for making any change in this formula factor.

Make Allowance (Nonfat dry milk). This final decision maintains the make allowance of $0.140 per pound of nonfat dry milk as indicated in the previous decisions issued in this proceeding. At the time the hearing notice was issued, the most recent RBCS data were not available, and those costs were not specified in the proposals. By the time the hearing was held, however, the RBCS data had been released and were included in the information introduced at the hearing. NMPF supported continued use of a weighted average of the CDFA and the RBCS manufacturing cost surveys, with inclusion of a marketing allowance and the CDFA factor for return on investment. NMPF proposed that the NFDM make allowance be $0.140 per pound.

Southeast Dairy Farmers Association also proposed that the RBCS survey be used to determine a make allowance for NFDM, but did not propose that a marketing allowance be included. The necessity of including a marketing allowance was discussed in the recommended decision.

Associated Milk Producers, Inc. (AMPI), proposed that the NFDM manufacturing allowance be increased from $0.137 to $0.1563 per pound, a rate based on AMPI's cost of making NFDM at its own three plants in the Upper Midwest over a 5-year period. The AMPI witness stated that in addition to a processing and packaging cost of $0.1254, the make allowance should include a marketing allowance of $0.0024 and return on investment of $0.026, for a total allowance of $0.1538 per pound, modified from the level proposed in the hearing notice. The witness testified that the three AMPI plants operate at approximately 80 percent of capacity.

No comments were filed that specifically addressed the adopted make allowance for use in the nonfat solids price.

On the basis of the data and testimony included in the hearing record, the manufacturing cost level that appears to be most appropriate for use in the pricing formula for nonfat solids is $0.14 per pound. This value is calculated by using a weighted average of the RBCS survey and the two less-cost California groups of plants, adding the CDFA General and Administrative costs and Return on Investment expenses for those two groups to the RBCS numbers, and adding a $0.0015 marketing allowance to both sets of data. The basis for using the two lower-cost groups of California plants is that the mid-cost group is of a similar average size as the group included in the RBCS survey, and that the lowest-cost California group has a very similar total cost to the mid-cost group. These three groups of plants (the RBCS plants and the two California groups) are similar enough in size and cost to consider as fairly representative, and should encompass those plants that perform a market balancing function. The highest-cost California group should not be included since its average cost is more than ten cents per pound of NFDM above the RBCS group or either of the other two California groups.

The AMPI cost numbers cannot be included in the weighted average since the number of pounds of NFDM associated with those costs is not available. When the AMPI marketing allowance and return on investment estimates are replaced with the more moderate numbers used in the make allowance calculation, the AMPI manufacturing costs do not differ much from the other two sources. This is true despite the wide discrepancy in the capacity utilization percentage estimates for the two data sets (80 percent for the AMPI plants versus less than 50 percent for the plants in the RBCS survey). Inclusion of the AMPI costs in the RBCS survey would have included a larger representation of NFDM manufactured outside California. However, the record indicates that a high percentage of the NFDM manufactured in the U.S. comes from California and the proportion of cost data representing California in the manufacturing allowance is reasonable.

''Yield'' (Nonfat solids). This final decision adopts changes to the Class IV nonfat solids formula in order to account for farm-to-plant losses, more accurately reflect the value of the nonfat milk solids in nonfat dry milk and buttermilk powder, and provide simplification and consistency to the milk price formulas.

The tentative and recommended decisions included buttermilk solids in the value of nonfat milk solids. However, a reevaluation of the Class IV nonfat solids pricing formula finds that recognizing a minimum value for buttermilk powder does not materially affect the Class IV skim milk price. Record evidence indicates that the price of buttermilk powder can be a low of 70 percent of the nonfat dry milk price for the same period. In addition, according to the record, the make allowance of buttermilk powder is an additional 2 cents per pound higher than the nonfat dry milk make allowance. Official notice of weekly Dairy Product Prices published by the National Agricultural Statistics Service for January 2000 through May 2002 is hereby taken. Copies of Dairy Product Prices can be located at the Web site: *http://www.usda.mannlib.cornell.edu/reports/nassr/price/dairy/.*

Using the 2-cent higher make allowance for buttermilk and prices for nonfat dry milk and buttermilk powder for the period of January 2000 through May 2002 it was determined that the effect of including buttermilk powder in the nonfat solids price and the Class IV skim milk price was negligible. Therefore, this decision eliminates the

consideration of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula.

According to the Economic Research Services publication *Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products,* nonfat milk solids in dry buttermilk are 0.0479 pounds per pound of nonfat milk solids and are calculated as follows:

- For every pound of dry buttermilk there are 0.919 pounds of nonfat milk solids.
- Assuming a dry buttermilk yield of 0.0521, the nonfat milk solids that end up in dry buttermilk are 0.0479 pounds per pound of nonfat dry milk solids ($0.919 \times 0.0521 = 0.0479$).

The Class IV nonfat milk solids price can therefore be calculated as follows:

- For every pound of nonfat milk solids (nfms), 0.0025 pounds is lost in the farm-to-plant transfer.
- One pound of nfms minus the farm-to-plant loss of 0.0025 equals 0.9975 pounds of nfms at the plant.
- For every pound of nfms, 0.0479 pounds of these solids end up in dry buttermilk powder.
- 0.9975 pounds of nfms minus the 0.0479 pounds of solids in dry buttermilk equals 0.9496 pounds of nfms in the form of nonfat dry milk.
- Since each pound of nonfat dry milk contains 96.2 percent nfms (3.8 percent moisture) then, 0.9496/0.962 = 0.9871 (rounded to 0.99)

Therefore, the Class IV nonfat milk solids price per pound is computed as follows:

(NASS nonfat dry milk price—0.14) × 0.99

A considerable portion of the testimony dealing with the nonfat solids pricing formula pertained to the 1.02 divisor. The divisor is not strictly a yield factor but is intended to reflect the amount of nonfat solids in NFDM, with an adjustment for the small amount of buttermilk powder that is made in conjunction with the manufacture of butter and NFDM. Testimony by a number of witnesses asserted that the product price minus the make allowance should be either multiplied by a number greater than 1 (such as 1.02) or divided by a number smaller than 1 (such as 0.99 or 0.975) to reflect the fact that more than 1 pound of NFDM can be expected to be manufactured from 1 pound of nonfat solids due to the moisture content of NFDM.

Many of the hearing participants supported the 1.02 divisor, adopted under Federal order reform, and expressed understanding of the approach of adjusting the ''yield'' of NFDM to compensate for the fact that some of the powdered product made from Class IV milk is buttermilk powder (BMP). Although 1.03 to 1.05 pounds of NFDM generally can be obtained per pound of nonfat solids, the formula also recognizes a lower value and higher manufacturing cost for BMP.

Several witnesses correctly assessed an alternate solution to the dilemma of calculating a component price from two commodities with different prices and different make allowances as one requiring addition of dry buttermilk as another component price in the Federal milk order pricing system. As described by at least one witness, such an undertaking would require adding dry buttermilk to the NASS price survey, determining a separate make allowance, and calculating a yield factor. This procedure would be a burdensome undertaking for very little benefit, since dry buttermilk represents only about 5 percent of the dry products resulting from the manufacture of butter and nonfat dry milk. The issue that remains is how best to reflect the value of nonfat solids used in both NFDM and BMP in the same component pricing formula.

The IDFA witness testified that for the 19-month period beginning with September 1998, the Central States' dry buttermilk price had averaged $0.798 per pound, while the Central States' ''mostly'' price for NFDM averaged $1.043. The LOL witness similarly testified that the 1999 Northeast ''mostly'' price for NFDM averaged $1.0389, while the BMP price was $0.7686 per pound. On the basis of these numbers, it would appear that the price of BMP is roughly 75 percent that of NFDM. However, comparison of BMP and NFDM prices for the years of 1996 through 1999 and into 2000 reflects a more complex relationship between these prices than the hearing testimony would indicate. The BMP price as a percentage of the nonfat dry milk price (using Western prices) was 100.9 percent in 1996, 94.5 percent in 1997, 88 percent in 1998, and 71 percent in 1999. During the first third of 2000, BMP prices generally averaged less than 70 percent of NFDM prices. As the year 2000 progressed, however, the percentage increased, being at levels up to 100 percent in late July and remaining above 85 percent for the second half of the year in all areas.

The witness representing Agri-Mark stated that Agri-Mark employees engaged in manufacturing operations had estimated that the costs of producing BMP range from 1 to 3 cents more per pound than those of producing NFDM. Given that the manufacturing costs estimated by the Agri-Mark witness for other products were somewhat higher than those supported by the bulk of the hearing record, it is reasonable to consider the extra cost of manufacturing BMP to be generally not more than 2 cents in excess of the cost of manufacturing NFDM. In addition, it is difficult to justify increasing the powder make allowance for all of the powdered product represented in the make allowance since the RBCS witness testified that manufacturing costs of BMP manufactured at the plants included in the RBCS survey are included in the powder costs reported by RBCS.

Testimony regarding actual yields of NFDM and BMP were provided by only one witness representing a manufacturing plant operator. The numbers provided, while not complete enough for an exact accounting of the ultimate disposition of the plant's receipts of producer milk, indicate strongly that the approximate loss of nonfat solids used in the manufacture of NFDM at the specific plant was 3 percent, with 16 percent lost in the manufacture of BMP, for a combined weighted average loss of more than 3.5 percent of nonfat solids. In comparison, data published by the State of California showed a weighted average loss of solids not fat of 2.13 percent in the manufacture of butter and powdered products.

The California data indicate a weighted average powder yield of 1.0252 pounds of NFDM and BMP from 1 pound of nonfat solids. One witness discounted this data by observing that the ''high'' California yield was reported as 1.0406, which would represent a higher-than-allowable moisture content. This number may be influenced by the ''high'' reported BMP yield of 0.0749.

As noted above, the general impression conveyed by testimony in the hearing record, that BMP is worth considerably less than NFDM and that the cost of processing it is significantly greater than that of processing NFDM, is misleading. The average BMP price over the period 1996–July 2000 is approximately 87 percent of the NFDM price, and the cost of manufacturing BMP is, on the basis of the information available, no more than 2 or 3 cents in excess of the $0.14 recommended as the NFDM make allowance.

The following information from the hearing record was used to determine a multiplier or divisor for the total nonfat solids pricing formula that would result in a minimum price for nonfat solids while incorporating the data and testimony in the record about the manufacture of NFDM and BMP. To assure that the result represents a

minimum price, the low or high areas of ranges of numbers related to the manufacture of these two products were used. The CDFA report on butter and powder yield in California plants in 1996 was used in making some of the calculations regarding this factor.

a. The price of BMP represents roughly 80 percent of the price of NFDM (80 percent is less than the average historical relationship of these prices over the past 5 years).

b. The cost of manufacturing BMP is not more than 2 cents greater than the make allowance for manufacturing NFDM.

c. Using a theoretical yield of 1.03 pounds of powder containing 3 percent moisture made from milk containing 8.62 percent nonfat solids would result in 0.054 pounds of BMP and 0.976 pounds of NFDM.

d. Adjusting the theoretical yield of 1.03 pounds to the minimal yield of 1.01 pounds (the ''low'' yield in the CDFA report) and prorating the BMP and NFDM to 1.01 pounds instead of to 1.03 pounds, the amount of BMP manufactured from a pound of nonfat solids used in butter/powder is approximately 0.053 pounds. When the NFDM yield is prorated, the resulting minimum yield is 0.957 pounds.

Using a NFDM price of $1.03 per pound, a make allowance of $0.14 cents per pound of NFDM, and a divisor of 1, the resulting calculation is: $1.03 − $0.14 = $0.89 per pound of nonfat solids. The same result is achieved through a more complicated calculation using both product prices and make allowances, as follows:

Buttermilk powder:

($1.03 × 0.80) − $0.16 = $0.664

$0.664 × 0.053 = $0.03519 + Nonfat dry milk:

$1.03 − $0.014 = $0.89

$ 0.89 × 0.957 = *$0.85173*

$0.88692 (Rounded to $0.89)

On the basis of this analysis, no multiplier or divisor would be necessary in this formula (same as a multiplier or divisor of 1).

A number of comments were filed in response to this aspect of the tentative final decision, with some supporting the use of a divisor of ''1,'' two comments suggesting that a divisor of 1.01 would be more appropriate (but one determining that such a change would not be possible on the record of this proceeding), and several insisting that the above analysis is flawed by use of incorrect or inappropriate data and that the divisor should be returned to the 1.02 level in effect before January 1, 2001.

The IDFA comments stated that, in the interest of establishing minimum pricing, no more than 70 percent of the NFDM value should be assumed for the BMP price and that 3 cents should be added to the BMP make allowance instead of 2. IDFA also indicated that the formula should include shrinkage. NDA and LOL criticized the use of the California yield data in determining the comparative yields of NFDM and BMP, both because some of the data reflected information that included powder with higher-than-allowable moisture and because no witnesses who had participated in the survey were present to testify about it. LOL criticized USDA's use of Western prices rather than the Northeast and Central prices quoted by witnesses who discussed the relative values of NFDM and BMP.

Comments filed by Agri-Mark protested elimination of the 1.02 divisor, arguing that USDA relied on a casual remark about the difference between the cost of manufacturing BMP and NFDM rather than on detailed cost information as in the other make allowances. Agri-Mark also stated that the role of Class IV in balancing surplus cream from Class I use increases the ratio of BMP to NFDM over that calculated from an assumption about uses of the nonfat solids in producer milk.

Criticism of use of the Western BMP and NFDM price series to analyze the relative values of BMP and NFDM in the tentative final decision did not consider the fact that the Western price (mostly) series is the only one with an uninterrupted data series for the five years considered. In addition, the percentage of the NFDM price represented by the BMP price for the Western region was lower during each of the years 1996–2000 than for the Central region; and very similar, with some years averaging higher and some lower, to the Northeast region. Criticism of the CDFA yield data ignores the fact that the yield factors used in the initial analysis for the tentative final decision adjusted the relative ''weighted average'' yields of BMP and NFDM to the ''low'' yield.

The hearing record contains enough information on the issue of the relative weights, values, and costs of manufacturing NFDM and BMP to support the conclusion reached in the tentative final decision about the appropriate divisor in the nonfat solids price formula. The 0.96 divisor considered in the proposed rule on Federal order reform represented the pounds of nonfat solids in NFDM rather than the yield of nonfat dry milk from nonfat solids. Use of the divisor of 1 recommended in the tentative final decision accounted for all of the nonfat solids used in Class IV and resulted in 3–4 cents less per pound of nonfat solids (over a NFDM price range of $0.86–$1.10) than the value that would be calculated if the formula attributed all of the Class IV skim value to NFDM.

The Agri-Mark comment emphasized that the ratio of BMP to NFDM milk considered in the nonfat solids price calculation should be calculated on the basis of the butterfat content in Class IV because butterfat surplus to Class I use is used in butter. The Agri-Mark comment observed that the butterfat percentage of milk used in Class IV in the Northeast over a 3-month period averaged 5.67 percent.

Even if the national average of butterfat in Class IV (6.4 percent) is used to determine the breakdown between nonfat solids used in BMP and nonfat solids used in NFDM, less than 0.8 pounds of nonfat solids out of the 8.4 contained in a hundredweight of Class IV milk at 6.4 percent butterfat should be attributed to use in BMP. In effect, the price of each of the 8.4 pounds would be reduced by 3–4 cents. Such a calculation results in 25.2–33.6 cents per hundredweight of milk containing 6.4 percent butterfat to cover the additional costs of making 0.8 pounds of BMP and the lower value of 0.8 pounds of BMP compared to the NFMP manufacturing cost and price. A 3-cent additional cost per pound of manufacturing 0.8 pounds of BMP would equal 2.4 cents, and a 25-percent reduction of the BMP value from that of NFDM would equal approximately 20 cents. These calculations would still leave 2.8–11.2 cents per hundredweight to cover any additional costs of making and selling BMP over those of NFDM.

The recommended decision noted that the additional 3 cents per pound cost of making BMP is on the high end of the information in the hearing record, and that the 25 percent reduction in value of BMP compared to NFDM is on the low end. It was also noted that over the past 5 years, only during the period cited by witnesses testifying about the relative values of BMP and NFDM and during the first 4 months of 2000 had the BMP price as a percentage of the NFDM price fallen below eighty percent. It was also mentioned in the recommended decision that calculations assumed that all of the nonfat solids not used in NFDM were used in BMP, whereas some are used in whole milk powder, which has a higher value than either NFDM or BMP.

In considering all of the above discussion, the record supports the finding that this final decision's incorporation of a Class IV nonfat dry

milk yield factor of 0.99 is appropriate. The formula is as follows:

((NASS nonfat milk solids price–0.14) × 0.99

c. Class III Butterfat, Protein, and Other Nonfat Solids Prices

In a change from the orders promulgated under the Federal order reform process, the tentative final decision calculated a Class III butterfat price from the value of butterfat in cheese rather than using the butterfat price calculated from the value of butter for both Classes III and IV. The Class III butterfat price in the tentative final decision was calculated to represent the value of the component in the NASS cheddar cheese price, as was a revised protein price formula.

Before the interim final rule became effective on January 1, 2001, several petitions were filed requesting the Secretary to delay implementation because industry participants objected to the effects of the separate Class III butterfat price.

Implementation could not be stayed because of the Congressional deadline on the rulemaking procedure, and partial implementation was not possible because the interim final rule had been approved by producers in its entirety. Before the separate Class III and Class IV butterfat prices could become effective, implementation of the separate butterfat prices was enjoined in the Federal District Court for the District of Columbia at the urging of organizations representing most of the interests in the dairy industry. The Court's order returned the price formulas for the Class III components to their earlier forms, with the new make allowances and cheese moisture adjustment incorporated.

By the end of the comment period on the tentative final decision, comments representing nearly 100 interested parties from most segments of the industry were received that objected to separating the Class III and Class IV butterfat prices and reducing the level of the protein price. The comments urged USDA to continue to calculate the Class III butterfat price on the basis of the value of butterfat in butter, and return to the Class III price formula formats in use before effectuation of the interim final rule.

Several reasons were given for rejecting the change to Class III component prices based on the contribution of butterfat and protein to cheese yield. Numerous commenters cited the negative effects of a marked increase in the cost of milk for use in high-fat cheeses and the incentive created for handlers to substitute lower-valued Class IV forms of butterfat for use in cheese-making. Others stressed the difficulties created by the decision in marketing cream. Several commenters argued that the shift in value from protein to butterfat caused by the decision did not make sense in light of the importance of protein in cheese-making, and that the reduced protein price would send incorrect economic signals to dairy farmers. One particular concern was the potential significant reduction in the Class I skim value if the Class III price at 3.5 percent butterfat became the mover for the Class I price.

Based on comments received, this final decision determines that the Class III butterfat price be the same as the Class IV butterfat price, calculated from the value of butterfat in butter. In addition, the portion of the protein price formula that adjusts the protein price to accommodate the differential value of butterfat in cheese, as opposed to butter, will continue to be incorporated into the protein price formula. The technical corrections to the protein price formula made in the recommended decision to make the protein price correlate somewhat more closely with the cheese price are adopted in this final decision.

The tentative final decision made only one modification to the specifications of the cheese price, currently a weighted average of the prices of cheese sold in 40-pound blocks and 500-pound barrels (with a 3-cent addition to the barrel price). That change, to adjust the price of 500-pound barrels to 38 percent moisture instead of the 39 percent moisture price currently reported by NASS, is continued in this final decision. Also, as in the tentative final and recommended decisions, this final decision reduces the make allowance for cheese from $0.1702 to $0.165 per pound.

As proposed in the recommended decision, the other nonfat solids price adopted in this final decision will continue to be calculated by subtracting the make allowance from the NASS-reported price for dry whey. However, the result will now be multiplied by 1.03 instead of dividing by 0.968. In addition, the recommended make allowance of 15.9 cents per pound of dry whey is also adopted.

Class III Product Price (Cheese). As proposed in the recommended decision, this final decision continues to utilize the NASS cheese price survey as a basis for determining a value for protein in computing a Class III milk price. The NASS 40-pound block price will continue as presently used. In addition, the NASS 500-pound barrel price will continue to be used as previously recommended at 38 percent moisture and a 3-cent addition to the barrel price.

Several proposals included in the hearing notice would, if adopted, have changed the NASS cheese price used in the Class III pricing formulas. One proposal would limit the cheese prices included to 40-pound blocks reported by the CME, while another would add 640-pound blocks to the prices surveyed by NASS for inclusion in the cheddar cheese price. A third proposal would replace the current 3-cent price adjustment between 500-pound barrel prices and 40-pound block prices to a value that reflects the actual differential industry cost of making 40-pound blocks over 500-pound barrels. Still another proposal would adjust 40-pound block cheese prices for moisture, as 500-pound barrel prices are adjusted.

As discussed above in Issue 2, CME commodity prices should not be used as the basis for calculating component prices. Eliminating 500-pound barrels, which represent approximately two-thirds of the cheese represented in the NASS survey, from calculation of the market value of cheddar cheese would reduce greatly the degree to which the current product prices represent U.S. cheddar cheese prices. The record of this hearing provides no support for relying solely on prices for 40-pound blocks to identify a market price of cheddar cheese.

Several parties testified that the NASS weighted average cheese price should include the value of 640-pound block cheese in the cheese price computation. They contended that such inclusion would improve the reliability of the average cheese price by adding a substantial quantity of cheese to the price survey. Witnesses' estimates of the percentage of U.S. cheddar cheese production represented by 640-pound blocks ranged from 20 to 27 percent. Witnesses testified that the increased volume would better reflect the true value of cheese and additionally would reduce the potential for price distorting manipulation by individual handlers.

In comments filed on the tentative final decision, IDFA stated that USDA had erred by excluding 640-pound blocks. IDFA reiterated the argument that 640-pound blocks represent as much as 27 percent of total cheddar cheese production. Furthermore, the comment noted that past data-collection problems are irrelevant because ''all participation in NASS surveys regarding data used to calculate federal order minimum prices is now mandatory.'' IDFA concluded that the argument that 640-pound blocks should not be used due to their being made on a custom basis to customers' specifications is not

valid because adjustments can be made, as they are for moisture in barrel cheese.

Opponents to inclusion of the 640's in the cheese price computation explained that the vast majority of 640's are made on a custom basis to customers' specifications and therefore are not sufficiently uniform to have a standard identity. One witness noted that much of the commerce in 640's is made on a long-term contractual basis and as such would rarely be reflective of changing market conditions.

The Association of Dairy Cooperatives in the Northeast (ADCNE) comments on the tentative final decision reiterated USDA's position, stating that ''the market in 640-pound blocks of cheddar cheese does not involve sufficient buyers and sellers in arms-length transactions to provide good data to establish the Class III price for producer milk in all federal milk orders.'' As stated in the tentative final decision, standardized pricing cannot be developed without a standard identity for the product, which 640-pound blocks lack. In addition, there appears to be an insufficient volume of 640-pound block cheese transactions to warrant inclusion. At the beginning of the NASS survey, price data for 640-pound blocks was collected but was discontinued due to lack of volume and too few participants to allow disclosure of data. Even earlier (1995–96), the former National Cheese Exchange attempted to include trading in 640-pound blocks but discontinued doing so because of lack of interest. Testimony from witnesses representing organizations that manufacture cheese in 640-pound blocks, and who favored inclusion of such product in the NASS survey, stated that the 640-pound blocks manufactured by their organizations are used internally, making that cheese ineligible for inclusion. Therefore, even though price reporting is now mandatory, 640-pound blocks of cheese do not meet the criteria necessary for the prices of these products to be eligible for inclusion in the NASS survey.

Elimination or reduction to one cent of the three-cent adjustment that is added to the barrel price for computing the weighted average cheese price was advocated in testimony at the hearing, comments contained in post-hearing briefs, and comments responding to the tentative final decision. The witnesses argued that since the barrel cheese price is adjusted to 39 percent moisture and block cheese is approximately 38 percent moisture, at least 2 cents of the observed difference in price between 40-pound blocks and 500-pound barrels is due to moisture and has nothing to do with actual differences in costs. In fact, they argued that there is no difference in packaging costs between block and barrel cheese.

The witness for DFA, a cooperative that manufactures cheese packaged in both 40-pound blocks and 500-pound barrels, testified that three cents is an acceptable and reasonable spread between blocks and barrels and that there is no compelling reason to change the three-cent addition to the barrel price. The witness for LOL testified that the three cents is an appropriate difference between blocks and barrels and that adding three cents to the barrel price when computing the weighted cheese price is an appropriate adjustment. DFA and ADCNE argued, in a brief filed on behalf of both parties, that the record supports a conclusion that the 3-cent adjustment of the barrel price is attributable to volume utility and cost differences in packaging and handling.

The National Cheese Institute, which proposed reducing or eliminating the 3-cent adjustment, argued that the adjustment should include only the actual cost differences involved in manufacturing and packaging the two sizes of cheese. Although a number of witnesses representing cheese manufacturers testified in favor of reducing or eliminating the adjustment, including one whose employer makes both sizes of cheddar, none of them addressed the actual cost differences of packaging and manufacturing 40-pound blocks and 500-pound barrels. Instead, the only testimony that was offered involved attributing a 2-cent difference to the moisture-adjusted value of the two sizes of cheese packages. In comments responding to the tentative final decision, ADCNE argued that the 3-cent adjustment is representative of the historical difference in market value between barrel cheese and block cheese after adjustments for moisture.

If the difference between the block and barrel prices were due to the difference in moisture, the difference between the prices should widen as the cheese price increases since the moisture adjustment is based on the price and moisture of the cheese. An analysis of historical cheese prices indicates that the difference between the block cheese and barrel cheese prices does not change with changes in price level. In fact, three of the largest differences between the block and barrel prices occurred at approximately the 40-month NASS weighted average monthly prices.

In comments filed by Leprino Foods Company (Leprino) on the tentative final decision, Leprino argued that comparisons of the block and barrel cheese prices from May 1995 through December 1999 are not valid because of artificial market distortions. Leprino stated that valid relative price data is available only for calendar year 2000, during which the average spread is 1.54 cents. Leprino continued, in its comment, that the price spread between blocks and barrels does not move in lock-step because it is affected by many factors, and will continue to be driven by current market forces.

In comments to the recommended decision, Kraft reiterated their position that at equal moisture tests of 38 percent, the appropriate value to add to the barrel price is 1-cent. In comments to the recommended decision, Glanbia stated that the difference in cost of production between blocks and barrels is $0.008 per pound of cheese at their plant. In comments received to the recommended decision, DFA and Select indicated that the 3-cent adjustment is the correct adjustment to the barrel price.

The record contains no basis for concluding that the actual cost of manufacturing and packaging the two sizes of cheese is not the historical 3-cent price spread. In fact, during the period September 1998 through June 2000 the difference between the block and barrel prices has been 4.4 cents per pound. The record supports maintaining the 3-cent addition to the barrel cheese price.

An expert witness, and several other witnesses, testified that the moisture content of the cheese used for determining the NASS cheese prices and the moisture content used in the Van Slyke cheese yield formula used for computing the ''yield'' coefficients in the protein formula should be the same. The witnesses explained that failure to align the formula and the moisture content represented by the cheese price survey would result in overstating or understating the formula coefficients.

The expert witness explained that the barrel cheese price is reported at 39 percent moisture after being adjusted from the actual moisture, while the block cheese price is reported at an unknown moisture level. The only testimony dealing with the actual moisture level of block cheese indicates that it averages about 38 percent.

The coefficients originally used for determining the Class III protein price and the Class III butterfat price and used in the formulas in the recommended decision were derived from using the Van Slyke cheese yield formula at 38 percent moisture. Therefore, it is appropriate to use cheese prices that reflect cheese containing 38 percent moisture. The current practice of using

the 40-pound block cheese price unadjusted for moisture and the 500-lb barrel price adjusted for moisture should be continued, but with the barrel price adjusted to 38 percent moisture instead of 39.

In several comments on the tentative final decision, commenters stated that the 38-percent moisture adjustment to the barrel price requires an adjustment to 1 cent and not 3 cents for the price spread between 500-pound barrels and 40-pound blocks. Other interested persons filed comments supporting both adjustments. DFA argued in its comment that eliminating either adjustment should result in use of only 40-pound block cheese prices.

The hearing record provides no basis for altering the composition of cheese prices surveyed for use in the Class III pricing formulas or for changing the calculation of the NASS weighted average cheese price, other than the moisture adjustment to 38 percent for 500-pound barrels.

Several witnesses testified that types of cheeses other than cheddar should be included in the NASS price survey as a more comprehensive basis for identifying a cheese price, although such a proposal was not included in the hearing notice. The cheddar cheese included in the NASS survey meets certain standard criteria that makes prices for the reported cheese sales comparable. If the survey included other descriptions of cheddar and other types of cheese, such as mozzarella, it would not be possible to consider the reported price as representative of the value of any particular product. Further, the manufacturing costs surveyed are, to a great extent, limited to the costs of processing cheddar cheese.

Class III Make Allowance (Cheese). As in the tentative final and recommended decisions, this final decision reduces the make allowance for cheese from $0.1702 to $0.165 per pound. Several proposals to adjust the manufacturing allowance for cheese were included in the hearing notice and considered at the hearing. The NMPF witness testified that the organization had determined that the most appropriate cheese make allowance would be a weighted average of the updated RBCS and CDFA surveys, with addition of a marketing allowance. Thus, the NMPF supported adoption of a cheese make allowance of $0.1536 per pound of cheese. Several witnesses representing cooperative associations supported the NMPF $0.1536 proposal but also would have included a cost factor for return on investment. One witness testified that the make allowance should be based on data from actual plant operations through the surveys conducted by RBCS and CDFA and testimony from individual plant operators; that it should include California data, as California plants represent a large proportion of cheese manufacture; and that it should be generous enough to assure adequate plant capacity for continued manufacture of cheese.

The witness representing NCI testified that the cheese make allowance should be no less that $0.1687, the weighted average of the NCI-sponsored and CDFA surveys with the addition of a marketing cost of $0.0011. He stated that such an allowance would represent the production of 24 cheese plants and 53 percent of U.S. cheese. Several cheese manufacturer representatives supported use of the NCI-supported make allowance, stressing the importance of adoption of an allowance that covers *all* of the costs of manufacturing cheese.

A witness representing Farmers Union and the American Farm Bureau witness both supported adoption of a make allowance of $0.1521, as a weighted average of RBCS and CDFA data; and a witness for National Farmers Organization supported a make allowance of $0.141 composed of the RBCS cost with the addition of a marketing allowance and return on investment.

Although ADCNE, in its comments on the tentative final decision, supported the use of California data as compiled and audited by a state agency, ADCNE disagreed with inclusion in the cheese make allowance of the CDFA ''general and administrative expense'' item, which added 1.9 cents per pound to the make allowance. ADCNE described this allowance as ''generous, to say the least,'' as it represents $2–$3.5 million for the newest, largest, and most efficient cheese plants, and stated a preference for having some basis in testimony before building that sort of expense level into plant costs at the expense of minimum producer prices.

The general and administrative expense was one of the cost factors included in the CDFA weighted average cost study, but not in the RBCS study. Therefore, it must be added to the RBCS data to make the two cost studies comparable.

The make allowance used for computing the Class III protein and butterfat prices, $0.165, was determined by combining the CDFA plant survey with the RBCS survey. As was pointed out by several witnesses at the hearing, several cost factors that are necessary to maintain the viability of processing plants are not represented in one or both of the RBCS and the CDFA studies. These cost factors include marketing costs, return on investment, and general and administrative expenses. A discussion of these expenses is included earlier. Neither the CDFA nor the RBCS survey included a marketing cost, so the $0.0015 marketing allowance was added to both studies. In addition, the CDFA return on investment cost of $0.0103 and the general and administrative expense of $0.0190, both of which were included in the CDFA weighted average cost, were added to the RBCS study, which included neither factor. The resulting adjusted costs for each survey are $0.1708 for CDFA and $0.15996 for RBCS. A weighted average of the two studies was computed using the respective adjusted make allowances and the pounds of cheese reported in each study—466,396,548 for the CDFA study and 633,142,812 for the RBCS study—to arrive at the Class III price make allowance of $0.165.

In a comment filed in response to the tentative final decision, NFU stated that the reduction in the cheese make allowance should have been greater than $0.0052, but that the cooperative could support an increased make allowance if it were tied to producer cost of production and market price through implementation of a variable make allowance. The $0.165 make allowance is based on actual costs discovered by two surveys, the conduct of which were open to review in the hearing record, and is very close to the results of another that was conducted in a somewhat less accessible manner. There is no basis in the record for adopting a lower make allowance and, as discussed earlier, no acceptable rationale for implementing variable make allowances.

Class III Butterfat Price. As discussed in the introductory portion of the Class III price section of the recommended decision, the Class III butterfat price adopted in the tentative final decision was changed by a court injunction to be the same as the Class IV butterfat price. This final decision continues to calculate butterfat prices for all classes based on the value of butterfat in butter. The order will refer to both the Class III and Class IV butterfat prices as ''the butterfat price,'' as it did previously.

The tentative final decision was based on the observation that market distortions occur due to using the Class IV butterfat price calculated from the value of butterfat in butter to also represent the value of butterfat in cheese (Class III), and trying to incorporate the difference in value in the protein price. Analysis shows that there is very little relationship between the cheese price and either the current butterfat price or the current protein price.

As a result, instances have occurred when the protein price declines while, at the same time, the cheese price is increasing. This outcome is contrary to the concept of pricing components on the basis of the value of the products in which they are used. The same inverse price scenario has affected the butterfat price, with occurrences in which the Class III butterfat price increases because the butter price has increased while the cheese market has been declining.

Although reflection of the value of a manufactured product in the prices for the milk components that are instrumental in the yield of that product would require that the Class III protein and butterfat prices be tied more directly to their value in cheese than the result obtained from the Federal order reform price formulas, that outcome cannot be accomplished on the basis of this hearing record. However, any distortion between the Class III butterfat and protein prices and the cheese price should be ameliorated partially by the following changes included in the protein formula.

Protein price. The protein price in this final decision is changed from the recommended decision by changing the 1.405 factor to 1.383 to reflect an adjustment for farm-to-plant losses and to reflect a change from a 0.8325 casein factor to a casein factor of 0.822 based on a reevaluation of the hearing record and comments filed in response to the recommended decision. In addition, the butterfat yield coefficient is changed from 1.582 to 1.572 to reflect the farm-to-plant butterfat losses. The remainder of the protein price formula is unchanged.

The tentative final decision on the hearing record for this proceeding derived formulas for calculating a Class III butterfat price and a protein price that considered only the contribution of each of those components to cheese yield and resulted in a 100 percent correlation with the cheese market. Therefore, the individual factors in the portion of the earlier protein price formula that adjusted the contribution of protein to cheese yield to account for differences in value between butterfat used in cheese and in butter and accounted for much debate in the hearing record were not considered in any detail.

The protein price formula resulting from the tentative final decision took the following form:

(NASS weighted average cheese price $-0.165) \times 1.405$.

This formula eliminated the following butterfat adjustment portion of the earlier protein price formula:

$+\{[$(NASS weighted average cheese price $-0.165) \times 1.582] -$ [the butterfat price]$\} \times 1.28$

This butterfat adjustment portion of the formula represents the difference between the value of butterfat used in cheese and the value of butterfat used in butter. The butterfat adjustment portion became unnecessary when the Class III butterfat price was calculated from the value of butterfat in cheese in the tentative final decision.

Reconsideration of the protein formula in light of the determination that there should be only one butterfat price for Class III and Class IV resulted in the following recommended protein price formula:

[(NASS weighted average cheese price $-0.165) \times 1.405] +$ ({[(NASS weighted average cheese price $-0.165) \times 1.582]$–[the butterfat price $\times 0.9$]} $\times 1.17$).

Leprino, in response to the tentative final decision, urged that the 1.405 factor used to reflect the yield effect of one pound of protein in milk be reduced to 1.367 because the 1.405 factor assumes that true protein contains more casein (83.3 percent) than is supported by testimony in the record (82.2–82.4 percent).

The hearing record contained much discussion of the derivation of the 1.32 cheese yield factor per pound of crude protein used to determine the 1.405 cheese yield factor per pound of true protein. Two explanations of the factor were advanced. The first involved assumption of 75 percent casein retention, 90 percent butterfat retention, and 38 percent moisture content in the cheese. Holding butterfat and moisture constant and changing the protein content by 0.1 results in a 0.1318 (rounded to 0.132) pound change in the cheese yield, or a one percent change in protein results in a 1.32 pound change in cheese yield. The second method assumes 78 percent casein retention, 90 percent butterfat retention, and a 38 percent moisture content in the cheese. In this second method the cheese yield is computed using a 3.2 percent protein and zero butterfat. The resulting cheese yield is divided by 3.2 to arrive at 1.316 pounds of cheese per pound of protein. The 1.316 was rounded to 1.32. Given these particular assumptions, both methods resulted in the same answer—1.32. A witness for National All Jersey testified that the second method is the appropriate procedure and was the one used to compute the 1.32 yield factor in past Federal order protein price decisions. However, if 78 percent is a more appropriate factor to use as the appropriate value for casein retention, then the first method yields a 1.37 yield factor. The 1.32 factor was used in the protein price formula in the Federal order reform proposed rule and in the five Upper Midwest markets beginning in January 1996 to compute the protein price prior to Federal order reform. The 1.32 yield factor generally has been accepted as an appropriate factor to use for computing a protein price.

When the final decision on Federal order reform was issued, the protein price computation was changed to compute the protein price on the basis of true protein rather than crude protein, which had been the basis for protein price computations in the past. As in determining the 1.32 factor, certain assumptions were made to arrive at the current 1.405 yield factor. The 1.405 factor was computed based on the assumption that milk testing 3.3 percent crude protein has an equivalent true protein test of 3.1 percent. The relationship between crude protein and true protein was based on the results of laboratory testing of producer milk for both crude and true protein. The resulting percentage change in protein is 1.0645 (3.3⅓.1), which was then multiplied by 1.32 to arrive at 1.405. In addition, use of the 1.405 yield factor when pricing true protein results in a protein value equivalent to use of the 1.32 factor in pricing crude protein.

Regardless of which procedure is used, assumptions must be made with regard to the various factors used in the formulas. These assumptions directly affect the outcome of the factors used in the protein formula and the resulting protein price and value. Since use of the 1.405 factor resulted in an equivalent protein value to use of 1.32—and there was no testimony or comments filed that the 1.32 factor was not appropriate—there was no reason to change the 1.405 cheese yield factor in the recommended decision.

Leprino argued that the appropriate casein recovery should be 82.3 percent which, when using the second procedure above with a 2.99 true protein level, would result in a factor of 1.388. However, the majority (⅔) of the difference between 1.405 and the 1.367 factor advocated by Leprino accounts for shrinkage between the farm and the cheese vat. The issue of including shrinkage as an additional make allowance or yield factor in the calculation of component prices was discussed in the tentative final decision and was determined to be inappropriate at that time. Eliminating shrinkage from the 1.367 protein factor resulted in a

factor close to the recommended decision's 1.405. The recommended decision also stated that using the second procedure and a 82.95 casein recovery, which an expert witness testified was equivalent to the 78 percent casein recovery used for crude protein, and a true protein test of 3 percent, which was equivalent to the 3.2 percent used in the second procedure, the protein factor would have been 1.3997, again, not significantly less than the recommended decision's 1.405. Testimony from other parties also stated that the 1.405 was appropriate and should be continued. Based on the hearing record, comments filed in response to the hearing and tentative final decision, and the analysis prior to the recommended decision, it was determined that there was no justification for reducing the 1.405 cheese yield factor.

Comments received from Leprino, IDFA, Kraft, NDA and others explained that the recommended decision did not correct what these parties considered as errors in the protein price formula. With regard to the protein price computation, the parties argued that the percentage of casein in true protein used in the Van Slyke formula was too high. They were of the opinion that since the Van Slyke formula is generally used to analyze in-plant efficiencies, an adjustment needs to be made for applying the formula to milk priced on farm weights and tests. Leprino, commenting on behalf of cheese processors, stated that, ''In order to properly adopt the Van Slyke formula for use in setting milk price policy * * * it is critical to understand the context for its use.'' Leprino further commented that the Van Slyke formula is commonly used by the industry to measure in-plant operational performance, namely, product yield. Leprino expressed the importance of including an allowance in the Van Slyke formula for farm-to-plant shrinkage. Leprino stated that ''The Van Slyke yield formula can be used to determine cheddar yields of milk measured at the farm, but only if component losses [farm-to-plant] are accounted for. Although the Van Slyke yield formula was developed to measure production efficiency starting at the vat, the yield formula can still be useful in determining the yield of farm level milk. However, if the Van Slyke formula is to be used for this purpose, component losses prior to the vat must be accounted for to accurately reflect the composition of milk actually entering the vat.'' Nine other comments supported Leprino's position on the need to include an allowance for farm-to-plant losses within the Van Slyke cheese yield computation in order for it to accurately determine the value of Class III farm milk.

This final decision finds that good reason exists to provide for incorporating farm-to-plant loss allowances into the Van Slyke cheese yield formula for determining the Class III milk price. As explained earlier in this final decision, the record supports a finding that such losses are 0.25 percent on all milk solid components and that butterfat losses are fractionally higher. Butterfat losses are an additional 0.015 pounds on top of the 0.25 percent farm-to-plant loss. When farm-to-plant losses are incorporated into the Van Slyke cheese yield formula, the Van Slyke formula results in the protein price factors from which the Class III protein price is derived.

The Van Slyke formula as proposed under reform and in the recommended decision utilized a casein-to-protein ratio of 83.25 percent or 0.8325.

Comments received on the recommended decision indicated that the cheese industry considers 82.2 percent casein as a reasonable and appropriate reflection of milk composition nationally. An expert witness testified that the casein from true protein ranges between 0.822 and 0.824. In this regard, according to Leprino, ''The Hearing Record contains clear evidence regarding milk chemistry * * * that true protein contains 82.20 percent casein.''

This final decision finds that using a casein percentage of 82.2 is appropriate. The 0.822 is at the lower end of the range indicated by the expert witness and is appropriate for use in determining minimum Federal order prices. This casein-to-protein ratio is included in the Van Slyke formula for determining the Class III protein formula factors. In addition, this final decision computes the protein yield factor by dividing the cheese yield attributable to protein by the protein test. This method is consistent with record evidence and, according to comments received in response to the recommended decision, is superior to using the additional cheese yield that occurs when additional protein is added. This results in reducing the 1.405 factor in the protein price formula to 1.383. The computation of 1.383 is shown later in this discussion.

As was proposed in the recommended decision, this final decision adopts a butterfat-to-protein ratio of 1.17. The recommended decision proposed a fat-to-protein ration of 1.17 that was based upon the fat-to-protein ratio of standard milk at the dairy farm (3.5/2.9915 = 1.17). The recommended decision concluded that a 1.17 (or lower) butterfat-to-protein ratio assured that the value adjustment for butterfat in butter to the value of butterfat in cheese (included in the protein price formula) would account for the total value of butterfat in producer milk.

Comments received in response to the recommended decision from NMPF, Select, Leprino and others supported the use of the 1.17 butterfat-to-protein ratio in the protein price formula. This final decision continues to use the 1.17 factor.

This final decision uses the following variables in the Van Slyke formula for computing the protein and butterfat yield factors used for computing the protein price:

1. *Butterfat at the farm:* 3.50 pounds per hundredweight.

2. *Protein at the farm:* 2.9915 pounds per hundredweight.

3. *Butterfat retention:* 0.9.

4. *Casein to true protein ratio:* 0.822.

5. *Moisture:* 38 percent.

For illustration purposes how the Van Slyke cheese yield formula has been relied upon since Federal order reform is provided below for ease in comparing the adopted changes to previous formulas.

The Van Slyke Formula Used Under Order Reform

- Cheddar cheese pounds attributable to butterfat = $((0.9 \times 3.5) \times 1.09)/(1–0.38)$ = 5.5379 pounds of cheddar cheese
- Cheddar cheese pounds attributable to protein = $((0.8325 \times 2.9915) - 0.01) \times 1.09/(1–0.38)$ = 4.2025 pounds of cheddar cheese
- Cheddar cheese pounds attributable to standard farm milk =

5.5379	pounds of cheese from butterfat
+4.2025	pounds of cheese from protein
9.7404	total pounds of cheese from standard milk

- Cheddar cheese yield contribution per pound of fat at farm = 5.5379 pounds of cheddar/3.5 pounds of fat at farm = 1.582
- Cheddar cheese yield contribution per pound of protein at farm = 4.2025 pounds of cheddar/2.9915 pounds of protein at farm = 1.405
- Protein pounds in standard milk = 3.1×0.965 = 2.9915
- The butterfat-to-protein ratio factor used under reform was a fixed 1.28

The Van Slyke Formula as Proposed Under the Recommended Decision

• Cheddar cheese pounds attributable to butterfat = ((0.9 × 3.5) × 1.09)/(1–0.38) = 5.5379 pounds of cheddar cheese

• Cheddar cheese pounds attributable to protein = ((0.8325 × 2.9915) − 0.01) ×1.09/(1–0.38) = 4.2025 pounds of cheddar cheese

• Cheddar cheese pounds attributable to standard farm milk =

5.5379	pounds of cheese from butterfat
+4.2025	pounds of cheese from protein
9.7404	total pounds of cheese from standard milk

• Cheddar cheese yield contribution per pound of fat at farm = 5.5379 pounds of cheddar/3.5 pounds of fat at farm = 1.582

• Cheddar cheese yield contribution per pound of protein at farm = 4.2025 pounds of cheddar/2.9915 pounds of protein at farm = 1.405

• The butterfat-to-protein ratio factor proposed under the recommended decision was 1.17 and was derived by dividing the butterfat in standard milk by the protein in standard farm milk (*i.e.* 3.5 pounds of butterfat/2.9915 pounds of protein = 1.17).

The Van Slyke Formula Used in This Final Decision

• Cheddar cheese pounds attributable to butterfat = ((0.9 × 3.5) × 1.09 / (1 − 0.38) = 5.5379 pounds of cheddar cheese

• Cheddar cheese pounds lost due to the 0.015 farm-to-plant butterfat loss = ((0.9 × 3.5) × 1.09 / (1 − 0.38) = 0.0237 pounds of cheddar cheese, 5.5379 − 0.0237 = 5.5142 of cheese after farm-to-plant loss.

• Cheddar cheese pounds lost due to the 0.25 percent solids loss on fat solids = 5.5142 pounds of cheese from butterfat × (1 − 0.0025), 5.5142 × 0.9975 = 5.5004 pounds of cheese from farm butterfat

• Cheddar cheese yield contribution per pound of fat at farm = 5.5004 pounds of cheddar / 3.5 pounds of fat at farm = 1.572

• Cheddar cheese pounds attributable to protein = ((0.8220 × 2.9915) − 0.01) × 1.09 / (1 − 0.38) = 4.1473 pounds of cheddar cheese

• Cheddar cheese pounds lost due to the 0.25 percent solids loss on protein solids = 4.1473 pounds of cheese from protein × (1 − 0.0025) for farm-to-plant loss = 4.1473 × 0.9975 = 4.1369 pounds of cheese from farm protein

• Cheddar cheese yield contribution per pound of protein at farm = 4.1369 pounds of cheddar / 2.9915 pounds of protein at farm = 1.383

• Cheddar cheese pounds from standard farm milk =

5.5004	pounds of cheese from standard farm butterfat
+4.1369	pounds of cheese from standard farm protein
9.6615	total pounds of cheese from standard farm milk

• The butterfat-to-protein ratio factor in this final decision is 1.17 and is derived by dividing the farm butterfat by the farm protein (*i.e.* 3.5 pounds of butterfat / 2.9915 pounds of protein = 1.17).

The results of the above computations yield the following protein price formula:

((NASS cheese price − 0.165) × 1.383) + (((NASS cheese price − 0.165) × 1.572) − (butterfat price × 0.9)) × 1.17

As stated in the recommended decision, since all of the butterfat used in Class III is to be priced on the basis of its value in butter, an adjustment must be made to account for the difference in butterfat values between cheese and butter. The butterfat adjustment portion of the protein price formula is the method chosen for making that adjustment. The first part of the butterfat adjustment portion of the protein price formula calculates the value of butterfat in Cheddar cheese using the Van Slyke formula, assuming a 90 percent recovery of butterfat in the finished cheese. The resulting cheese yield factor attributable to butterfat is a multiplier of 1.582. Testimony in the hearing record and comments on the tentative final decision urged adoption of different multipliers in the butterfat adjustment portion of the protein price formula that represents the effects of butterfat on cheese yield. Suggestions to increase the butterfat recovery factor of 1.582 (to 1.6 or 1.617) were made by DFA; Select, Elite, et. al; and National All-Jersey, Inc. These commenters relied on hearing testimony that butterfat recovery in cheddar cheese generally ranges between 90 and 93 percent, although Kraft testified that their butterfat recovery is lower. The commenters favored use of a factor that reflected 91 or 92 percent fat recovery because that level of recovery is common. In a comment filed by Leprino, the cheese manufacturer urged that the 1.582 factor not be increased, as any increase would exacerbate the overvaluation of whey fat in the current formula and because the 90 percent recovery factor reflects results from many cheese vats installed prior to the late 1980's.

The recommended decision stated that even though many cheese makers may be able to achieve a higher fat retention in cheese, the use of the 1.582 factor representing 90 percent fat recovery in cheese continued to be appropriate. The recommended decision also stated that as a result of the 90 percent level, butterfat in cheese was not overvalued, and those cheese makers who fail to recover more than 90 percent of the fat would not suffer a competitive disadvantage. The preponderance of the record indicates that most cheese manufacturers should be able to obtain a 90 percent butterfat recovery.

In testimony at the hearing and comments filed on the tentative final decision the issue was raised of whether the butterfat adjustment portion of the protein price formula in which the value of butterfat in butter is subtracted from the value of butterfat in cheese is based on equivalent amounts of butterfat. The 1.582 factor represents 90 percent recovery in cheese of one pound of butterfat used in its manufacture, while the butterfat price represents the value of one pound of butterfat used to make butter. Clearly, subtracting the value of a pound of butterfat in butter from the value of 0.9 pounds of butterfat in cheese reduces the actual value of butterfat used in cheese. Therefore, the value of butterfat used in butter should be reduced by 10 percent in this calculation.

Comments received from Select, NMPF, LOL and National All-Jersey (NAJ), in response to the recommended decision, supported the use of the factor resulting from multiplying the butterfat price by 0.9 prior to subtracting the butterfat price from the value of butterfat in cheese. NAJ was of the opinion that the 0.9 adjustment is appropriate in that it recognizes that only ninety percent of the butterfat is retained in cheese. Select explained that using an adjustment to the value of butterfat in cheese (the 0.9) provides an important factor for correcting the relatively low butterfat retention in cheese, but maintained that the butterfat retention factor should be larger. LOL supported the addition of the 0.9 factor and indicated that it represented a more consistent margin across a wide range of butter and cheese prices.

Opponents to the use of the 0.9 adjustment factor to the butterfat value included Leprino, Kraft, IDFA, and the Wisconsin Cheese Makers Association (WCMA). These parties instead favored using a 0.95 factor. They explained that

not all of the butterfat attributable to the 0.9 factor is represented in whey cream, but rather is lost in the handling process. They were of the opinion that the portion that is lost in the handling process should be accounted for in the protein price by using a factor of 0.95. They explained that butterfat in whey cream is overvalued in the Class III pricing formulas and that sweet cream is worth approximately 40 cents more than whey cream. In addressing this difference in value, the commenters suggested subtracting 2-cents from the butterfat adjustment portion of the protein price formula.

As explained in the previous discussion on shrinkage, this final decision makes a purposeful adjustment for farm-to-plant milk losses, but not for in-plant losses. The use of the 0.9 factor is more appropriate than a 0.95 factor since the Van Slyke formula uses a 0.9 butterfat retention factor for computing the cheese yield attributable to butterfat. The aforementioned adjustment for farm-to-plant loss is also contained in the butterfat factor (1.572) used for computing the protein price, as well as an adjustment for farm-to-plant losses in the Class III butterfat price. It would not be appropriate to include additional reductions in the protein price for butterfat losses. This finding is also supported by testimony by several witnesses indicating that whey cream is often returned to the cheese vat for use in cheese making, thus increasing the value of whey cream above the value of whey cream used for whey butter, which is not accounted for in the protein formula.

As stated in the recommended decision, testimony at the hearing and analysis of the relationship between the current cheese, butterfat, and protein prices revealed that the current Class III pricing formulas cause inequities in producer payments based on the relationship between producers' butterfat and protein tests. The inequities were attributed to the use of the 1.28 factor used in the portion of the protein price formula that is designed to incorporate the butterfat value of milk used in cheese that is not already accounted for by the Class III and IV butterfat price. Such a factor is necessary to reflect the fact that there is more than one pound of butterfat in cheese for every pound of protein. The record supports a conclusion that when the price of butter increases, the price paid for milk used in cheese and for milk delivered by producers will decline if the milk has a fat to protein ratio of less than 1.28, and decline at a more rapid rate than that at which the butter price increases. According to the record and numerous comments filed, most milk delivered by producers has a fat-to-protein ratio less than 1.28.

In a number of the comments filed in response to the tentative final decision, commenters argued that this factor should be reduced—to 1.22, 1.19, or 1.17—to better reflect the fat-to-protein ratio in producer milk. The factor, which originally appeared in a comment filed early in the Federal order reform process as 1.20, was calculated by dividing 1.582 by 1.32. When the change was made from crude protein to true protein, 1.20 was multiplied by 1.0645 to reflect that change, becoming 1.28. The recommended factor of 1.17 in the protein price formula represented a minimum value for the ratio of butterfat to true protein in producer milk. Its use assures that the value adjustment for butterfat in butter to butterfat in cheese included in the protein price formula accounts for the full amount of butterfat in producer milk.

The Alliance of Western Milk Producers argued in a comment filed in response to the tentative final decision that the Class III component price formulas adopted in that decision would lead to disorderly marketing and provide an incentive for processors to seek alternative sources of butterfat, resulting in negative effects on producer income. The Alliance favored a return to the Federal order reform Class III component price formulas, but suggested that a snubber to prevent the butterfat value adjustment to the protein price from becoming negative would mitigate the potential for undervaluing protein under the formula.

This final decision concludes that the Class III protein formula to be adopted is as follows:

((NASS Cheese
Price $-0.165) \times 1.383) +$
((((NASS Cheese
Price $-0.165) \times 1.572) -$
(Class III & IV Butterfat
Price $\times 0.9)) \times 1.17$)

Class III—Other Nonfat Solids price (Dry Whey). As discussed above, this final decision provides a loss allowance for the other solids lost in moving milk from the farm to the processing plant. This loss is reflected in the Class III dry whey formula by adjusting the 0.968 divisor for farm-to-plant losses. The divisor is also converted to a multiplier in order to provide simplification and consistency in the price formulas.

As proposed in the recommended decision, the manufacturing allowance for dry whey is increased from the 14 cents per pound adopted in the tentative final decision to 15.9 cents per pound of dry whey to reflect a higher cost of drying whey relative to the cost of drying nonfat dry milk.

The hearing included several proposals that would change the dry whey or other solids price formula by changing the make allowance. Although the hearing notice included a proposal to use the CME average dry whey price, the proponent withdrew support for the proposal when it became apparent that the CME has no cash exchange market for dry whey. The NASS survey that currently is being used to identify commodity prices has included price data on dry whey since September 1998. There were no proposals to change the 0.968 yield factor in the other solids price formula. The 0.968 factor reflects the solids content of dry whey, given a 3.2 percent moisture content.

As explained earlier in this decision, an adjustment factor for farm-to-plant losses on all milk solids is 0.0025. Application of this loss adjustment to the other solids price computation formula is as follows:

- One pound of dry whey minus 0.0025 farm-to-plant solids loss equals 0.9975 pounds of dry whey.
- Since each pound of dry whey contains 96.8 percent milk solids, 0.9975 is divided by 0.968 to equal a dry whey factor of 1.03.
- Therefore, the Class III dry whey price per pound is computed as follows:

(NASS butter price $- 0.159) \times 1.03$

The other solids formula divisor is converted to a multiplier to simplify and provide consistency with the other formulas contained in this final decision.

Make Allowance (Dry Whey). This final decision continues to use a dry whey make allowance of 0.159 as contained in the recommended decision.

Since the most recent CDFA and RBCS cost surveys did not include costs for drying whey, there is no information from those two studies to use for computing the dry whey make allowance. A witness from NMPF suggested using the nonfat dry milk manufacturing cost allowance for dry whey since both products involve similar processing equipment and then adding $0.01 per pound to reflect the additional energy and higher equipment costs incurred in drying whey. Since the make allowance for nonfat dry milk adopted under the tentative final decision is $0.140, this procedure would result in a dry whey make allowance of $0.150. DFA proposed a dry whey make allowance of $0.1478 per pound based on costs at its plant at Smithfield, Utah. The plant is a cheddar block plant running throughout the year

that condenses and dries whey from the cheese manufactured in this Smithfield plant only. The DFA costs include both direct and indirect costs, and return on investment and marketing cost data.

A witness from Western States Dairy Producers Trade Association, et al. (WSDPTA) testified that there is no reason to change the other solids price computation from the current formula, and that it is a necessary component of the cheese pricing formula. He noted that the use of dry whey as a commodity is correct and that the 0.968 factor in the pricing formula reflects 96.8 pounds of solids in 100 pounds of dry whey.

Most witnesses who testified about the cost of drying whey expressed the belief that drying whey costs more than drying nonfat dry milk. Two cooperative association witnesses testified that their organizations have determined that the returns from whey powder with the current make allowance would not cover the costs associated with building and operating whey powder plants. At the hearing, IDFA presented the results of the survey contracted for by NCI. The IDFA witness testified that the survey showed a dry whey manufacturing cost of at least $0.1592. The IDFA witness testified that using the nonfat dry milk make allowance significantly understates the manufacturing cost of dry whey due to the relatively higher percentage of water in liquid whey compared to skim milk and the additional crystallization process required.

A witness representing Leprino testified on the differences in the manufacturing processes for dry whey and nonfat dry milk that result in higher costs to produce whey powder. The witness concluded that the cost of making dry whey is $0.02559 above the cost of drying nonfat dry milk.

The brief submitted by Leprino argued that the additional costs of processing whey powder over those of processing nonfat dry milk should include additional staffing, cleaning, and maintenance associated with the additional equipment for whey product.

A witness from Kraft agreed that the dry whey manufacturing costs are about 2.6 cents per pound greater than the nonfat dry milk manufacturing costs. Although Kraft described its Tulare plant as large and efficient, it also represents a recent capital investment, meaning that depreciation costs are likely higher than average.

Comments on the dry whey make allowance portion of the tentative final decision generally followed the lines of the testimony in the hearing record. WSDPTA favored maintaining the 14-cent make allowance adopted in the tentative final decision, and ADCNE/DFA supported not using the NCI survey on the manufacturing cost of dry whey. IDFA, Leprino, and Northwest Dairy Association advocated adoption of a dry whey make allowance of at least 15.92 cents per pound, the level determined in the NCI survey. These comments cited testimony in the record that the cost of drying whey is as much as 2.6 cents greater than that of drying skim milk, a calculation that would result in a make allowance of 16.6 cents. Kraft favored adding a value reflecting the reduced value of butterfat in whey to the whey make allowance and increasing the make allowance by at least 2 cents.

Since information regarding the costs of drying whey was not available from the sources used for determining the other make allowances in product price formulas, the tentative final decision determined that the dry whey make allowance should remain the same as that for nonfat dry milk. However, in the recommended decision it was determined that the dry whey make allowance should be changed to reflect testimony and other evidence in the hearing record that the cost of drying whey is greater than that of drying nonfat dry milk.

The recommended decision concluded that the other solids price would be computed by subtracting the make allowance of $0.159 from the NASS weighted average dry whey price and dividing the result by 0.968. The differential costs of manufacturing whey powder, from one source, over those of nonfat dry milk, from others, did not provide close enough agreement with the NCI-sponsored survey to use them with any confidence. Neither of the witnesses who testified that the extra costs of drying whey are 2.6 cents greater than the costs of drying nonfat dry milk testified about the total costs of either operation.

In lieu of other studies and direct evidence of the total cost of drying whey, the recommended decision concluded that the NCI-commissioned study results, rounded to the nearest 1/10 cent, should be used for determining the dry whey make allowance. National Milk Producers, in their comments on the recommended decision, stated that the dry whey make allowance was acceptable. Schreiber and Leprino also stated that they supported the dry whey make allowance of 0.1592 (essentially 0.159).

DFA and Select/Continental, in their comments to the recommended decision, opposed the recommended decision's proposed increase from 0.14 to 0.159. They based their opposition on lack of credible evidence.

The comments opposing the recommended decision's increase to the dry whey make allowance are not persuasive. This final decision concludes that the NCI-commissioned study should be utilized in the absence of other studies or direct evidence of the total cost of drying whey. This final decision adopts the $0.159 make allowance as proposed in the recommended decision.

Snubber/Other Solids Price. The tentative final decision snubbed the other solids price at zero. Thus, if the NASS dry whey price minus the make allowance resulted in a negative number, the other solids price would become zero. Michigan Milk Producers Association supported the inclusion of such a ''snubber'' concept for the whey price in a brief, citing testimony in which the DFA witness referred to the difficulty of explaining to producers a negative component price. Snubbing the other solids price to zero would have prevented it from negatively affecting the value of other Class III components or having a negative impact on the producer price differential. Support was expressed for use of the snubber in two additional comments received on the tentative final decision.

The snubber in the other solids price formula was opposed in comments filed by two parties. Leprino stated that sound policy should allow not only positive, but negative net revenues to be reflected in the milk price to prevent overvaluing milk. IDFA opposed the snubber on the grounds that it would prevent manufacturers of dry whey from covering all manufacturing costs if wholesale prices for dry whey failed to fully cover manufacturing costs. Both commenters suggested that if the component price were to become negative, the negative value could be pooled as part of the producer price differential, as inferred by the DFA witness.

The prices calculated for the components in Class III milk are intended to reflect the value of those components in the products from which the prices are calculated. Use of a snubber to limit the other nonfat solids price would be inconsistent with the purpose of a pricing formula to reflect a component value and would appear to be an arbitrary adjustment to the price formula. After a thorough review of the record, including briefs and the comments on the tentative final decision and the recommended decision, USDA has determined that the snubber on the other solids price should be eliminated.

d. Effects of Changes to Class III and Class IV Price Formulas

The changes to the Class III and Class IV component price formulas discussed above would result not only in changes to the respective component prices, but also to the resulting Class III and Class IV skim milk and hundredweight milk prices at 3.5 percent butterfat. The changes discussed are relative to the formulas resulting from Federal order reform. The calculations that were made in the recommended decision showed some increase in the level of the Class III price. USDA believed that the Class III pricing formulas incorporated in the recommended decision were more technically correct than those adopted as a result of Federal order reform because they were based on more complete information derived through the formal rulemaking process. The product-price formulas adopted as part of Federal order reform have contributed to further industry analysis and participation in developing more precise and accurate measures of determining the pricing formulas adopted herein.

It is important to note that these calculated class price differences, or the ''static effect'' of the recommended changes, are based on historical product price data and not on product prices that will occur in the future. The price differences calculated in this portion of the decision cannot be used to calculate or estimate changes in revenue that would have occurred or may occur in the future because changing intersections of supply and demand for each product result in different prices.

The 19-month comparisons included in the recommended decision were calculated based on the NASS weighted average commodity prices from January 2000 through July 2001. NASS weighted average commodity prices for that time period were available, and no estimates of the relevant commodity prices were needed. Although that time period was relatively short, a number of interesting price relationships occurred in the data series.

For instance, during that period the cheddar cheese (39 percent moisture) market ranged from a low of $1.0245 per pound during November 2000 to a high of $1.6434 per pound during July 2001. The November low was about 7.5 cents below the $1.10 per pound support price for 40-pound blocks of cheddar. During this same 19-month period the NASS weighted average nonfat dry milk price showed little movement until July 2001, ranging from a high of $1.0165 per pound during January 2001 to a low of $0.9634 per pound during July 2001. The July 2001 decline was the result of a reduced support price. In fact, the nonfat dry milk price stayed within about one cent of support over the January 2000 through June 2001 period.

Unlike the cheese and nonfat dry milk market, the butter price did not trade anywhere near the butter support price of $0.65 per pound or the revised support price of $0.8548 per pound. The butter price traded in a range from a low of $0.8820 per pound during January 2000 to a high of $1.9263 per pound during June 2001. It is important to keep in mind that since all milk is priced on the basis of butterfat and skim or nonfat components under Federal orders, focusing on the calculated hundredweight prices at 3.5 percent butterfat that are announced for comparison purposes may result in misleading conclusions.

The formulas used for computing the Class IV prices in the recommended decision were unchanged from those contained in the tentative final decision which currently are being used.

Changing the butterfat price make allowance from $0.114 to $0.115 would have resulted in a calculated average decline in the Class IV butterfat price of $0.0012 over the 19-month period included in the recommended decision. The two changes to the Class IV nonfat solids formula—increasing the make allowance from $0.137 to $0.140 and eliminating the 1.02 divisor—would have resulted in a net increase of $0.0141 per pound in the Class IV nonfat solids price in the absence of any other changes. Since the Class II prices were to continue to be computed on the basis of the Class IV formulas plus the Class II differential of $0.70 per hundredweight, changes to the Class II prices would have been the same as the changes to the Class IV prices. The calculated Class IV skim milk price would have increased by an average of $0.127 per hundredweight. The calculated 3.5 percent Class IV milk price would have increased by an average of $0.118 per hundredweight, reflecting the net difference between the increase in the skim milk price and the very small decline in the Class IV butterfat price.

As a result of the 38 percent moisture adjustment to barrel cheese prices, the NASS weighted average cheese price used for computing the Class III protein price would have been calculated to be higher by $0.011 per pound over the 19-month period January 2000 through July 2001. Use of this cheese price increase in the recommended protein price formula would have resulted in an increase of 3.6 cents per pound of protein. The decrease in the make allowance from $0.1702 to $0.165 in the recommended protein price formula would have accounted for an increase of 1.7 cents per pound of protein. The two changed factors in the protein price formula (0.9 and 1.17), using data for the 19-month period, would have resulted in an increase in the calculated protein price averaging approximately 14.8 cents. The total increase in the protein price as a result of three changes to aspects of the Federal order reform protein price formula (moisture adjustment, make allowance, and formula changes) would have been approximately 20.6 cents above the price that would have been computed based on the formula prior to 2001.

At the same time, the increase from $0.137 to $0.159 in the dry whey make allowance for calculating the other solids price would have resulted in a calculated decline in the other solids price of $0.0227 over the 19-month period. Elimination of the snubber on the other solids price would have made no difference during the period considered. The combination of the changes in both the protein price and the other solids price would have resulted in an average of about $0.50 per hundredweight increase in the Class III skim milk price over the 19-month period if cheese and dry whey prices were unchanged.

The recommended decision showed that the changes in the protein price formula improved significantly the relationship between the cheese price and the protein price, from a correlation coefficient of 0.54, using the Federal order reform protein formula, to a correlation coefficient of 0.70 using the formula recommended in that decision. In addition to improving the relationship between the cheese price and the protein price, the recommended protein formula reduced the variability of the protein price and moderated the extremes that occurred under the Federal order reform protein formula, thereby giving producers a more consistent and positive protein price signal.

The calculation of the Class III price at 3.5 percent butterfat, based on the formulas contained in the recommended decision, would have averaged about $0.48 per hundredweight above the 3.5 percent Class III price based on the Class III formulas implemented under Federal order reform.

In comments filed in response to the tentative final decision, IDFA and Leprino urged that in no case should the Class III price be enhanced relative to price levels under Federal order reform. Leprino reiterated the importance of assuring that yield factors not be too

high or make allowances too low for cheese plants to retain sufficient revenue to maintain their operations. IDFA focused on the negative long-term effects on producer prices, as described in USDA's analysis, of adopting enhanced Class III and Class IV prices. As described in detail above (in Issue 3c), the factors incorporated in the Class III component price calculations are based solidly on testimony and data in the hearing record.

The recommended decision stated that the record provided ample basis for believing that the margins provided in the formulas would have been adequate for cheesemakers to maintain their operations. As observed at the hearing and in comments filed in response to the tentative final decision by the expert witness from Cornell, a break-even point would be where the value of cheese plus whey cream plus whey powder equals the value of the milk price plus the make allowances. According to the witness, under Federal order reform, and to a greater extent in the tentative final decision, the total value of these products exceeded the sum of the milk price and the make allowances.

The discussion at the hearing centered specifically on the make allowance used in the protein formula, with the implication that it represented the entire make allowance for cheese. The recommended decision stated that unlike the Class IV price formulas, where the make allowances used in the butterfat and nonfat solids price formulas can be attributed directly to butter and nonfat dry milk, the make allowances used for butterfat, protein, and other solids in the pricing formulas for Class III must be looked at in aggregate. The recommended decision also stated that all three components are involved in the cheesemaking process and have a significant effect on cheesemakers' costs and returns.

The recommended decision stated that gross margins (including make allowances) could be compared using both the cost of milk based on the Federal order reform Class III formulas, and the cost of milk based on the Class III formulas. For this purpose, gross margins in the recommended decision were defined as the difference between the sum of the selling price of cheese and dry whey based on monthly average NASS prices and whey butter, estimated at nine cents below the NASS AA butter price, and the cost of milk under the two sets of formulas. The gross margins therefore reflected the amount of money available to processors to procure, process, and market the end products of milk used in Class III: cheese, whey butter and dry whey.

The recommended decision stated that using Class III component tests from the Upper Midwest market to estimate product yields, the estimated gross margins would have averaged approximately $3.00 per hundredweight using the Federal order reform Class III formulas and $2.52 per hundredweight over the 19-month period of January 2000 through July 2001 if the recommended Class III formulas had been in effect. The gross margins indicated in the recommended decision were significantly different than the cheese make allowances of $0.1702 and $0.165 used in the formulas, which would have been equivalent to approximately $1.70 and $1.65 per hundredweight of milk with an estimated yield of 10 pounds of cheese. Such a difference was expected since the make allowances for whey butter and dry whey were significantly lower than the cheese make allowance. Any residual value could have been used by the handler to improve returns or increase producer pay prices. Also, the lower gross margins under the recommended formulas could have lead to reduced over-order premiums to reflect increased milk costs and maintain current gross margins.

Comments received from Leprino, IDFA, and NDA expressed concern with the accuracy of gross margin analysis contained in the recommended decision. Comments received from Select and Continental stated that the gross margins presented in the recommended decision effectively restored the margins to their computed ''implied margin'' offered in their testimony at the hearing. Because of industry concerns regarding the accuracy of the gross margin analysis together with the industry's concern regarding the definition of ''implied margin,'' the gross margin analysis was not considered in adopting the provisions contained in this final decision.

This final decision compares prices over the period of January 2000 through May 2002 instead of the more limited 19-month price period from January 2000 to July 2001. Nevertheless, the 29-month period from January 2000 through May 2002 used in this final decision arrives at similar conclusions as those reached in the recommended decision. In particular, the conclusions made in the recommended decision regarding make allowances continue to be valid. Product yield formulas have been amended to include a farm-to-plant loss allowance and to provide simplification and consistency in pricing formulas. The effects on class prices are different due to the amendments adopted in this final decision together with their application to the expanded 29-month period.

It is important to again note that these calculated class price differences, or the ''static effect'' of the following adopted changes, are based on historical product price data and not on product prices that will occur in the future. The price differences calculated in this portion of the decision cannot be used to calculate or estimate changes in revenue that would have occurred or may occur in the future because changing intersections of supply and demand for each product result in different prices.

Class III Butterfat. When the Class III formulas adopted in this decision are applied to the 29-month period from January 2000 through May 2002, the value of Class III fat would have been $0.0247 per butterfat pound lower from the announced price of $1.5126 per butterfat pound. The adopted formula results in an average of $1.4879 per butterfat pound. As proposed in the recommended decision, Class III formulas would have resulted in an average butterfat price of $1.5121. The following table is provided for comparison purposes:

CLASS III BUTTERFAT PRICE

[$/lb]

	Announced price	Recommended decision	Final decision
2000 average	1.2522	1.2509	1.2309
2001 average	1.8480	1.8480	1.8184
Jan-May 2002 average	1.3325	1.3325	1.3112
29-month average	1.5126	1.5121	1.4879

Class III Protein. Using the same 29-month period, the Class III protein price would have been higher if the formula adopted herein had been used. The Class III protein price would have increased from the announced average of $1.8610 per protein pound to $2.0213 per protein pound. The Class III protein price as proposed in the recommended decision would have resulted in an average protein price of $2.0334. The following table is provided for comparison purposes:

CLASS III PROTEIN PRICE

[$/lb]

	Announced price	Recommended decision	Final decision
2000 average	1.6938	1.8631	1.8513
2001 average	1.9613	2.1612	2.1498
Jan-May 2002 average	2.0218	2.1352	2.1210
29-month average	1.8610	2.0334	2.0313

Class III Other Solids. Using the 29-month period, the Class III other solids price would have been lower if the formula adopted herein had been used. Most of this difference is explained by using the increased dry whey make allowance of $0.159 instead of $0.140. Under the same conditions, the Class III other solids price would have decreased from the announced average of $0.0904 per other solids pound to $0.0692 per other solids pound. The Class III other solids price as proposed in the recommended decision would have resulted in an average other solids price of $0.0694. The following table is provided for comparison purposes:

CLASS III OTHER SOLIDS PRICE

[$/lb]

	Announced price	Recommended decision	Final decision
2000 average	0.0509	0.0282	0.0281
2001 average	0.1343	0.1146	0.1143
Jan-May 2002 average	0.0796	0.0600	0.0598
29-month average	0.0904	0.0694	0.0692

Class III Standard Skim. Using the 29-month period, the Class III standard skim milk price would have been higher if the formula adopted herein had been used. The Class III standard skim price would have increased from the announced average of $6.30 per hundredweight to $6.67 per hundredweight. The Class III skim price as proposed in the recommended decision would have resulted in an average Class III skim price of $6.71 per hundredweight. The following table is provided for comparison purposes:

CLASS III STANDARD SKIM MILK PRICE

[$/cwt]

	Announced price	Recommended decision	Final decision
2000 average	5.55	5.94	5.90
2001 average	6.87	7.38	7.34
Jan-May 2002 average	6.74	6.97	6.93
29-month average	6.30	6.71	6.67

Class III Standard Milk. Using the 29-month period, the Class III standard milk price would have been higher if the formula adopted herein had been used. The Class III standard milk price would have increased from the announced average of $11.38 per hundredweight to $11.65 per hundredweight. The Class III milk price as proposed in the recommended decision would have resulted in an average Class III standard milk price of $11.77 per hundredweight. The following table is provided for comparison purposes:

CLASS III STANDARD MILK PRICE

[$/cwt]

	Announced price	Recommended decision	Final decision
2000 average	9.74	10.11	10.01
2001 average	13.10	13.59	13.45
Jan-May 2002 average	11.16	11.39	11.27
29-month average	11.38	11.77	11.65

Class IV Butterfat (same as Class III butterfat). When the Class IV formulas adopted in this decision are applied to the 29-month period from January 2000 through May 2002, the value of Class IV fat would have been $0.0247 per butterfat pound lower from the announced price of $1.5126 per butterfat pound. The adopted formula results in an average of $1.4879 per butterfat pound. As proposed in the recommended decision, Class IV formulas would have resulted in an average butterfat price of $1.5121. The following table is provided for comparison purposes:

CLASS IV BUTTERFAT PRICE

[$/lb]

	Announced price	Recommended decision	Final decision
2000 average	1.2522	1.2509	1.2309
2001 average	1.8480	1.8480	1.8184
Jan-May 2002 average	1.3325	1.3325	1.3112
29-Month average	1.5126	1.5121	1.4879

Class IV Nonfat Milk Solids (NFMS). When the Class IV formulas in this decision are applied to the 29-month period the prices of Class IV nonfat milk solids would have been lower. Using the 29-month period, the Class IV NFMS solids price would have decreased from an average of $0.8340 per NFMS pound to $0.8315 per NFMS pound. Class IV NFMS as proposed in the recommended decision would have resulted in an average NFMS price of $0.8399 per hundredweight. The following table is provided for comparison purposes:

CLASS IV NONFAT MILK SOLIDS PRICE

[$/lb]

	Announced price	Recommended decision	Final decision
2000 average	0.8574	0.8715	0.8629
2001 average	0.8391	0.8391	0.8306
Jan-May 2002 average	0.7656	0.7658	0.7580
29-month average	0.8340	0.8399	0.8315

Class IV Standard Skim. Using the 29-month period, the Class IV standard skim milk price would have been lower if the pricing formulas adopted herein had been used. The Class IV standard skim milk price would have decreased from the announced average of $7.51 per hundredweight to $7.48 per hundredweight. The Class IV skim milk price as proposed in the recommended decision would have resulted in an average Class IV skim price of $7.56 per hundredweight. The following table is provided for comparison purposes:

CLASS IV STANDARD SKIM MILK PRICE

[$/cwt]

	Announced price	Recommended decision	Final decision
2000 average	7.72	7.84	7.77
2001 average	7.55	7.55	7.48
Jan-May 2002 average	6.89	6.89	6.82
29-month average	7.51	7.56	7.48

Class IV Standard Milk. The Class IV milk price over the 29-month period would have decreased from the announced average price of $12.54 per hundredweight to a $12.43 per hundredweight price (a decrease of $0.11/cwt) if the formulas adopted herein had been used. Class IV milk as proposed in the recommended decision would have resulted in an average Class IV milk price of $12.59 per hundredweight. The following table is provided for comparison purposes:

CLASS IV STANDARD MILK PRICE

[$/cwt]

	Announced price	Rec-ommended decision	Final decision
2000 average	11.83	11.95	11.80
2001 average	13.76	13.76	13.58
Jan-May 2002 average	11.31	11.31	11.17
29-month average	12.54	12.59	12.43

Class Price Relationships

The price relationships between Classes I, II , III and IV established under the Federal order reform process should be maintained. One proposal heard in this proceeding would have reduced the Class IV butterfat price without affecting the computation of other butterfat or product prices. That proposal is addressed specifically in the Class IV Butterfat price.

The current pricing system uses the same formulas for computing the advance component prices used to compute the Class I skim milk and butterfat prices and Class II skim milk price as are used to calculate the Class III and Class IV component prices. Several witnesses testified as to what the class price relationships should be if changes were made to any of the Class III or Class IV component price formulas. The witness for IDFA and several other parties stated that any changes to the Class III and Class IV formulas should also apply to the advance price formulas used for computing the Class I and Class II prices. The witness explained that failure to use the same formulas between the related classes of use would result in a direct impact on the Class I and Class II differentials which was clearly not the intent of Congress when it instructed the Secretary to conduct a rulemaking proceeding concerning the Class III and Class IV price formulas.

A witness for Hershey Foods pointed out that the Secretary went to great lengths to justify the 70-cent Class II differential above the Class IV price. In support of Proposal 31, the witness said that there is no justification or new evidence for changing the current price relationship that exists between the manufactured products (butter and nonfat dry milk) and the Class II price if the Class IV formulas were revised as suggested in several proposals. The witness stated that such changes in price relationships clearly were not the intent of Congress. A brief filed on behalf of IDFA in support of Proposal 31 stated that the correct price relationship between NFDM and Class II is 70 cents and that the record provides no basis for changing that relationship. Actually, as explained in the final decision on Federal order reform, 70 cents represents the correct price relationship between milk used to make dry milk powder and milk used in Class II, as nearly as can be determined from the information available.

A proposal (Proposal 30) by two parties that any increases resulting from changes to the Class III and Class IV price formulas not be allowed to result in increases in Class I prices was supported in testimony by one of the parties, who argued that any increases in the Class I price mover should be balanced with reductions in Class I differentials. The witness stated that the proponents want to be sure that Class I prices are not further decoupled from Class III and Class IV pricing formulas, or that Class I prices are not artificially inflated.

Neither Proposal 30 nor Proposal 31 was adopted under the tentative final decision.

In comments on the tentative final decision filed by ADCNE and fully supported by DFA, consideration of Proposal 30 was opposed as being beyond the scope of the Congressional mandate and not fully debated at the hearing. ADCNE further opposed any modifications to Proposal 30, such as the Family Dairies' testimony supporting a weighted average Class I price mover, or to a similar proposal relative to the Class II price, that would change the basis for Class I and Class II prices or Class I and Class II differentials. ADCNE continued that there was no evidence presented at the hearing that would support the substantial revenue reductions to farmers throughout the Federal order system which Proposals 30 and 31 would cause. ADCNE urged that the conclusions of the tentative final decision to deny proposals 30 and 31 be affirmed.

The recommended decision also did not adopt Proposal 30 or Proposal 31. Comments received on the recommended decision from DFA indicated agreement with the Department's reasoning for rejecting these proposals and any modifications to those proposals that called for changing how Class I and Class II prices as established. Accordingly, this final decision continues with the findings contained in the recommended decision for not adopting Proposal 30 or 31.

According to the recommended decision, neither the price relationships established in the tentative final decision between milk used in Class III and Class IV, nor milk used in Classes I and II, should be changed. The recommended decision stated that changes should be reflected in the Class I and Class II prices to the extent that there may be differences in the Class III or Class IV prices between the current prices as a result of adjustments to the component pricing formulas. Any reevaluation of the formulas used to price the components used in manufactured products should be carried through to the class prices that are based on those component prices. A change in the computation of the nonfat solids price, for instance, is intended to better reflect the value of those solids in dry milk products. If the new nonfat solids price formula results in an increase in the Class IV price, the record provides no basis for changing the difference in the value of the milk used in those solids between Class IV and Class II use. Similarly, the availability of milk for use in Class I is related to the higher of the alternative manufacturing

values for that milk. The current relationships should be maintained.

California Price Relationships

Many witnesses provided comments on the recommended decision in regard to the relationship of Federal order Class III prices as compared to the California 4b prices. These two prices are considered to be minimum prices that reflect the value of producer milk used to make cheese. Multiple comments received indicated the importance of maintaining a close relationship between these prices.

Northwest Dairy Association expressed concern that the recommended decision ''simply ignored'' the ''issue of price alignment with the nation's largest dairy producing state'' and that there are ''differences between the Federal and California pricing systems that the Department has utterly failed to explore and explain.''

A comment received from Agri-Mark stated that ''USDA must take in consideration the competitive situation between California and Federal Order Class III and IV plants.''

In their comments, Dairylea stated that ''It is important that manufacturers buying Federal order milk pay Class prices that are competitive with similar manufacturers in California and Idaho.''

A comment received from Western United Dairymen stated that, ''It is imperative that California's prices maintain a close relationship with Federal order prices.''

Lastly, a comment received from Select Milk Producers and Continental Dairy Products stated that, ''Considering the fact that California has transformed itself into the number one dairy state and soon to be number one cheese producing state in little more than a decade, it is appealing to consider modeling the decision in this hearing off the California system.'' They go on to state that ''Producer groups in California along with others are now seeking to have California adjust to the Federal scheme. It would be a sad day indeed if the [Department] reduced prices to meet California's while California was in the process to make such an effort unnecessary.''

Class III and Class IV prices established under the Federal milk order program should not be based upon, aligned with, or identical to the equivalent class prices established for milk under California's State milk order program. The equivalent class prices established under the California milk order program are based largely on the conditions unique to California while the Class III and Class IV prices established under Federal milk orders are based on national dairy product prices which reflect the national supply and demand conditions of milk used in these two classes. The California milk program is single-state oriented while the Federal program is national in scope.

Class III and Class IV dairy products compete in a national market. Because of this, Class III and Class IV milk prices established for all Federal milk marketing order areas are the same. The Federal milk order program gradually adopted the Minnesota-Wisconsin (M–W) price as the Class III price in all Federal milk marketing orders. Although the M–W was first adopted in 1963, it was not until the mid 1970's that the M–W established a uniform class price for milk used in Class III products in all Federal milk orders. Observations of the market place for cheese, butter, and nonfat dry milk provided the basis for concluding that these products compete in a market that is national in scope. Such findings were upheld with the adoption of the Basic Formula Price (BFP), which provided an interim pricing method for milk (due largely to the declining statistical reliability of the M–W price series) until a more long-term pricing method could be developed.

The implementation of milk order reform in January 2000 continued finding that Class III and Class IV dairy products compete in a national marketplace. However, a competitive price for milk, as represented by the M–W and BFP prices, was no longer viable. As an intended long-term method, the Federal milk order program has adopted end-product price formulas, valuing Class III and Class IV milk on the basis of the value of Class III and Class IV end-products in the marketplace. The NASS price survey for dairy products used as a basis for establishing Class III and Class IV prices includes all dairy product prices and sales volumes in all regions of the country, including California. In this regard, the Federal order program has and will continue to reflect California's impact on dairy product prices while establishing Class III and Class IV prices that are reflective of national supply and demand conditions.

With the adoption of end-product pricing formulas under order reform, the need for periodic adjustments that would arise with the changes in marketing conditions is acknowledged. Although the relationship of Federal Order prices to California prices is important, the record does not indicate how California and Federal order prices should be aligned or what the appropriate relationship between the California and the Federal order program should be.

5. Class I Price Mover

A proposal that was not included in the hearing notice was made at the hearing by a Family Dairies, USA, witness on behalf of that cooperative and the Midwest Dairy Coalition, which represents 13 additional organizations of dairy farmers. The proposal would change the Class I price mover from the higher of the Class III and Class IV prices to a weighted average of the two. The witness for Family Dairies testified that the results of the current regulation are disturbing and unanticipated with the unexpected strength of the Class IV price relative to Class III.

In testimony at the hearing, the Family Dairies representative complained that 10 percent of production under Federal orders (milk used to make nonfat dry milk) has been driving the Class I price that applies to 40 percent of the milk. As a result, he testified, milk production for fluid purposes is encouraged in markets with high Class I differentials and relatively high Class I use at a time when marketing conditions (an oversupply of milk) should have the opposite effect. As fluid-oriented markets are receiving increased prices relative to markets in which cheese is the dominant use, he complained, inequities in blend prices between markets are increasing.

A group representing Upper Midwest producer interests filed a brief describing the recent movement of milk from the Upper Midwest pool onto the Central and Mideast marketwide pools as disorderly marketing caused by increases of Class I prices in these higher-Class I use markets.

An argument in another brief stated that since the 1960's the dairy industry has used a Class I mover tied to a market-clearing price represented by a weighted average of milk used in butter, cheese, and powder.

In several briefs it was argued that the Regulatory Impact Analysis (RIA) published with the final decision on Federal order reform stated that the price formulas adopted therein were expected to generate a sufficient quantity of milk, and that both the adoption of Class I pricing option IA and use of the higher of the Class III and IV prices as the price mover have worked to enhance Class I price levels.

A brief filed by a group representing fluid milk handlers suggested that USDA should give careful consideration to the proposal to use a weighted average of the Class III and Class IV prices to move Class I prices.

Based on analysis of the hearing record and briefs filed by interested persons, the tentative final decision continued use of the higher of the advance Class III or Class IV prices as the mover for Class I prices.

In comments on the tentative final decision, the Midwest Dairy Coalition repeated its position that the existing mover should be changed to a weighted average of the advanced Class III and advanced Class IV prices, with the weight based on the portion of manufacturing milk used for Class III and Class IV during the prior year. The Coalition stated that using the higher of Class III or Class IV prices could result in setting a minimum fluid milk price that is actually above the market clearing price for milk, especially if the higher of the Class III and IV prices were not representative of manufacturing markets. The Coalition also expressed concern that the tentative final decision adopted, as an unnoticed and unsupported change, the higher of the advanced Class III or Class IV milk prices at 3.5 percent butterfat as the new Class I mover instead of using the skim value.

In comments, NMPF noted that significant fluctuation that could occur in the Class I skim milk price mover due to using the higher of the advanced Class III or Class IV prices at 3.5 percent butterfat. Several parties noted that use of the advanced price at 3.5 percent butterfat could cause the Class III price to be the Class I price mover, even with a very low Class III skim milk price, causing significant month-to-month changes in the Class I skim milk price.

Michigan Milk Producers Association (MMPA) filed comments, stating that using a weighted average to set the Class I mover would severely impact fluid users' ability to attract sufficient quantities of milk when there were large differences between Class III and Class IV prices. MMPA and NMPF supported the continued use of the higher of the Class III or Class IV prices as the Class I mover.

ADCNE's comments to the tentative final decision, fully supported by DFA, expressed opposition to the Family Dairies' proposal for a weighted average Class I price mover or any other proposal that would change the basis for Class I and Class II prices or Class I and Class II differentials. ADCNE argued that there was no evidence presented at the hearing that would support the substantial revenue reductions to farmers throughout the Federal order system which would result from adoption of the weighted average Class I price mover. ADCNE urged that the conclusions of the tentative final decision to continue to use the higher of the advanced Class III and IV prices as the basis for calculating the Class I price mover be affirmed.

The shift in the pooling of milk from the Upper Midwest to higher-valued markets complained of in one Upper Midwest brief has been a long-sought outcome on the part of Upper Midwest producer groups. It is difficult to understand why it is now seen as a manifestation of disorderly marketing.

Those briefs that cited the sufficient level of milk production projected under the RIA for Federal order reform appeared to base their arguments in opposition to use of the ''higher of'' Class I price mover on that projection. It should be noted that Congressional action relative to Class I prices following issuance of the final decision on Federal order reform applied only to the Class I pricing surface. Use of the higher of the Class III and IV prices as the Class I price mover was included in Federal order reform and in the accompanying RIA.

The Upper Midwest Coalition's concern that the tentative final decision adopted the higher of the advanced Class III or Class IV milk prices at 3.5 percent butterfat instead of using the skim value as the new Class I mover, and the NMPF criticism that doing so would result in significant fluctuations in the Class I skim price is now moot because of the return to the use of one butterfat price. Use of the same butterfat price for the Class III and Class IV prices will result in the ''higher of'' the two being determined by the relative skim milk prices. Therefore, the recommended decision concluded that fluctuations in the Class I skim milk price projected under the tentative final decision should be reduced.

The price referred to in the brief expressing preference for the historical use of a weighted average of prices paid for milk used in butter, cheese, and powder was, at first, the Minnesota-Wisconsin price series (the M–W). The M–W, and later the M–W adjusted by a weighted average of current product prices for manufactured products, was specific to the Upper Midwest area and included very little NFDM, since that area manufactures a higher percentage of cheese, relative to NFDM, than the rest of the U.S. The current pricing system is much more representative of national supply and demand for manufactured dairy products than either of the versions of the former Class I mover.

As explained in the final decision on Federal order reform, the higher of the Class III or Class IV prices are used to move the Class I price to assure that fluid plants will be better able to attract milk away from manufacturing uses. Use of the weighted average of the two prices when there is a significant difference between them would provide no assurance that milk would be available as needed for fluid uses and would be more likely to result in Class price inversions (where the Class I price falls below one or more of the manufacturing class prices). In addition, use of a weighted average Class I price mover would increase the occurrence of the blend price falling below the Class III or IV price in markets with low Class I utilization.

Aside from the fact that the proposal to use a weighted average of the Class III and Class IV prices as the Class I mover was not noticed for consideration in this proceeding, it should be rejected on the basis of its lack of merit.

Comments received on the recommended decision from the Kroger Company opposed using the higher of Class III or Class IV for establishing the Class I price for milk. They suggested a review of alternatives that would not lead to higher Class I milk prices. Comments received from MMPA and DFA on the recommended decision, however, continued to express their support for using the ''higher of.'' MMPA was of the opinion that using the higher of the Class III or Class IV prices as the Class I mover establishes farm milk prices that assure priority in providing milk for Class I uses. After consideration of the entire record on this proceeding this final decision adopts the recommended decision provision to continue to use the higher of the advance Class III or Class IV prices for establishing the Class I base price or, as it is sometimes referenced, the Class I mover.

6. Miscellaneous and Conforming Changes

a. *Advanced Class I butterfat price.* Because of the change made between the interim rule and this final decision—to use only one butterfat price for butterfat used in both Class III and Class IV—the conforming change made in the interim final rule to the procedure for calculating the Class I butterfat and hundredweight prices is no longer necessary. The advanced butterfat price used for pricing Class I butterfat will continue to be calculated by the application of the Class III and Class IV price formulas to the advanced NASS prices as announced.

b. *Classification.* The classification of anhydrous milkfat, butteroil, and plastic cream was changed in the tentative final decision from Class III to Class IV as a conforming change required by the

adoption of separate butterfat prices for the two classes. The hearing notice contained no proposal to change the classification of these products, and there was no testimony in the record of the proceeding supporting their re-classification. Therefore, with the elimination of the separate Class III butterfat price, the sole basis for the change in classification also is eliminated.

As noted in the tentative final decision, a difference between the classification of these products, which have a very high butterfat content, and butter should not cause any market dislocation in a pricing plan where butterfat used in Class III products has the same value as butterfat used in Class IV products. One commenter to the tentative final decision opposed changing the classification of these products.

In comments to the recommended decision, MMPA disagreed with returning anhydrous milkfat, butteroil, and plastic cream back to Class III classification because, in their opinion, the products compete with butter and therefore should have a cost base similar to butterfat. Comments received from NDA and WestFarm Foods also indicated opposition to returning these products back to Class III.

As a result of the elimination of the separate Class III butterfat price, this final decision finds that anhydrous milkfat, butteroil, and plastic cream is most appropriately classified as Class III.

In a comment filed in response to the tentative final decision, Hershey Foods urged that the Federal orders adopt a 2-class pricing system. Such a suggestion is entirely outside the scope of the current proceeding.

c. *Distribution of Butterfat Value to Producers.* There were several responses in comments on the tentative final decision to the issue of whether the butterfat price paid to producers should be the result of pooling butterfat prices from the different classes or continue to reflect the value of butterfat in Class III. A witness from Northwest Dairy Association testified that being able to line up the Class III price to plants with the component value calculation for producers is helpful, especially with regard to forward pricing. In a brief filed on behalf of DFA and ADCNE, the co-op groups supported continued use of the Class III butterfat price as the producer butterfat price. According to the brief, changes in direct pricing to the producer are not prudent at this time, and any change between the Class III and Class IV butterfat price should be settled through the producer price differential mechanism in the market order pools. The brief continued that the producer price differential is a blending of various debits and credits in the pooling process and the additional equalizing of any butterfat pricing adjustments through this procedure currently makes the most sense.

In a post-hearing brief, National All-Jersey (NAJ) urged that USDA retain the current practice of using Class III milk component values to price producer component values. NAJ noted that this scenario makes it easier to use accepted hedging tools, such as Class III futures contracts, and helps simplify pricing for producers. NAJ further stated that the current procedure maintains the same producer butterfat price in all Federal orders with multiple component pricing (MCP).

Seventy-nine dairy organizations supported payment to producers on the basis of the milk components priced in Class III, including the Class III butterfat price instead of a pooled butterfat price, plus the producer price differential in a comment filed in response to the tentative final decision. The commenters argue that payment to producers on the basis of Class III components facilitates the use of risk management tools by producers and avoids wider fluctuations in Class I and producer fat, skim, and component values.

One of the principal reasons given in the tentative final decision for changing the pooling provisions of the MCP orders was that potential large differences between the Class III and Class IV/II butterfat prices would be likely to result in significant distortions in the effect of those differences on the producer price differential. The recommended decision also concluded that according to observation made under the tentative final decision, it was possible that pool calculations in some markets would result in a negative producer price differential if the producer butterfat price was not changed to represent a blend of the values of butterfat in the four classes of use.

The reversal to calculate separate Class III and Class IV butterfat prices invalidated the principal reason for pooling butterfat under the MCP orders.

Therefore, in the recommended decision it was determined that producer payments under the MCP orders would continue to be made on the basis of the prices for milk components used in Class III rather than pooling the butterfat values of the four classes and this continues in this final decision. The four orders that do not have component pricing will continue to pool the class use butterfat values and return a weighted average butterfat price to producers. The difference adopted in this final decision may result in some inconsistency between the producer butterfat prices under MCP and non-MCP orders. However, it is expected that such inconsistency will not result in disorderly marketing.

d. *Inclusion of Class I other source butterfat in producer butterfat price computation.* In the process of promulgating the tentative final decision, it was determined that the value associated with the occasional classification of other source milk as Class I should be included in pooling the class butterfat values to determine butterfat prices to producers. For the orders under which butterfat is pooled, this change was made in the interim final rule and should continue so that the value of all of the butterfat in the pool will be reflected in the producer butterfat price.

In the component pricing orders, the changes made in the interim final rule to include the Class I other source butterfat value in the butterfat pool should be reversed. Although the District Court's injunction had the effect of reversing these changes and the Federal order reform language has continued in effect, the order language in the Code of Federal Regulations reflects the provisions adopted in the interim final rule. The proposed order language amendments in the recommended decision and in this final decision reflect the language that is currently in effect in the MCP orders, reversing the changes that were made to include Class I other source butterfat in the butterfat pool.

7. Issue of Reopening of the Hearing, or Issuance of a Final Decision

The statute requiring that this proceeding be held to reconsider the Class III and Class IV pricing formulas also required that a final decision be published by December 1, 2000, with any amendments to the orders to be effective January 1, 2001.

The hearing record reflected unanimity among those addressing the issue that the industry should be afforded the opportunity to comment on a decision before its content results in a final rule. Consequently, a tentative final decision was issued affording interested persons an opportunity to comment even though the amendments adopted in the decision were to become effective January 1, 2001. An injunction was issued on January 31, 2001, to prevent some of the provisions adopted in the interim final rule from becoming effective.

The recommended decision noted that several interested parties commented in opposition to reopening the proceeding with regard to the Class III butterfat and protein price formulas. The only commenter that favored revisiting any of the issues involved stated that some way of reflecting increased energy costs in make allowances should be explored. The commenter seemed to refer to conducting an entirely new proceeding rather than reopening the current proceeding. At that time it was decided that reopening the proceeding would not be considered due to the lack of interest in pursuing development of Class III component prices that are more closely correlated with cheese prices.

Two commenters on the tentative final decision urged that USDA act quickly to conclude the proceeding. The most rapid conclusion to the proceeding was through issuance of a tentative final decision, followed by a determination of producer approval and issuance of a final rule for the orders approved. However, because significant changes were made to the tentative final decision by the District Court order and by the recommended decision, interested parties were given an additional opportunity to comment on those changes. Therefore, USDA issued the recommended decision and provided for a 30-day comment period. Additional time to file comments was requested by a number of proprietary and cooperative handlers in order to allow for more thorough analysis of the impacts of the technical changes in the pricing formulas.

Several comments on the recommended decision were received urging prompt implementation of the amendments recommended. The National Milk Producers Federation (NMPF) supported the recommended decision's amendments in their entirety. They stated that, ''In the absence of a clear-cut industry consensus for change, and without clear evidence of a market failure caused by federal order provisions, we believe it would be detrimental to the industry to reopen these proceedings in the near future.''

Several comments from both processors and producers on the recommended decision suggested reopening the hearing. A few comments noted the outdated nature of some of the data, while other comments indicated a need to further study the impacts that new price formulas would have on cheese plants that are small businesses. The proceeding is not being reopened and this final decision is being issued.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions, and comments on the tentative final decision and the recommended decision were filed on behalf of certain interested parties. These briefs, the proposed findings and conclusions, the comments, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this final decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when each of the aforesaid orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to each of the aforesaid tentative marketing agreements and orders;

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions adopted in this final decision, all exceptions received were considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this final decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this final decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the Northeast and other marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

Referendum Order to Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that referenda be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the orders as amended and as hereby proposed to be amended, regulating the handling of milk in the Northeast and Mideast marketing areas are approved or favored by producers, as defined under the terms each of the orders, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

The representative period for the conduct of such referenda is hereby determined to be May 2002.

The agents of the Secretary to conduct such referenda are hereby designated to be the respective market administrators of the aforesaid orders.

Determination of Producer Approval and Representative Period for All Other Orders

May 2002 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and as hereby proposed to be amended, regulating the handling of milk in the Appalachian, Florida, Southeast, Upper Midwest, Central, Pacific Northwest, Southwest, Arizona Las-Vegas, and Western marketing areas is approved or favored by producers, as defined under

the terms of each of these orders as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

List of Subjects in 7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, 1131, and 1135.

Milk marketing orders.

Dated: October 25, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

Order Amending the Orders Regulating the Handling of Milk in the Northeast and Other Marketing Areas

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and are applicable only to persons in the respective classes of industrial or commercial activity specified in marketing agreements upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast and other marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreements and orders amending the orders contained in the recommended decision issued by the Associate Administrator, Agricultural Marketing Service, on October 19, 2001, and published in the **Federal Register** on October 25, 2001 (66 FR 54064), as modified herein, shall be and are the terms and provisions of this order, amending the orders, and are set forth in full herein.

1. The authority citation for 7 CFR parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, 1131, and 1135 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

1. Section 1000.40 is amended by adding paragraph (c)(1)(ii) and revising paragraph (d)(1)(i) to read as follows:

§ 1000.40 Classes of Utilization.

* * * * *

(c) * * *

(1) * * *

(ii) Plastic cream, anhydrous milkfat, and butteroil; and

* * * * *

(d) * * *

(1) * * *

(i) Butter; and

* * * * *

2. Section 1000.50 is amended by revising the last sentence of the introductory text; by revising paragraphs (a), (b), (c), (g), (h), (j), (l), (m), (n), (o), (p)(1), and (q)(3); and by removing paragraph (q)(4) to read as follows:

§ 1000.50 Class prices, component prices, and advanced pricing factors.

* * * The price described in paragraph (d) of this section shall be derived from the Class II skim milk price announced on or before the 23rd day of the month preceding the month to which it applies and the butterfat price announced on or before the 5th day of the month following the month to which it applies.

(a) *Class I price.* The Class I price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class I skim milk price plus 3.5 times the Class I butterfat price.

(b) *Class I skim milk price.* The Class I skim milk price per hundredweight shall be the adjusted Class I differential specified in § 1000.52 plus the higher of the advanced pricing factors computed in paragraph (q)(1) or (2) of this section.

(c) *Class I butterfat price.* The Class I butterfat price per pound shall be the adjusted Class I differential specified in § 1000.52 divided by 100, plus the advanced butterfat price computed in paragraph (q)(3) of this section.

* * * * *

(g) *Class II butterfat price.* The Class II butterfat price per pound shall be the butterfat price plus $0.007.

(h) *Class III price.* The Class III price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class III skim milk price plus 3.5 times the butterfat price.

* * * * *

(j) *Class IV price.* The Class IV price per hundredweight, rounded to the nearest cent, shall be 0.965 times the Class IV skim milk price plus 3.5 times the butterfat price.

* * * * *

(l) *Butterfat price.* The butterfat price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS AA Butter survey price reported by the Department for the month less 11.5 cents, with the result multiplied by 1.20.

(m) *Nonfat solids price.* The nonfat solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS nonfat dry milk survey price reported by the Department for the month less 14 cents and multiplying the result by 0.99.

(n) *Protein price.* The protein price per pound, rounded to the nearest one-hundredth cent, shall be computed as follows:

(1) Compute a weighted average of the amounts described in paragraphs (n)(1)(i) and (ii) of this section:

(i) The U.S. average NASS survey price for 40-lb. block cheese reported by the Department for the month; and

(ii) The U.S. average NASS survey price for 500-pound barrel cheddar cheese (38 percent moisture) reported by the Department for the month plus 3 cents;

(2) Subtract 16.5 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.383;

(3) Add to the amount computed pursuant to paragraph (n)(2) of this section an amount computed as follows:

(i) Subtract 16.5 cents from the price computed pursuant to paragraph (n)(1) of this section and multiply the result by 1.572; and

(ii) Subtract 0.9 times the butterfat price computed pursuant to paragraph (l) of this section from the amount computed pursuant to paragraph (n)(3)(i) of this section; and

(iii) Multiply the amount computed pursuant to paragraph (n)(3)(ii) of this section by 1.17.

(o) *Other solids price.* The other solids price per pound, rounded to the nearest one-hundredth cent, shall be the U.S. average NASS dry whey survey price reported by the Department for the month minus 15.9 cents, with the result multiplied by 1.03.

(p) * * *

(1) Multiply 0.0005 by the weighted average price computed pursuant to paragraph (n)(1) of this section and round to the 5th decimal place;

* * * * *

(q) * * *

(3) An advanced butterfat price per pound, rounded to the nearest one-hundredth cent, shall be calculated by computing a weighted average of the 2 most recent U.S. average NASS AA Butter survey prices announced before the 24th day of the month, subtracting 11.5 cents from this average, and multiplying the result by 1.20.

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

1. Section 1001.60 is amended by revising paragraphs (c)(3), (d)(2), and (h) to read as follows:

§ 1001.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(h) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1001.61 is revised to read as follows:

§ 1001.61 Computation of producer price differential.

For each month, the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1001.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions in this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1001.60 for all handlers required to file reports prescribed in § 1001.30;

(b) Subtract the total of the values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1001.60 by the protein price, other solids price, and the butterfat price, respectively;

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1001.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1001.60(h); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result, rounded to the nearest cent, shall be known as the producer price differential for the month.

3. Section 1001.62 is amended by revising paragraphs (e) and (g) to read as follows:

§ 1001.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;

* * * * *

(g) The statistical uniform price for milk containing 3.5 percent butterfat computed by combining the Class III price and the producer price differential.

4. Section 1001.71 is amended by revising paragraphs (b)(2) and (b)(3) to read as follows:

§ 1001.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively; and

(3) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1001.60(h) by the producer price differential as adjusted pursuant to § 1001.75 for the location of the plant from which received.

5. Section 1001.73 is amended by revising paragraphs (a)(2)(ii) and (b)(3)(vi) to read as follows:

§ 1001.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) Multiply the pounds of butterfat received by the butterfat price for the month;

* * * * *

(b) * * *

(3) * * *

(vi) Multiply the pounds of butterfat in Class III and Class IV milk by the butterfat price for the month;

* * * * *

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1030.60 is amended by revising paragraphs (c)(3), (d)(2), and (i) to read as follows:

§ 1030.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(i) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1030.61 is revised to read as follows:

§ 1030.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1030.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1030.60 for all handlers required to file reports prescribed in § 1030.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1030.60 by the protein price, other solids price, and the butterfat price, respectively, and the total value of the somatic cell adjustment pursuant to § 1030.30(a)(1) and (c)(1);

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1030.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1030.60(i); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1030.62 is amended by revising paragraphs (e) and (h) to read as follows:

§ 1030.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;

* * * * *

(h) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer butterfat price differential.

4. Section 1030.71 is amended by revising paragraphs (b)(2) and (b)(4) to read as follows:

§ 1030.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively;

* * * * *

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1030.60(i) by the producer price differential as adjusted pursuant to § 1030.75 for the location of the plant from which received.

5. Section 1030.73 is amended by revising paragraphs (a)(2)(ii), (c)(2)(v), and (c)(3)(ii) to read as follows:

§ 1030.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;

* * * * *

(c) * * *

(2) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;

* * * * *

(3) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;

* * * * *

PART 1032—MILK IN THE CENTRAL MARKETING AREA

1. Section 1032.60 is amended by revising paragraphs (c)(3), (d)(2), and (i) to read as follows:

§ 1032.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(i) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1032.61 is revised to read as follows:

§ 1032.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1032.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations.

Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1032.60 for all handlers required to file reports prescribed in § 1032.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1032.60 by the protein price, the other solids price, and the butterfat price, respectively, and the total value of the somatic cell adjustment pursuant to § 1032.30(a)(1) and (c)(1);

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1032.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1032.60(i); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1032.62 is amended by revising paragraphs (e) and (h) to read as follows:

§ 1032.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;

* * * * *

(h) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

4. Section 1032.71 is amended by revising paragraphs (b)(2) and (b)(4) to read as follows:

§ 1032.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively;

* * * * *

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1032.60(i) by the producer price differential as adjusted pursuant to § 1032.75 for the location of the plant from which received.

5. Section 1032.73 is amended by revising paragraphs (a)(2)(ii), (c)(2)(v), and (c)(3)(ii) to read as follows:

§ 1032.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;

* * * * *

(c) * * *

(2) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;

* * * * *

(3) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;

* * * * *

PART 1033—MILK IN THE MIDEAST MARKETING AREA

1. Section 1033.60 is amended by revising paragraphs (c)(3), (d)(2), and (i) to read as follows:

§ 1033.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(i) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1033.61 is revised to read as follows:

§ 1033.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1033.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1033.60 for all handlers required to file reports prescribed in § 1033.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1033.60 by the protein price, the other solids price, and the butterfat price, respectively, and the total value of the somatic cell adjustment pursuant to § 1033.30(a)(1) and (c)(1);

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1033.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1033.60(i); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1033.62 is amended by revising paragraphs (e) and (h) to read as follows:

§ 1033.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;
* * * * *

(h) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

4. Section 1033.71 is amended by revising paragraphs (b)(2) and (b)(4) to read as follows:

§ 1033.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices, respectively;
* * * * *

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1033.60(i) by the producer price differential as adjusted pursuant to § 1033.75 for the location of the plant from which received.

5. Section 1033.73 is amended by revising paragraphs (a)(2)(ii) and (b)(3)(v) to read as follows:

§ 1033.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;
* * * * *

(b) * * *

(3) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;
* * * * *

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

1. Section 1124.60 is amended by revising paragraphs (c)(3), (d)(2), and (h) to read as follows:

§ 1124.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.
* * * * *

(h) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.
* * * * *

2. Section 1124.61 is revised to read as follows:

§ 1124.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1124.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1124.60 for all handlers required to file reports prescribed in § 1124.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1124.60 by the protein price, the other solids price, and the butterfat price, respectively;

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1124.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1124.60(h); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1124.62 is amended by revising paragraphs (e) and (g) to read as follows:

§ 1124.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;
* * * * *

(g) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

4. Section 1124.71 is amended by revising paragraphs (b)(2) and (b)(3) to read as follows:

§ 1124.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively; and

(3) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1124.60(h) by the producer price differential as adjusted pursuant to § 1124.75 for the location of the plant from which received.

5. Section 1124.73 is amended by revising paragraphs (a)(2)(ii), (c)(2)(v), and (c)(3)(ii) to read as follows:

§ 1124.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;
* * * * *

(c) * * *

(2) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;
* * * * *

(3) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;
* * * * *

PART 1126—MILK IN THE SOUTHWEST MARKETING AREA

1. Section 1126.60 is amended by revising paragraphs (c)(3), (d)(2), and (i) to read as follows:

§ 1126.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(i) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1126.61 is revised to read as follows:

§ 1126.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1126.71 for the preceding month shall not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1126.60 for all handlers required to file reports prescribed in § 1126.30;

(b) Subtract the total of the values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1126.60 by the protein price, other solids price, and the butterfat price, respectively, and the total value of the somatic cell adjustment pursuant to § 1126.30(a)(1) and (c)(1);

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1126.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1126.60(i); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1126.62 is amended by revising paragraphs (e) and (h) to read as follows:

§ 1126.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;

* * * * *

(h) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

4. Section 1126.71 is amended by revising paragraphs (b)(2) and (b)(4) to read as follows:

§ 1126.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively;

* * * * *

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1126.60(i) by the producer price differential as adjusted pursuant to § 1126.75 for the location of the plant from which received.

5. Section 1126.73 is amended by revising paragraphs (a)(2)(ii) and (b)(3)(v) to read as follows:

§ 1126.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) Multiply the pounds of butterfat received times the butterfat price for the month;

* * * * *

(b) * * *

(3) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;

* * * * *

PART 1135—MILK IN THE WESTERN MARKETING AREA

1. Section 1135.60 is amended by revising paragraphs (c)(3), (d)(2) and (h) to read as follows:

§ 1135.60 Handler's value of milk.

* * * * *

(c) * * *

(3) Add an amount obtained by multiplying the pounds of butterfat in Class III by the butterfat price.

(d) * * *

(2) Add an amount obtained by multiplying the pounds of butterfat in Class IV by the butterfat price.

* * * * *

(h) Multiply the difference between the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received and the Class III price by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1000.43(d) and § 1000.44(a)(3)(i) and the corresponding step of § 1000.44(b) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1000.44(a)(8) and the corresponding step of § 1000.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order.

* * * * *

2. Section 1135.61 is revised to read as follows:

§ 1135.61 Computation of producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight. The report of any handler who has not made payments required pursuant to § 1135.71 for the preceding month shall

not be included in the computation of the producer price differential, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations. Subject to the conditions of this paragraph, the market administrator shall compute the producer price differential in the following manner:

(a) Combine into one total the values computed pursuant to § 1135.60 for all handlers required to file reports prescribed in § 1135.30;

(b) Subtract the total values obtained by multiplying each handler's total pounds of protein, other solids, and butterfat contained in the milk for which an obligation was computed pursuant to § 1135.60 by the protein price, the other solids price, and the butterfat price, respectively;

(c) Add an amount equal to the minus location adjustments and subtract an amount equal to the plus location adjustments computed pursuant to § 1135.75;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1135.60(h); and

(f) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (e) of this section. The result shall be known as the producer price differential for the month.

3. Section 1135.62 is amended by revising paragraphs (e) and (g) to read as follows:

§ 1135.62 Announcement of producer prices.

* * * * *

(e) The butterfat price;

* * * * *

(g) The statistical uniform price for milk containing 3.5 percent butterfat computed by combining the Class III price and the producer price differential.

* * * * *

4. Section 1135.71 is amended by revising paragraph (b)(2) and removing and reserving paragraph (b)(3) to read as follows:

§ 1135.71 Payments to the producer-settlement fund.

* * * * *

(b) * * *

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively; and

(3) [Reserved]

* * * * *

5. Section 1135.73 is amended by revising paragraphs (a)(2)(ii) and (b)(3)(v) to read as follows:

§ 1135.73 Payments to producers and to cooperative associations.

(a) * * *

(2) * * *

(ii) The pounds of butterfat received times the butterfat price for the month;

* * * * *

(b) * * *

(3) * * *

(v) The pounds of butterfat in Class III and Class IV milk times the butterfat price;

* * * * *

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ _____[1] to _____, all inclusive, of the order regulating the handling of milk in the (_____ Name of order_____) marketing area (7 CFR PART_____[2]) which is annexed hereto; and

II. The following provisions: § _____[3] Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of_____[4], hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ _____[3] Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest

[FR Doc. 02–27570 Filed 11–6–02; 8:45 am]

BILLING CODE 3410–02–P

[1] First and last sections of order.

[2] Appropriate Part number.

[3] Next consecutive section number.

[4] Appropriate representative period for the order.

Federal Register

Thursday,
November 7, 2002

Part III

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910

Exit Routes, Emergency Action Plans, and Fire Prevention Plans; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

RIN 1218–AB82

Exit Routes, Emergency Action Plans, and Fire Prevention Plans

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

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is revising its standards for means of egress. The purpose of this revision is to rewrite the existing requirements in clearer language so they will be easier to understand by employers, employees, and others who use them.

The revisions reorganize the text, remove inconsistencies among sections, and eliminate duplicative requirements. The rules are performance-oriented to the extent possible, and more concise than the original, with fewer subparagraphs, and fewer cross-references to other OSHA standards. Additionally, a table of contents has been added that is intended to make the standards easier to use.

Also, OSHA is changing the name of the subpart from ''Means of Egress'' to ''Exit Routes, Emergency Action Plans, and Fire Prevention Plans'' to better describe the contents.

Finally, OSHA has evaluated the National Fire Protection Association's Standard 101, Life Safety Code, 2000 Edition (NFPA 101–2000), and has concluded that the standard provides comparable safety to the Exit Routes Standard. Therefore, employers who wish to comply with the NFPA 101–2000 instead of the OSHA standards for Exit Routes may do so.

DATES: The final rule becomes effective December 9, 2002.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates the Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT: OSHA, Ms. Bonnie Friedman, Director, Office of Public Affairs, N–3647, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999. For additional copies of this **Federal Register** document, contact: OSHA, Office of Publications, U.S. Department of Labor, Room N–3103, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1888.

For electronic copies of this **Federal Register** document, as well as news releases, fact sheets, and other relevant documents, visit OSHA's homepage at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION: References to comments and testimony in the rulemaking record (Docket S–052) are found throughout the text of the preamble. In the preamble comments are identified by an assigned exhibit number as follows: ''Ex. 5–1'' means Exhibit 5–1 in Docket S–052. For quoted material in the preamble, the page number where the quote can be located is included if other than page one. The transcript of the public hearing is cited by the page number as follows: Tr. 37. A list of the exhibits, copies of the exhibits, and transcripts are available in the OSHA Docket Office.

I. Background

In 1971 and 1972, OSHA adopted hundreds of national consensus and established Federal standards under section 6(a) of the Occupational Safety and Health Act of 1970. Section 6(a) allowed the Agency to adopt these standards for a limited period of time without going through traditional rulemaking. Many of these ''start-up standards'' have been criticized for being overly wordy, difficult to understand, repetitive and internally inconsistent.

On September 10, 1996, OSHA published a proposed rule in the **Federal Register** (61 FR 47712) proposing to revise subpart E of part 1910. OSHA proposed to rewrite the existing requirements of subpart E in plain language so that the requirements would be easier to understand by employers, employees, and others who use them. The proposal did not intend to change the regulatory obligations of employers or the safety and health protection provided to employees by the original standard.

OSHA proposed two versions of the revision of subpart E. The first version was organized in the traditional regulatory format characteristic of most OSHA standards. The second version was in a question and answer format. OSHA invited interested parties to comment on the content and effectiveness of the proposed changes and to indicate which version they preferred. Both versions left unchanged the regulatory obligations placed on employers and the safety and health protection provided to employees. Based on the majority of comments (*e.g.*, Exs. 5–13, 17, 24–26, 45–47, 58–60) OSHA has decided to use its traditional regulatory text format for this final rule. OSHA believes that the revised subpart E is more performance-oriented and more compliance options will be available to employers.

In the proposal, OSHA stated what it expected to achieve by revising subpart E: (1) To maintain the safety and health protection provided to employees without increasing the regulatory burden on employers; (2) to create a regulation that is easily understood and; (3) to state employers' obligations in performance-oriented language to the extent possible.

The proposal attempted to simplify, rather than to substantively revise, OSHA's means of egress standards. In finalizing this proposal, the Agency has been careful to ensure that the protections afforded employees were not weakened. Employers who are in compliance with the original subpart E will continue to be in compliance with the revised subpart E that is being promulgated in this rule.

In developing the proposal, OSHA reviewed relevant OSHA decisions of the Federal courts, the Occupational Safety and Health Review Commission, and Agency letters of interpretation (Ex. 2) to determine how each provision of subpart E has been interpreted. Also, OSHA reviewed comparable State regulations, training materials and current consensus standards including the National Fire Protection Association's Life Safety Code, NFPA 101 (at that time the 1994 Edition). This review enabled OSHA to reorganize subpart E, eliminate duplicative provisions, and have confidence that the revisions did not diminish the safety and health protection afforded by existing rules.

OSHA discovered during the review process that some provisions of subpart E were outdated and not consistent with contemporary fire safety options in then current NFPA 101, Life Safety Code, 1994 Edition. Where it was possible to expand permissible employer compliance options without lessening employee safety, the proposal included these expanded options. For example, OSHA incorporated NFPA 101, 1994 Edition, the Life Safety Code's option to exit to a refuge area rather than to the outside (proposed paragraph 1910.36(f)(3)). The proposal also permitted the use of self-luminous and electroluminescent exit signs (proposed paragraph 1910.37(c)(6)). (*E.g.*, Exs. 5–18, 40, 45, 54.) The proposal enabled employers to avail themselves of these

newer options or continue with current compliance methods. In this way OSHA increased compliance flexibility without reducing safety.

OSHA did not substitute performance-oriented language for current language where doing so would either eliminate a requirement that protects employee safety and health, or expand an employer's compliance obligation. For example, the proposal continued the existing requirement that a means of egress must be at least 28 inches wide (proposed paragraph 1910.37(j)). The Agency chose not to substitute performance-oriented criteria for this provision (such as ''means of egress be of adequate width to support building occupants'') because this change would eliminate the existing minimum width specification and might not provide adequate protection to employees leaving the workplace in an emergency. For this reason, OSHA decided not to revise the minimum clearance requirement.

OSHA noted in the proposal that for some employers, reliance on performance-oriented standards might create confusion as to the specific precautions necessary in a variety of situations. In the past, OSHA has used NFPA 101 as an aid in interpreting subpart E. OSHA intends to continue to rely on NFPA 101 as guidance in implementing performance-oriented provisions of revised subpart E.

In addition to organizing the requirements of the revised subpart E in a logical and understandable manner, OSHA has organized the requirements around three aspects of exit routes: (1) Design and construction requirements; (2) maintenance, safeguards, and operational requirements; and (3) requirements for warning employees of the need to escape. Reorganizing subpart E in this manner has enabled OSHA to eliminate many duplicative provisions. For example, in existing subpart E, both paragraph 1910.36(b)(8) and paragraph 1910.37(e) contain the design requirements that where workplaces are required to have two means of egress, these means of egress must be located as far away as practical (remote) from one another.

Other significant revisions to subpart E include: Removal of obligations that are not related to employee protection but pertain to the protection of the general public, and the deletion of any recommended as opposed to required actions (*i.e.*, provisions that use ''should'' or ''may'').

II. Regulatory Format

As noted above, OSHA proposed two versions of subpart E; a traditional regulatory text version and a question and answer version. The traditional regulatory text version was preceded by a descriptive section heading that told the reader what information could be found in that section. The question and answer version was written in a form by which an employer might ask a question about the rule, and this question was then followed by an answer that told the employer about the requirement.

Other efforts to make subpart E more user-friendly included: removal of unused terms and ordinary terms from the definitions; elimination of cross-references to other standards; removal of overly technical terms in favor of more common words; use of the active voice; and, the use of positive as opposed to negative sentences.

The Agency invited public comment and requests for a hearing on the proposed revision to subpart E. An informal public hearing was requested by the National Fire Protection Association (Ex. 5–18) and Hallmark Cards (Ex. 5–51).

On March 3, 1997, OSHA published a notice in the **Federal Register** (62 FR 9402) announcing an informal public hearing and a reopening of the written comment period. Written comments on the proposed standard were to be postmarked by April 19, 1997. The hearing was held in Washington, DC on April 29–30, 1997.

In the hearing notice, OSHA invited comment on ten issues that will be discussed below in more detail. In summary, OSHA asked: (1) How OSHA should use the Life Safety Code in the final rule; (2) how or if OSHA should use model building codes; (3) whether the use of performance language creates new enforcement problems; (4) how OSHA should address the issues of exit capacity and the number of required exits; (5) whether or not the exit sign provisions were too general; (6) whether or not the revised requirements for exit illumination were too general; (7) whether or not there were still provisions or terms in the proposed revision that were too technical or difficult to understand; (8) whether OSHA achieved in the proposed revision its goal of not changing employers obligations; (9) whether any of the proposed provisions provided greater protection than in the original subpart E; and (10) whether any of the requirements presented technological feasibility problems for affected employers.

The subpart E rulemaking record contains 23 exhibits, 69 comments, 170 pages of testimony and four post-hearing comments.

III. Summary and Explanation of the Final Rule

This section contains an analysis of the record evidence and policy decisions pertaining to the various provisions of revised subpart E.

As stated previously, OSHA's goals in revising subpart E were to maintain the safety and health protection provided to employees in subpart E without increasing the regulatory burden on employers, create a regulation that is easily understood, and, to the extent possible, express employers' obligations in performance-oriented language.

The majority of commenters supported OSHA's use of plain language. Owens Manufacturing, Inc. (Ex. 5–1) stated they were ''in favor of this change as it allows the production people in our manufacturing area to understand the scope and meaning of this regulation much easier.'' United Refining Company (Ex. 5–2) remarked ''For those individuals who occasionally reference a standard the Plain English version will be beneficial.'' The commenter from Medical Environment, Inc. (Ex. 5–7) stated ''I commend your actions in correcting the highly technical language into wording that is understandable to the average person. I have read your proposed changes, and find them to be significantly improved.'' The Institute for Interconnecting and Packaging Electronic Circuits (IPC) (Ex. 5–25) observed that:

> * * * Because IPC members are predominantly small companies, they have limited resources to track down, read, understand, and comply with the substantial volume of federal, state, and local regulations. In many firms, the company president, plant manager, or production supervisor is responsible for facility-wide health and safety compliance in addition to running production and perhaps running the company.
>
> Given IPC members' commitment to advancing employee health and safety, IPC applauds OSHA's proposed Means of Egress rule. The proposed changes are designed to make the standard more understandable and, therefore promote industry compliance. ''Translating'' OSHA's current regulations into ''plain English'' is an outstanding activity that should be aggressively applied to ALL federal regulations—not just OSHA regulations, and IPC supports OSHA's actions to effect such change.

The International Brotherhood of Teamsters (Ex. 5–31) commended OSHA for undertaking the revision effort and stated that the International:

> [I]s pleased to see the Occupational Safety and Health Administration attempt to develop plain English standards. This International Union feels that this approach to safety and health standards will enable our members and other workers across the

country to better understand their OSHA rights and their employer's obligations.

The National Institute for Occupational Safety and Health (NIOSH, Ex. 5–42) also supported the effort observing that ''By revising the Means of Egress rule in easy to understand terms as part of a shorter, performance-oriented standard, the standard will be easier to use and provide more compliance options for employers.''

Schirmer Engineering Corporation (Ex. 5–57) stated:

> Review of the revisions introduced in the proposed rule indicates an effort to provide language which is more condensed and clear, with the removal of verbose wording. The sections that were deleted from the original version did not greatly affect the overall life safety concept as it pertains to egress from a building. In addition, the reorganization helps to clarify some of the requirements of the code which, in turn, facilitates overall compliance.

(*See also* Exs. 5–5, 12, 13, 15–17, 20–24, 26, 27, 29, 30, 34, 35, 37, 39, 43, 45, 47, 51, 52, 54–56, 58, 59, 60, 61, 70.)

On the other hand, some commenters did object to the revision of subpart E on the grounds either that it was not productive for OSHA to re-write these standards, or that the revised language actually changed the requirements. For example, James R. Hutton, a fire protection engineer (Ex. 5–9), believed the ''proposed revisions will complicate and cause more difficulties, not less, for smaller businesses who do not have the resources to undergo the time or expense required to develop ''custom solutions'' to ''plain English'' requirements.'' OSHA disagrees. The revised subpart E only makes compliance requirements clearer and it refers employers and employees to NFPA 101 for added details, when necessary.

It was also suggested by some commenters that instead of finalizing the proposed revision, OSHA should adopt NFPA 101, the Life Safety Code, or that OSHA should rely on building codes, instead of revising subpart E. (*See e.g.*, Exs. 5–10, 15, 18, 19, 26, 41, 46, 48, 61, 68; Tr. 14, 23; Ex. 10.)

The National Fire Protection Association (NFPA, Ex. 5–18) remarked:

> NFPA agrees with several of the goals as contained in the OSHA/NPRM but find serious flaws in the methodology being proposed to attain these goals. Specifically, NFPA applauds OSHA's goal ''to maintain the safety and health protection provided to employees by subpart E * * *'' and ''to create a regulation that is easily understood.'' We also applaud OSHA's desire ''to allow employers the flexibility of relying on more contemporary compliance approaches.''
>
> However, we do not believe these goals can be achieved by either ''plain English'' alternative taken together or separately as being proposed by OSHA in the NPRM. Specifically, NFPA recommends OSHA abandon its attempt to rewrite a 25-year old standard as represented in the first alternative of the NPRM * * *.
>
> Further, NFPA asserted that OSHA's rewrite would make enforcement more difficult especially when performance-oriented language is substituted for specifications; that the proposal drops all references to the NFPA Life Safety Code even though the proposal indicated OSHA would continue to rely on that Code; and, that the proposed rewrite did not specifically allow for contemporary compliance options as contemplated by OSHA and as set forth in the current edition of NFPA 101 (1994). NFPA recommended that:
>
> [T]he first alternative be abandoned [traditional regulatory text] and that OSHA instead adopt by reference the 1994 edition of NFPA 101 * * * Further, NFPA believes the adoption of the 1994 edition of NFPA 101, together with a supplemental Q&A (question and answer) format as proposed in the second NPRM alternative, would be the best approach to achieve the desired goals as stated by OSHA in the NPRM.

At the time of the proposal, the latest version of NFPA 101 was the 1994 Edition. NFPA subsequently issued a 1997 edition and then a 2000 edition. OSHA has reviewed the NFPA 101–2000 edition carefully and found that compliance with its provisions would protect employees as well as the parallel provisions of subpart E. Adopting NFPA 101 as an OSHA standard would require OSHA to conduct a full rulemaking under section 6(b) of the OSH Act, scrutinizing each provision, accounting for each cost impact on employers, justifying why the new standard is reasonably necessary and appropriate, and showing that the adoption would reduce significant risk to employees. This would be inconsistent with the goal of this project which was to clarify employer obligations without increasing compliance burdens. However, OSHA has been convinced by commenters that consideration should be given to compliance with NFPA 101.

The 2000 Life Safety Code goes far beyond the requirements of OSHA's standard, both in details of compliance and flexibility for unique workplace conditions. If an employer complies with NFPA 101–2000, OSHA will deem such compliance to be compliance with the OSHA standard. OSHA believes that allowing employers to comply with NFPA 101 as an alternative to the revised Exit Routes standard will provide greater flexibility to employers who want to go beyond OSHA's basic provisions. Additionally, the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 3701 (1996)) directs Federal agencies to use voluntary consensus standards to the extent practicable. Under section 6(b)(8) of the OSH Act, the Agency must consider using national consensus standards as the basis for its safety and health standards wherever possible. By allowing employers to comply with the exit route provisions of NFPA 101–2000, OSHA has struck a balance that is consistent with its goals for this rulemaking as well as the spirit of the National Technology Transfer and Advancement Act.

OSHA has evaluated NFPA 101–2000 and has concluded that an employer who complies with the provisions of that code for means of egress will provide employees with safety that is comparable with compliance with OSHA's revised Exit Routes standard. OSHA is adding a new § 1910.35 to the final rule to recognize NFPA 101–2000 in this regard.

The South Carolina Department of Labor, Licensing & Regulation (Ex. 5–49, p.2) remarked that ''It is a shame to spend this amount of time to adjust the wording when the whole standard is in need of repair.''

Others criticized the proposal, feeling that it did not achieve its stated goal. For example, the American Health Care Association (Ex. 53) indicated that by ''Developing new terminology for traditional means of egress requirements, we firmly believe, is a step backward and counter to OSHA's stated goal of creating a regulation that is easily understood.'' The United Steelworkers of America (Ex. 5–69) objected ''to the very general performance language of this proposal. The language gives little, if any direction to employers and employees on how to comply with this proposed standard * * * Further, the proposed standard is somewhat confusing.'' (*See also* Exs. 5–33, 38, 40, 62, 66–68, 71).

OSHA does not agree with commenters who have concluded that OSHA has failed to meet its goals of (1) maintaining the safety and health protection provided to employees by subpart E without increasing the regulatory burden; (2) creating a regulation that is easily understood; and, (3) stating employers' obligations in performance-oriented language to the extent possible. Many commenters suggested improvements and language changes. Unfortunately in some cases the recommendations would have made substantive changes in the requirements of subpart E (*e.g.*, Exs. 5–4, 11, 18, 21,

24, 40, 47, 49, 63). OSHA has considered and incorporated many comments that improve the clarity of the text, without making substantive changes in the obligations and protections offered by existing subpart E. The final rule as revised and reorganized, incorporates many commenter suggestions. OSHA strongly believes the final rule fulfills its goal of providing employers and employees with much clearer standards in subpart E. In addition, as already discussed, employers may take advantage of a more recent version of NFPA 101 under § 1910.35 which recognizes compliance with the 2000 Edition of the Life Safety Code.

In response to comments, OSHA has changed the name of subpart E to better reflect the contents of the final rule. OSHA proposed to call the subpart ''Exit Routes,'' but several commenters (Exs. 5–24, 40, 45) noted that the subpart contains provisions not only for exit routes but also for emergency action plans, and fire prevention plans. OSHA agrees with these commenters and has therefore changed the name of subpart E to reflect its coverage of Exit Routes, Emergency Action Plans, and Fire Prevention Plans.

In the preamble to the proposal OSHA stated that it included a table of contents to make it easier to access the provisions. The table was inadvertently left out of the proposed regulatory language in the **Federal Register** notice. OSHA believes that a table of contents will be helpful to employers and employees in locating provisions in the subpart and therefore, is including a table of contents in § 1910.33.

As indicated in the Regulatory Format section above, the proposed rule offered two versions of a revised subpart E. The first version was written in the traditional format of OSHA standards. The second version was written in a question and answer format.

Commenters who addressed this issue indicated a preference for the traditional regulatory format as opposed to the question and answer format. For example, Medical Environment, Inc. (Ex. 5–7) supported the traditional ''regulatory format, because this is what everyone is used to seeing. The question/answer format seemed too ''loose'' to find an answer to a specific question.'' Similarly, the International Dairy Foods Association (IDFA) (Ex. 5–22) believed ''that the ''traditional'' plain English version is the preferred version. In contrast, we find that the question and answer format quickly becomes condescending, and to a degree, annoying.''

The American Petroleum Institute (API) (Ex. 5–29, p.2) supported the traditional format because of perceived pitfalls in the question and answer format.

> While the Q/A version has some appeal in terms of better first-impression, API believes that the traditional format makes it easier to understand the rule in total, and to locate specific requirements.
>
> Another API concern is that of confusion. The Q/A format could be associated with OSHA's Field Directives, in which questions and answers are sometimes used to explain requirements. The questions and answers in Field Directives, however, do not hold the same weight as regulatory language. As a result, confusion could be caused by the use of questions and answers in both the OSHA standards and in Field Directives.
>
> API is also concerned that the potential for inadvertent change of requirements is greater during a Q/A conversion. This is because more structural revision and reorganization is required to accommodate the Q/A approach, as demonstrated by comparison of the two approaches in this pilot conversion. It follows that the Q/A approach would face even greater conversion problems for other, more complicated safety and health regulations.

In addition, the International Brotherhood of Teamsters recommended that OSHA not adopt the question and answer format because the union believed that the format is neither well organized nor easy to read. (*See also* Exs. 5–2, 3, 12, 13, 14, 15, 16, 17, 20, 21, 24, 25, 26, 27, 30, 31, 34, 36, 37, 40, 41, 43, 45, 46, 47, 49.)

Several commenters stated that either version would be acceptable (Exs. 5–12, 17, 25). Other commenters supported the question and answer version (Exs. 5–16, 23, 32, 42, 48). Some suggested that the question and answer version be included in an appendix or some other OSHA publication (Exs. 5–20, 24, 26, 45, 54, 59). The Agency, after considering the comments, has decided to use the traditional format in the final rule. The Agency believes that including the question and answer version in an appendix might result in confusion. OSHA does use the question and answer format for other, non-regulatory documents, and will consider that format for future guidance in this area.

Additional comments ranged from remarks that OSHA should do nothing, revise subpart E and reference NFPA 101, or adopt NFPA 101 entirely (Exs. 5–10, 18, 28, 38, 41, 47, 53, 62, 66, 68, 71). The subject of how to address NFPA 101 in the plain language revision was also issue 1 in the hearing notice (at 62 FR 9403). Liberty Mutual Insurance Group (Ex. 5–19) recommended that OSHA ''include a provision that compliance with a national consensus standard such as NFPA 101, Life Safety Code * * *would be recognized as compliance with the OSHA standard.'' The Building Owners and Managers Association (BOMA) stated that it believed that ''it is essential for OSHA to add appendix language stating that compliance with the Life Safety Codes NFPA 101, constitutes compliance with subpart E. Current OSHA practices essentially recognize this now (Tr. 23).''

OSHA's intention in the proposed rule was to simplify subpart E, not to replace it. First, OSHA could not simply adopt ''NFPA 101'' as an OSHA standard, because it can only consider versions of that standard that are currently in existence. To do otherwise (*i.e.*, attempting to approve a future edition) would result in an illegal delegation of agency authority. Second, adoption of NFPA 101–2000 as the OSHA standard goes beyond the limited purpose of this rulemaking. Such action would involve substantive rulemaking, including detailed analysis of the differences between OSHA current rules and NFPA 101–2000, including costs to employers and benefits to employees.

As discussed earlier, OSHA has reviewed NFPA 101–2000 and has determined that compliance with that standard will provide comparable protection to subpart E. Although the Agency is not adopting NFPA 101–2000, an employer who demonstrates compliance with that standard will be deemed to be in compliance with §§ 1910.34, 1910.36, and 1910.37 of subpart E. Many commenters (*e.g.*, Exs. 5–10, 18, 19, 41, 46, 48, 61) supported language that would allow employers to comply with the NFPA 101 standard as an alternative to the OSHA standard for Exit Routes. OSHA has incorporated such language into § 1910.35 of the final rule.

Some commenters also asserted that OSHA should base its standard on the model building codes or allow compliance with the various national building codes (Exs. 5–19, 27, 47, 67; Tr. 23, 26, 32, 43). At the time of the rulemaking, there were three different national building codes in the United States: The Building Officials and Code Administrators' (BOCA) National Building Code, the International Conference of Building Officials' (ICBO) Uniform Building Code, and the Southern Building Code Congress International's (SBCCI) Standard Building Code.

OSHA emphasizes again that it did not propose to substantively revise subpart E, nor did it propose to allow the use of building codes to comply with subpart E. OSHA is not familiar enough with the detailed requirements

of the various building codes to determine unequivocally whether compliance with any or all of them could be considered to fulfill employer obligations imposed by subpart E. Moreover the contents of these building codes were not analyzed, evaluated or considered as part of this rulemaking. The BOCA, ICBO, and SBCCI Codes vary considerably in their requirements and coverage relating to areas covered by subpart E. This rulemaking was not designed to address these differences, nor was it intended to expand the coverage of subpart E. Accordingly, OSHA declines to extend recognition to building codes as a means of determining compliance with subpart E. This decision only involves the narrow issue of whether compliance with a given building code demonstrates compliance with subpart E. OSHA recognizes and acknowledges the importance and the value of building codes in assuring that buildings are constructed safely.

Final Rule

Section 1910.34, Coverage and Definitions

In the proposal, § 1910.35 was entitled ''Coverage.'' It noted that all general industry employers were covered by subpart E, and that ''exits'' and ''exit routes'' were covered. The section went on to define these unique terms in the proposal. OSHA has retitled this section as ''coverage and definitions,'' and has moved it to § 1910.34 of the final rule. The ''coverage'' paragraph, § 1910.34(a), specifies that the standard covers all workplaces in general industry except mobile workplaces. Paragraph (b) sets forth the ''coverage'' of the subpart: The minimum requirements for exit routes, emergency action plans, and fire prevention plans. Paragraph (c) of § 1910.34 includes the definitions pertinent to the subpart.

In the proposal, OSHA included definitions for ''Exit'' and ''Exit Route,'' eliminating all other definitions, believing they were unnecessary. However, commenters thought that OSHA went too far by not defining other terms or inappropriately failed to define other important terms (*e.g.*, Exs. 5–18, 21, 24, 28, 41, 45, 47, 49.) After due consideration, OSHA agrees with these commenters and in the final rule (now paragraph 1910.34(c)) has added and clarified definitions for words used in the proposal that commenters found unclear. OSHA has clarified the terms ''exit'' and ''exit route'' and has added definitions for electroluminescent, exit access, exit discharge, high hazard area, occupant load, refuge area, and self-luminous.

Section 1910.35, Compliance With NFPA 101–2000, Life Safety Code

As discussed previously in this preamble, this section provides that an employer who complies with corresponding provisions of NFPA 101–2000 is deemed to be in compliance with subpart E, sections 1910.34–1910.37.

Section 1910.36, Design and Construction Requirements for Exit Routes

Section 1910.36 contains requirements for the design and construction of exit routes. It includes a requirement that exit routes be permanent, addresses fire resistance-ratings of construction materials used in exit stairways (exits), describes openings into exits, defines the minimum number of exit routes in workplaces, addresses exit discharges, and discusses locked exit route doors, and exit route doors. It also addresses the capacity, height and width of exit routes, and finally, it sets forth requirements for exit routes that are outside a building.

Many of these requirements are identical or nearly the same as those proposed, but have been rearranged in a more logical order or reworded so that the requirements are clearer and easier to understand and follow.

Paragraph (a)(1) of 1910.36 (proposed paragraph 1910.36(a)), requires that exit routes be a permanent part of the workplace. This provision remains as proposed. OSHA believes that exit routes must be a permanent part of a structure and that employees must know the route to safety. Otherwise, during an emergency, employees may become confused and take the wrong path to safety.

Paragraph (a)(2) of 1910.36 (proposed paragraph 1901.36(d)), specifies the fire resistance-rating of construction materials used to separate exits from other parts of the workplace (*e.g.*, stairways). For example, where an exit stairway connects three or fewer stories, it must be constructed of materials having a 1-hour fire resistance-rating. If the exit stairway connects four or more stories, it must be constructed of materials having a 2-hour fire resistance-rating.

One commenter, IMC Global, Inc. (Ex. 5–54), suggested that OSHA include information in the standard or the appendix that would specify what construction materials or combination of materials would meet the fire resistance-ratings required by the standard. They explained that the information would be used by in-house personnel who make alterations or repairs to the building. OSHA believes that the reference to NFPA 101 in § 1910.35 will assist employers and employees in answering these questions.

IMC Global, Inc. also recommended that OSHA define the term ''story,'' suggesting that OSHA use the definition used in the NFPA 101, Life Safety Code, but did not provide any rationale or support to demonstrate that the failure to include a definition would have a negative impact on worker safety or health. OSHA notes that the NPFA 101–2000, defines the term ''story'' to mean ''That portion of a building between the upper surface of a floor and the upper surface of the floor or roof next above.'' OSHA believes this definition to be generally understood and has determined not to include a definition of ''story'' in the regulatory text of the final rule.

Another commenter, the American Trucking Association (Ex. 5–52), suggested that OSHA reword proposed paragraph 1910.36(d), to make it similar to the wording in the existing subpart E concerning fire resistant-materials (paragraphs 1910.37(b)(1) and (b)(2)). That wording requires that for exits protected by separation from other parts of the building, the separation shall meet certain construction requirements. The commenter noted that the proposed wording appears to require all exits to be separated by fire resistant-materials. OSHA agrees that the provision was not clearly worded and has revised the language of the final rule to specify the required fire resistance-rating of materials used to construct separations, *i.e.*, enclosed stairways. The revised language reflects the concerns raised by the commenter.

Paragraph (a)(3) of 1910.36 (proposed paragraph 1910.36(c)), restricts the number of openings into exits to those openings necessary to allow access to the exit from occupied areas of the workplace, or from the exit to the exit discharge. It also specifies that openings must be protected by a self-closing fire door that remains closed unless the fire door automatically closes in an emergency when the fire alarm or employee alarm system is sounded.

The final rule differs from the proposal in that it permits fire doors to remain open as long as they close automatically during an emergency. This change was made in response to comments from H. M. Bucci and the NFPA (Exs. 5–10, 18). Both pointed out that NFPA 101, Life Safety Code, permits the exception. OSHA notes that

the additional flexibility provided from this provision is in keeping with the Agency's intent in rewriting subpart E, *i.e.*, to add flexibility if it does not detract from employee safety or health and does not impose additional costs or compliance obligations.

A commenter, Dennis Kirson (Ex. 5–4), noted that the proposed provision did not provide guidance on the fire rating for fire doors opening into an exit. Such ratings are based on the purpose of the door. To be listed or approved as a fire door, the door would have to meet the fire rating set by a nationally recognized testing laboratory (see next paragraph).

Paragraph 1910.36(a)(3) (proposed paragraph 1910.36(c)), requires that each fire door, including its frame and hardware, be listed or approved by a nationally recognized testing laboratory. The International Dairy Foods Association (Ex. 5–22), suggested that OSHA include the definition of the terms ''listed,'' ''approved,'' and ''nationally recognized testing laboratory'' in the regulatory language of the final rule instead of giving a cross-reference to another section of the standards. Section 1910.7 contains what employers need to know about ''listed,'' ''approved,'' and ''nationally recognized testing laboratory.'' OSHA does not agree that adding additional definitions, which are duplicated elsewhere in part 1910, to the standard would be particularly helpful. Therefore, OSHA has retained in the final rule the cross-reference to the standard containing the terms.

Two commenters (Exs. 5–10, 11) commented on OSHA's failure to address other openings in exits made for electrical and mechanical systems. One commenter (Ex. 5–11) suggested that OSHA delete the provision because it precludes the use of protected openings when such openings are necessary for certain mechanical or electrical penetrations. The other commenter (Ex. 5–10) asked OSHA to address such openings by requiring that they be sealed with an approved fire barrier sealant or fire stop. The existing rule does not contain requirements addressing such openings and, as discussed above, the purpose of the revision is not to add new requirements that would impose new obligations on employers. If an employer has these openings, OSHA notes that such openings into exits are addressed in NFPA 101. The employer may use NFPA 101–2000 for guidance even though the final rule does not address this issue.

Paragraph 1910.36(b) of the final rule, the proposal, and issue 4 in the hearing notice (at 62 FR 9403), all address the general requirement that all workplaces have at least two exit routes, as far away as practical from each other, to ensure that all employees and other building occupants can promptly and safely evacuate the workplace during an emergency. Where two are insufficient, the employer must have additional exit routes (see NFPA 101–2000 for guidance). The number of exit routes can be reduced to one where the number of employees, the size of the building, its occupancy, or the arrangement of the workplace is such that all employees would be able to evacuate safely during an emergency.

Although OSHA does not have direct authority to regulate non-employee occupants of a building, in assuring the safe evacuation of employees, the impact of other occupants in a building must be taken into consideration to assure a safe evacuation of all employees. Thus, OSHA refers to ''other building occupants'' generally as it does in the existing subpart E.

''As far away as practical'' (''remote'' in the proposal) means that exit routes must be located far enough apart so that if one exit route is blocked by fire or smoke, employees can evacuate using the second exit route. The paragraph also provides a note that employers must consider the number of employees, the size of the building, its occupancy, and the arrangement of the workplace to determine the correct number of exit routes, recommending that employers consult the NFPA 101–2000 for the number of exit routes appropriate to their particular workplace.

The provision in the final rule differs from the proposed rule in that it has been reworded to state specifically that an employer must have at least two exits (final paragraph 1910.36(b)(1)), or a sufficient number of exit routes (final paragraph 1910.36(b)(2)) to ensure that all occupants can safely and promptly leave the workplace during an emergency. An exception to the two-exit route rule is provided in those circumstances where an employer can demonstrate that the number of employees, size of the building or arrangement of the workplace is such that one exit route alone is sufficient (final paragraph 1910.36(b)(3)).

There were a number of comments on the required number of exit routes provision in the proposal (*e.g.*, Exs. 5–4, 5, 8, 11, 18, 24, 26, 40, 41, 43, 45, 47, 49, 54, 63) with many commenters suggesting that the provision be rewritten to state clearly that two exit routes are required. Commenters also suggested that OSHA more fully explain how to determine when one exit route would be permitted or suggested that this exception be eliminated (Exs. 5–4, 5, 8, 26, 40, 41, 43, 45, 49, 54, 63).

OSHA agrees with some of the commenters in part, and has made it clear that employers must have at least two exit routes, except where one exit route would be sufficient to allow all employees to evacuate the workplace safely and promptly. OSHA has added a note to the provision stating that employers may consult NFPA 101–2000 for guidance on how to determine the appropriate number of exit routes.

Other commenters suggested that the expression in proposed paragraph 1910.36(b)(2), ''other means of escape * * * should be available,'' invited confusion, made the provision vague, and was unenforceable, and that OSHA should remove it in the final rule (Exs. 5–4, 11, 24, 40). OSHA agrees with the commenters and has eliminated the advisory wording in the final provision.

Paragraph 1910.36(c)(1) of the final rule (proposed paragraph 1910.36(f)) requires that each exit discharge lead directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside. Paragraph 1910.36(c)(2) requires that the street, walkway, refuge area, public way, or open space to which an exit discharge leads must be large enough to accommodate the building occupants likely to use the exit.

Lastly, paragraph 1910.36(c)(3) (proposed paragraph 1910.36(f)(4)) requires that exit stairs that continue beyond the level on which the exit discharge is located must be interrupted at that level by doors, partitions, or other effective means to make clear the direction to go to the exit discharge. This paragraph differs from the proposed provision. It has been reworded to make it clear that where exit stairs continue beyond the level of the exit discharge, there must be some effective way to direct occupants to the exit discharge. This rewording responds to comments questioning the clarity of the provision as proposed (Exs. 5–22, 41).

A number of commenters indicated their support for allowing exit discharges to lead to a refuge area as proposed in paragraph 1910.36(f)(3) (Exs. 5–24, 29, 40, 45); they also suggested that the paragraph heading and the definition of exit route needed to be reworded to reflect the acceptability of refuge areas. The American Petroleum Institute remarked:

> Section 1910.35(b)(2) should be revised to clarify that an exit route does not necessarily lead to the outside but could lead to a refuge area * * *.

As currently written, section 1910.35(b)(2) incorrectly defines an 'exit route' as a means of travel to safety 'outside' and further states that one part of an 'exit route' is the way from the exit to the 'outside.' is incorrectly misleads users into thinking that the only endpoint for an exit route is outside.

Similarly, the heading of section 1910.36(f) incorrectly states that an exit must lead to the outside. This heading should be amended to include the endpoint of a refuge area. Organization Resources Counselors, Inc. (5–45, p. 3) stated that it ''agrees that the concept of refuge areas is one that should be adopted by OSHA.''

In response to the comments, OSHA has revised the definition of exit route (paragraph 1910.34(c) of the final rule) to reflect the acceptability of refuge areas. Also, the heading to paragraph 1910.36(f) of the proposal, ''An Exit Must Lead Outside,'' has been changed to ''Exit Discharge'' in final rule paragraph 1910.36(c).

Paragraphs 1910.36(d)(1), (2), and (3) of the final rule (proposed as paragraph 1910.36(g)), address locking exit route doors. Paragraph 1910.36(d)(1) specifies that employees must be able to open an exit route door from the inside at all times without keys, tools, or special knowledge. Devices that only lock from the outside at the exit discharge door, such as panic bars, are permitted. Paragraph 1910.36(d)(2) specifies that exit route doors must be free of any device or alarm that could restrict emergency use of the exit route if the device or alarm fails. Finally, paragraph 1910.36(d)(3) of the final rule states that in mental, penal or correctional facilities, an exit route door may be locked from the inside if supervisory personnel are continuously on duty and the employer has a plan to remove occupants from the facility during an emergency.

The final rule requirements on locking exit doors are essentially those in the proposal, except that the provisions are now located in paragraph 1910.36(d) in the final rule (instead of paragraph 1910.36(g) in the proposal). There were three comments on the proposal addressing locking exit doors. Commenter Dennis Kirson (Ex. 5–4) suggested that OSHA delete the sentence ''A device that locks from the outside such as a panic bar is permitted because,'' he said, ''it deals with ingress (to be locked out) rather than egress (to be locked in), it serves no purpose.'' Mr. Kirson further noted that this sentence did not modify the first sentence. OSHA has not made the suggested change because to avoid any misunderstandings it believes that the rule should include specific language to indicate what is acceptable. The Agency believes it is necessary in this context to state what is permitted along with what is not permitted, because of the widespread use of panic bars. The commenter also suggested OSHA delete the reference to mental, penal, or correctional institutions because they did not appear to fit the definition of general industry worksites. OSHA has not made the suggested change because such institutions are indeed ''general industry'' establishments and employees in these establishments are afforded the same protections as employees in other general industry workplaces. In recognition of the unique problems these institutions have with regard to the need to ensure occupants remain inside the facilities, OSHA is providing specific language to indicate clearly the performance to be achieved at these worksites.

Another commenter, the Department of Energy (Ex. 5–11), suggested that this last provision should also reflect national security at Federal locations and that OSHA should add ''or other facility requiring security from unauthorized access.'' While OSHA does not disagree with the commenter, it has not made the suggested change because the inclusion of this additional language is beyond the stated scope of this proceeding. However the Agency will consider adding the suggested language in the future when substantive revisions are made to this subpart.

Paragraph 1910.36(e) (proposed paragraph 1910.36(h)), sets out requirements for doors leading to an exit route. The paragraph requires that a side-hinged door must be used to connect any room to an exit route and that the door that connects any room to an exit route must swing out in the direction of exit travel if the room is designed to be occupied by more than 50 people or if the room is used as a high hazard area (*i.e.*, contains contents that are likely to burn with extreme rapidity or explode).

The final rule provision in paragraph 1910.36(e) is essentially the same as the proposed provision (paragraph 1910.36(h) in the proposal) with minor reorganizing to emphasize the requirements of the provisions. OSHA has divided the paragraph into two concise paragraphs in the final rule, paragraphs 1910.36(e)(1) and (2). Two commenters recommended changing the language of the proposed provision that required exit doors ''swing out.'' Mr. Dennis Kirson (Ex. 5–4) suggested adding an exception to the provision that doors swing out, to allow for containment of hazardous materials, because of the greater hazard (to the public) of loss of containment of such materials. Such a change is beyond the scope of this project but the Agency may consider such a change as part of a future rulemaking. Tenneco (Ex. 5–41) suggested the phrase be changed to ''swing with the exit travel'' for further clarity. OSHA has revised the provision to incorporate the recommended change.

Eastman Kodak Company (Ex. 5–21) asked if security pass-through gates/turnstiles that free wheel when an alarm goes off would be considered an exit. Another commenter (Ex. 5–18) suggested that sliding doors be acceptable to OSHA if their operation is maintained to NFPA 101 specifications. The commenter noted that the current code (at that time NFPA 101–1994) allows vertical and sliding doors. OSHA has not modified the provision to address sliding doors or turnstiles because it would be a substantive change to the Exit Routes standard. However, these configurations are addressed in NFPA 101–2000. Employers who comply with that standard for the requirements concerning gates, turnstiles, and vertical or sliding doors, will be deemed to comply with this provision of subpart E.

Final rule paragraph 1910.36(f) (proposed paragraph 1910.36(i)) and issue 4 in the hearing notice (at 62 FR 9403)), address the required capacity for exit routes. The paragraph requires that exit routes be able to support the maximum permitted occupant load for each floor served by the exit routes, and that the capacity of exit routes may not decrease in the direction of exit route travel to the exit discharge.

OSHA has divided this proposed provision into two provisions in the final rule. The Agency has also made an editorial change in response to a concern raised by the Tennessee Valley Authority (TVA) (Ex. 5–47). TVA pointed out that in the existing standard, each exit route does not have to support the maximum permitted occupant load; rather, the existing standard requires that the combined capacity of the exits must support the maximum permitted occupant load for that floor. OSHA agrees with the commenter and has revised final paragraph 1910.36(f) accordingly.

Several commenters (Exs. 5–14, 36) expressed concerns about how to determine adequate capacity or the expected occupancy load for each floor. Argonne National Laboratory (Ex. 5–14) suggested that OSHA adopt the latest NFPA 101 to determine ''whether or not adequate exiting capacity is provided from an area.'' Another commenter, Mr. Donald R. Delano (Ex. 5–36), suggested that OSHA define ''maximum permitted occupant load'' and ''expected occupant

load.'' IMC Global, Inc. (Ex. 5–54) asked that OSHA define ''occupant load.'' In response to these comments OSHA has added a definition for the term ''occupant load'' and explained generally how to calculate the occupant load in the definition. The calculation can be done in accordance with NFPA 101–2000, since there are a wide variety of general industry occupancies which may be subject to different considerations.

Final rule paragraph 1910.36(g) (proposed paragraph 1910.36(j)) addresses the height and width requirements for exit routes and specifies that the ceiling of an exit route must be at least seven feet six inches (2.3 m) high. The paragraph specifies that any projection from the ceiling cannot decrease the space between the projection and the floor to less than six feet eight inches (2.0 m). Paragraph 1910.36(g) also specifies that the width of an exit access must be at least 28 inches (71.1 cm) wide at all points and that where a single way of exit access leads to an exit, its width must be at least equal to the width of the exit to which it leads.

Final paragraph 1910.36(g) also specifies that the width of an exit route must be sufficient to accommodate the maximum permitted occupant load of each floor served by the exit route. Lastly, the paragraph specifies that any objects that project into the exit route must not reduce the width of the exit route to less than the minimum width requirements for exit routes.

Paragraphs 1910.36(h)(1) through (4) (proposed paragraphs 1910.36(k)(1)(i) through (iv)), set out special requirements for exit routes that are outside of a building. The paragraphs require that each outdoor exit route must meet the minimum height and width requirements for indoor exit routes and must also meet certain other requirements. Specifically, (1) an outdoor exit route must have guardrails to protect unenclosed sides if a fall hazard exists; (2) an outdoor exit route must be covered if snow or ice is likely to accumulate along the route, unless the employer can demonstrate that any snow or ice accumulation will be removed before it presents a slipping hazard; (3) an outdoor exit route must be reasonably straight and have smooth, solid, substantially level walkways; and (4) an outdoor exit route must not have a dead-end that is longer than 20 feet (6.2 m).

Several commenters addressed this paragraph. Two commenters (Exs. 5–29, 40) suggested adding the wording ''if a fall hazard exists'' to the requirement for guardrails. OSHA agrees that guardrails only need to protect unenclosed sides if a fall hazard exists. One commenter (Ex. 5–10) suggested that the Agency use a 50 foot dead-end rather than a 20 foot dead-end. This would be a significant change and appears to be a decrease in safety to employees during emergencies and therefore OSHA has not changed the length of a dead-end. Other changes to these provisions are editorial only.

Section 1910.37, Maintenance, Safeguards, and Operational Features for Exit Routes

OSHA proposed in § 1910.37 to include provisions covering the operation and maintenance of exit routes. OSHA has expanded the name from the proposal's ''Operation and Maintenance Requirements for Exit Routes'' to better reflect its contents. In the final rule, § 1910.37 is entitled ''Maintenance, safeguards, and operational features for exit routes.'' Provisions of this section include the safe use of exit routes during an emergency, lighting and marking exit routes, fire retardant paints, exit routes during construction, repairs, or alterations, and employee alarm systems.

OSHA has made several changes to paragraph 1910.37(a) of the proposed rule, by combining related provisions. In the final rule, paragraph 1910.37(a) remains titled ''The Danger To Employees Must Be Minimized'' and addresses furnishings and decorations (proposed paragraph 1910.37(a)(2)), travel toward a high hazard area (proposed paragraph 1910.37(a)(3)), unobstructed access to exit routes (proposed paragraph 1910.36(e)), and properly operating safeguards designed to protect employees (proposed paragraphs 1910.37(a) and 1910.37(e)). Minor editorial changes have been made to these paragraphs, with the exception that final paragraph 1910.37(a)(2) has been modified because commenters found the requirement confusing (Exs. 5–5, 18, 26, 63). This confusion resulted from OSHA's use of the terminology ''An exit route must not require employees to travel toward materials that burn very quickly, emit poisonous fumes, or are explosive.'' OSHA has modified the language to more closely reflect the current subpart E language: ''Exit routes must be arranged so that employees will not have to travel toward a high hazard area, unless the path of travel is effectively shielded from the high hazard area by suitable partitions or other physical barriers.'' In addition, OSHA added a definition for ''high hazard area'' to the final rule's definition section, 1910.34. The new definition is from NFPA–101 with slight editorial changes.

In the proposal, paragraph 1910.37(b) required that exit route lighting be adequate, and paragraph 1910.37(c) required that exits be marked appropriately. OSHA has combined these paragraphs into paragraph 1910.37(b) in the final rule, in part because the provisions are closely related and the Agency believes that the standard will be easier to understand and use if all the requirements covering lighting and marking of exit routes are arranged together. The content of these paragraphs remains virtually the same in the final rule except for editorial clarifications (*e.g.*, ''lighted'' instead of ''illuminated'') and the addition of specifications (issue 5 in the hearing notice at 62 FR 9403) for exit signs in response to comments (*e.g.*, Exs. 5–4, 14, 18, 21, 43, 54). OSHA believes that these changes will enable employers and employees to have better and clearer information concerning the requirements for exit routes.

Issue 6 in the hearing notice (62 FR at 9403) asked whether the proposed requirements for exit lighting were too general. Some commenters objected to OSHA's use of the word ''adequate'' to describe the required amount of lighting in exit routes (Exs. 5–4, 18, 19, 22, 54, 57, 63, 64). (Issue 6 in the hearing notice at 62 FR 9403.) OSHA's current subpart E uses the term ''adequate'' (existing paragraph 1910.36(b)(6)); OSHA did not revise the word ''adequate'' in the proposal because specifying a level of lighting could be viewed as a substantive change. However, OSHA has clarified in the final rule (paragraph 1910.37(b)(1)), to make it clear and performance-oriented. The revised provision requires that employees with normal vision be able to see their way along an exit route. Therefore, OSHA has retained the word ''adequate'' but clarified its meaning in the final rule. Employers and employees can refer to NFPA 101–2000 for more detailed guidance.

Final paragraph 1910.37(b)(4) (proposed paragraphs 1910.37(c)(3) and (c)(4)), addresses the marking of the direction of travel to an exit. Signs would be redundant where the direction of travel is apparent. Therefore, OSHA has added the existing subpart E language to the final rule ''where the direction of travel to the nearest exit is not immediately apparent'' because such signs are needed only in that situation (Exs. 5–4, 14, 21, 64).

Final paragraph 1910.37(b)(5) (proposed paragraph 1910.37(c)(5)), requires that doors that could be mistaken for exit doors must be marked

to indicate the actual use of the door. In the proposal, OSHA required the use of the term ''Not an Exit'' on such doors. Doing so eliminated the provision's performance nature. In the final rule OSHA has added the language currently found in subpart E (paragraph 1910.37(q)(2)) (''''Not an Exit'' or similar designation''). This change allows employers to comply with the current OSHA language or the NFPA language. (*E.g.,* Exs. 5–14, 36).

In final paragraph 1910.37(b)(6) (proposed paragraph 1910.37(c)(6)), OSHA has restored the language from subpart E referring to the color of exit signs. In the proposal OSHA stated ''An exit sign must show a designated color.'' OSHA has changed the language back to the current subpart E language, ''distinctive in color'' (paragraph 1910.37(q)(4)) at the request of several commenters (Exs. 5–30, 41). OSHA does not believe that the proposed language improved the provision and has accordingly changed it back to existing subpart E as recommended by commenters. This paragraph also retains the use of ''electroluminescent'' and ''self-luminous'' signs and has defined the terms in the definition section (§ 1910.34).

Paragraph 1910.37(b)(7) of the final rule was not in the proposed rule. OSHA proposed to delete the following requirement from current subpart E (paragraph 1910.37(q)(8)) ''Every exit sign shall have the word 'Exit' in plainly legible letters not less than 6 inches high, with the principal strokes of letters not less than three-fourths-inch wide.'' The Agency believed that this requirement could be handled without specifications (issue 5 in the hearing notice at 62 FR 9403). Commenters disagreed and suggested that the current exit sign dimensions also be included in the final rule. For example, Donald R. Delano, P.E., (Ex. 5–36, p. 3) remarked:

> Deletion of reference to design parameters for exit signs leaves no adequate frame of reference. Exit signs need to be of a minimum size and design, just as a national standard exists for a highway STOP sign.

Further, Tenneco Newport News Shipbuilding (NNS, Ex. 5–41, p.2) stated:

> The exit signs as dictated by the current standard have become traditional and easily recognized by the general public. An employer's interpretation of 'clearly visible' may not create an *easily recognized* sign. Therefore, *in an emergency* the lack of the traditional and consistent format may be detrimental. NNS suggests that the text from the current standard stay in effect.

(*See also* Exs. 5–5, 14, 18, 31, 39, 63.) OSHA agrees with these commenters and has included in the final rule new paragraph 1910.37(b)(7) specifying the height and stroke width of exit signs (as it appears in the existing subpart E, paragraph 1910.37(q)(8)).

Final paragraph 1910.37(c) (proposed paragraph 1910.37(d)), addresses the upkeep of fire-retardant properties of paints or solutions used in the workplace that might impact the safety of an exit route. In the proposal, OSHA stated that an employer must maintain the fire retardant properties of paints or other coatings used in the workplace. Commenters suggested that OSHA return to the existing subpart E language because the proposed language is vague and harder to understand than the existing language (*e.g.*, Exs. 5–4, 18, 21, 43, 54). OSHA believes the language in the final rule has been made clearer by returning to the subpart E language fire-retardant paints or ''solutions,'' rather than ''coatings.'' OSHA has further clarified the requirement by specifying that paints or solutions used in an exit route must be renewed as often as necessary to maintain the necessary flame retardant properties.

Final paragraph 1910.37(d) (proposed paragraph 1910.37(f)) addresses the maintenance of exit routes during construction, repairs, or alterations. ''Alterations'' were not included in the heading of the proposed provision; however, in the final rule, the heading has been modified to include ''alterations.'' Both the proposal and final rule include the word ''alterations'' in the regulatory text.

The first paragraph concerning new construction remains the same as proposed and is now paragraph 1910.37(d)(1). Minor editorial changes have been made to final paragraph 1910.37(d)(2) that address repairs and alterations. Final paragraph 1910.37(d)(3) concerning flammable and explosive substances or equipment used during construction, repairs, or alterations, remains the same as proposed except for some minor changes. As discussed above OSHA has added the word ''alterations'' to the proposed language. In addition, the Agency returned to the use of ''substances'' instead of ''materials.'' Finally, OSHA has added ''equipment'' to the paragraph. The words ''substances'' and ''equipment'' are in the present subpart E requirement (paragraph 1910.37(c)(3)) but were inadvertently left out of the proposal. OSHA has changed the proposed language ''flammable or explosive materials used during construction or repair must not expose employees to hazards * * *'' to ''Employees must not be exposed to hazards of flammable or explosive substances or equipment used during construction, repairs, or alterations, that are beyond the normal permissible conditions in the workplace * * *.''

Final rule paragraph 1910.37(e) (proposed paragraph 1910.37(g)), requires the installation and maintenance of an employee alarm system meeting § 1910.165, unless employees can promptly see or smell a fire or other hazard. This requirement remains unchanged from the proposed rule.

Section 1910.38, Emergency Action Plans, and Section 1910.39, Fire Prevention Plans

In the final rule, OSHA has retained the separate sections for emergency action plans and fire prevention plans, §§ 1910.38 and 1910.39 respectively. OSHA believes it is clearer for the plans and their requirements to be contained in separate sections. Because commenters tended to address both plans at the same time in their comments or their comments were quite similar about the plans, OSHA is discussing them together.

Final paragraph 1910.38(a) states that an emergency action plan is required, and final paragraph 1910.39(a) states that a fire prevention plan is required, when an OSHA standard requires such a plan. A number of commenters (Exs. 5–14, 20, 21, 23, 40, 49) recommended that OSHA include a listing of all OSHA standards that require an emergency action plan or a fire prevention plan. The Agency considered modifying the appendix to add a list of such standards. Instead, OSHA has issued a Compliance Directive that contains a list of current OSHA standards that require emergency action plans or fire prevention plans. The Agency has included this information in a Compliance Directive instead of an appendix to the standard because it is easier to amend the Compliance Directive as needed to keep it current.

For informational purposes, OSHA has identified the following general industry standards that require an emergency action plan or a fire prevention plan.

1. Process Safety Management of Highly Hazardous Chemicals, paragraph 1910.119(n), emergency action plan.

2. Hazardous Waste Operations and Emergency Response, paragraphs 1910.120(l)(1)(ii), (p)(8)(i), (q)(1), and (q)(11)(ii), emergency action plan.

3. Portable Fire Extinguishers, paragraphs 1910.157(a) and (b)(1), emergency action plan and fire prevention plan.

4. Grain Handling Facilities, paragraph 1910.272(d), emergency action plan.

5. Ethylene Oxide, paragraph 1910.1047(h)(1)(iii), emergency action plan and fire prevention plan.

6. Methylenedianiline, paragraph 1910.1050(d)(1)(iii), emergency action plan and fire prevention plan.

7. 1,3-Butadiene, paragraph 1910.1051(j), emergency action plan and fire prevention plan.

Final paragraph 1910.38(b) and paragraph 1910.39(b) address written emergency action plans and fire prevention plans respectively. They require that the plans must be in writing and available; and for employers with 10 or fewer employees the plan may be transmitted orally rather than in writing. In the final rule, proposed paragraphs 1910.38(a)(2) and (a)(3) are combined into one paragraph, 1910.38(b), and proposed paragraphs 1910.39(a)(2) and (a)(3) become final paragraph 1910.39(b). Combining these paragraphs involved some minor editorial changes.

The Department of Energy (Ex. 5–11, p. 2) suggested that plans should be communicated orally to a ''limited number'' of employees rather than the 10 or fewer required by OSHA because the intent would be better served by not using an arbitrary number. OSHA disagrees with this suggestion. Since their promulgation in 1980, the emergency action plan and the fire prevention plan have used 10 as a reasonable number of employees for a plan to be communicated orally.

The International Brotherhood of Teamsters (IBT) (Ex. 5–31, p. 6) did not agree with the language in proposed paragraph 1910.38(a)(2) and paragraph 1910.39(a)(2), which stated that ''the plan must be made available to employees on request.'' IBT asked the Agency to use the current language of subpart E, requiring the plans ''be available for employees to review.'' The IBT believed the proposed language added an obstacle to employees by making them request to see the plan. OSHA agrees; in the proposal it had inadvertently changed the language from the current subpart E. OSHA fully believes that the plan should be available for employee review and in the final rule the language reflects this intent.

OSHA has reordered final paragraph 1910.38(c), containing the elements of an emergency action plan, to better reflect the order of an emergency response. Final paragraph 1910.38(c)(1) (proposed paragraph 1910.38(b)(3)) requires that the plan include procedures for reporting a fire or other emergency. OSHA believes reporting a fire or other emergency should be the first thing done in an emergency. The rest of the elements remain in the same order.

Final paragraphs 1910.38(c)(2), (3), and (4) remain for the most part the same as the proposed paragraphs—procedures for evacuation and exit route assignments, procedures to be followed by employees who remain to operate critical plant operations before they evacuate, and procedures to account for all employees after evacuation.

Final paragraph 1910.38(c)(3) concerning emergency operations or shutdown of plant equipment during an emergency has been changed back to the current subpart E language. This was done to clarify that this element of the plan does not apply to all employees and all plants, only to those plants that use employees for these emergency or shutdown procedures (Exs. 5–4, 18, 54).

Eastman Kodak Company (Ex. 5–21, p.3) suggested that OSHA delete the wording that addresses accounting for employees (final paragraph 1910.38(c)(4)):

> • Procedures to assure that the fire area is clear of employees, visitors and contractors. Expectations to track employees such as maintenance personnel, service providers, or engineers is very burdensome. In today's work environment many transient employees work in multiple locations making it difficult to track who will be in any work area in an emergency. Hence, many emergency plans require the use of trained searchers to assure that the area being evacuated is clear of all personnel regardless of their normal work locations.

OSHA disagrees with this commenter and believes that accounting for employees after an emergency is critically important information to rescuers. Employees could, for example, be assigned designated locations away from the facility at which to meet.

In final paragraph 1910.38(c)(5), which requires that the plan include procedures for rescue or medical duties, OSHA has added language to clarify that the requirements only apply to those employees who will be performing such duties. This language parallels more closely the current subpart E language (paragraph 1910.38(a)(2)(iv)). The Agency has also changed ''rescue and medical duties'' in the proposal to ''rescue *or* medical duties'' (emphasis added) since employees may do one or the other but not necessarily both.

Final paragraph 1910.38(c)(6), which addresses names or job titles of employees to be contacted for more information or for an explanation of duties, has been revised from the proposal and is closer to the current language in subpart E (paragraph 1910.38(a)(2)(vi)). The change clarifies the requirement.

A few commenters (*e.g.*, Ex. 5–4) contended that proposed paragraphs 1910.38(d) and 1910.37(g), are redundant. However, while both paragraphs require alarm systems, the two provisions are different. Proposed paragraph 1910.37(g) (paragraph 1910.37(e) in the final rule) requires that an employee alarm system be installed and maintained, unless employees can promptly see or smell a fire or other hazard. It applies regardless of whether the employer must have an emergency action plan. Paragraph 1910.38(d) requires that employers have and maintain an alarm system when an employer is required to have an emergency action plan by another OSHA standard. That alarm system must be provided even if employees can promptly see or smell a fire or other hazard. These paragraphs remain the same as proposed in the final rule.

Final paragraph 1910.38(e), regarding training of designated employees to assist in a safe and orderly evacuation of other employees, remains as proposed except for minor reorganization.

Final paragraph 1910.38(f) (proposed paragraph 1910.38(e)) requires that employers review the emergency action plan with each employee when the plan is developed or the employee is assigned initially to a job, when responsibility under the plan changes or the plan changes. Only minor editorial changes have been made to the final provision.

With regard to 29 CFR 1910.39, fire prevention plans, final paragraph 1910.39(c) (proposed paragraph 1910.39(b)) remains the same as proposed. Few comments were received with respect to the elements of the fire prevention plan.

Final rule paragraph 1910.39(d) (proposed rule paragraph 1910.39(c)) requires employers to inform employees of workplace fire hazards and review those parts of the fire prevention plan necessary for the employee's self-protection. Only minor editorial changes were made to this paragraph.

Miscellaneous Changes

OSHA is also amending the sections listed in the preamble's discussion of 1910.38 and 1910.39 above (*e.g.*, 29 CFR 1910.120, 1910.157, etc.). These changes are necessary to conform with new section and paragraph designations for Emergency Action Plans and Fire Protection Plans found in this revised subpart E.

Other Hearing Issues

As discussed earlier in this preamble, OSHA asked a series of questions in its hearing notice (62 FR 9402). To the extent possible, OSHA has included the questions with the pertinent discussions in the preamble. For example, the use of performance-oriented language in the proposal was discussed earlier in this preamble (issue 3). ''Are terms too technical'' (issue 7) was discussed by commenters addressing the definitions of the standard or when commenters identified unclear language. However, some of the issues raised in the questions were more general and the vast majority of commenters did not definitively respond to these questions. These issues were numbered 3, 7, 8, 9, and 10 in the hearing notice (62 FR at 9403), and they asked: Would performance-oriented standards create compliance problems; are there terms that might be too technical; whether the revision imposes additional obligations; whether any requirements result in greater safety; and whether any requirements present technical feasibility problems. The questions raised in the hearing notice were intended to assure that various aspects of the proposal were fully considered. Some commenters addressed the issues through their comments regarding specific provisions of the proposal and did not respond to the questions specifically set forth in the hearing notice. To the extent that interested persons commented on these issues, OSHA has responded to these comments in the context of specific provisions of the proposed rule.

III. Legal Considerations

Because the final rule is only a plain language redrafting of a former Agency subpart, it is not necessary to determine significant risk or the extent to which the final rule reduces that risk. As noted above, most of the provisions of subpart E were adopted under section 6(a) of the Occupational Safety and Health Act, which gave the Secretary of Labor the authority, for a limited period of time, to adopt as occupational safety and health standards any established Federal Standard or national consensus standards unless the promulgation of such a standard would not result in improved safety and health for designated employees. By including section 6(a) in the OSH Act, Congress implicitly found that the promulgation of occupational safety and health standards was reasonably necessary or appropriate to provide safe or healthful employment and places of employment. In *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980), the Supreme Court ruled that before OSHA can increase the protection afforded by a standard, the Agency must find that the hazard being regulated poses a significant risk to employees and that a new, more protective standard is ''reasonably necessary and appropriate'' to reduce that risk. The final rule that replaces the Agency's former rules regulating means of egress, emergency action plans, and fire prevention plans does not directly increase or decrease the protection afforded to employees, nor does it increase employers' compliance obligations. Therefore, no finding of significant risk is necessary.

The Agency believes, however, that improved employee protection is likely to result from promulgation of the final rule because employers and employees who clearly understand a rule's requirements are more likely to comply with that rule. In addition, employers may find it easier to comply with the final rule because the final rule is more performance-oriented than the former rule.

IV. Economic Analysis

This final rule has been designated as significant and reviewed by the Office of Management and Budget under Executive Order 12866. It is not an economically significant rule under Executive Order 12866 or a major rule under the Unfunded Mandates Reform Act or section 801 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The final rule imposes no additional costs on any private or public sector entity and does not meet any of the criteria for an economically significant or major rule specified by the Executive Order or the other statutes. Certain provisions of the rule that add flexibility, such as permitting fire doors to remain open as long as they close automatically during an emergency and modifying the definition of exit route to reflect the acceptability of refuge areas, may even reduce costs for employers. Because the rule does not impose any additional costs on employers for exit routes, emergency action plans, and fire prevention plans, no economic or regulatory flexibility analysis of the final rule is required.

V. Regulatory Flexibility Certification

In accord with the Regulatory Flexibility act, 5 U.S.C. 601 *et seq.* (as amended), OSHA has examined the regulatory requirements of the final rule to determine if it will have a significant economic effect on a substantial number of small entities. As indicated in the previous section of this preamble, the final rule does not increase employers' compliance costs, and may even reduce the regulatory burden on all affected employers, both large and small. Accordingly, the Agency certifies that the final rule does not have a significant economic effect on a substantial number of small entities.

VI. Environmental Impact Assessment

OSHA has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), of the Council on Environmental Quality regulations (40 U.S.C. part 1500 *et seq.*), and the Department of Labor's NEPA regulations (29 CFR part 11). As noted earlier in this preamble, the final rule imposes the same requirements on employers as the standards it replaces. Consequently, the final rule has no additional impact beyond the impact imposed by OSHA's former standards for means of egress on the environment, including no impact on the release of materials that contaminate natural resources or the environment.

VII. Paperwork Reduction Act

The final rule contains no information collection requirements (paperwork) that are subject to the Paperwork Reduction Act. Therefore, approval under the Paperwork Reduction Act is unnecessary.

VIII. Unfunded Mandates

For the purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any year.

IX. Federalism

OSHA has reviewed this final rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255) which requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of State law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health (OSH) Act (29 U.S.C. 651 *et seq.*) expresses Congress' intent to preempt state laws where OSHA has promulgated occupational safety and

health standards. Under the OSH Act, a state can avoid preemption on issues covered by Federal standards only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement (State-Plan state). 29 U.S.C. 667. Occupational safety and health standards developed by such State-Plan states must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Subject to these requirements, State-Plan states are free to develop and enforce their own requirements for exit routes, emergency action plans, and fire prevention plans. Having already adopted OSHA's former standards on means of egress, emergency action plans, and fire prevention plans, (or having developed alternative standards acceptable to OSHA), State-Plan states are not obligated to adopt the final rule; they may, however, choose to adopt the final rule, and OSHA encourages them to do so.

Although Congress has expressed a clear intent for OSHA standards to preempt State job safety and health rules in areas involving the safety and health rules of employees, this rule nevertheless limits State policy options to a minimal extent.

OSHA concludes that this action does not significantly limit State policy options.

X. State Plan States

OSHA encourages the 26 States and Territories with their own OSHA-approved occupational safety and health plans to revise their standards regulating means of egress, emergency action plans, and fire prevention plans according to the final rule that resulted from this rulemaking. These states include Alaska, Arizona, California, Connecticut (state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey (state and local government employees only), New Mexico, New York (state and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming.

List of Subjects in 29 CFR 1910

Means of egress, Exit, Exit route, Emergency action plan, Fire prevention, Occupational safety and health, Reporting and recordkeeping, Signs and symbols.

XI. Authority and Signature

This document was prepared under the direction of John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3–2000 (65 FR 50017) and 29 CFR part 1911.

Signed in Washington, DC, this 21st day of October, 2002.

John L. Henshaw,

Assistant Secretary of Labor.

OSHA amends 29 CFR part 1910 as follows:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

1. The authority citation for subpart E of part 1910 is revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), (8–76 41 FR 25059), 9–83 (48 FR 35736) or 1–90 (55 FR 9033), 6–96 (62 FR 111), or 3–2000 (65 FR 50017), as applicable.

2.a. In subpart E, §§ 1910.33, 1910.34, and 1910.39 are added, and §§ 1910.35 through 1910.38 are revised.

b. In the appendix to subpart E to part 1910, the heading is revised, and in the third sentence of section 1, ''in paragraph 1910.38(a)(2)'' is revised to read ''in paragraph 1910.38(c)''.

The added and revised text is set forth as follows:

Subpart E—Exit Routes, Emergency Action Plans, and Fire Prevention Plans

§ 1910.33 Table of contents.

This section lists the sections and paragraph headings contained in §§ 1910.34 through 1910.39.

§ 1910.34 Coverage and definitions.
(a) Every employer is covered.
(b) Exit routes are covered.
(c) Definitions.
§ 1910.35 Compliance with NFPA 101–2000, Life Safety Code.
§ 1910.36 Design and construction requirements for exit routes.
(a) Basic requirements.
(b) The number of exit routes must be adequate.
(c) Exit discharge.
(d) An exit door must be unlocked.
(e) A side-hinged exit door must be used.
(f) The capacity of an exit route must be adequate.
(g) An exit route must meet minimum height and width requirements.
(h) An outdoor exit route is permitted.
§ 1910.37 Maintenance, safeguards, and operational features for exit routes.
(a) The danger to employees must be minimized.
(b) Lighting and marking must be adequate and appropriate.
(c) The fire retardant properties of paints or solutions must be maintained.
(d) Exit routes must be maintained during construction, repairs, or alterations.
(e) An employee alarm system must be operable.
§ 1910.38 Emergency action plans.
(a) Application.
(b) Written and oral emergency action plans.
(c) Minimum elements of an emergency action plan.
(d) Employee alarm system.
(e) Training.
(f) Review of emergency action plan.
§ 1910.39 Fire prevention plans.
(a) Application.
(b) Written and oral fire prevention plans.
(c) Minimum elements of a fire prevention plan.
(d) Employee information.

§ 1910.34 Coverage and definitions.

(a) *Every employer is covered.* Sections 1910.34 through 1910.39 apply to workplaces in general industry except mobile workplaces such as vehicles or vessels.

(b) *Exits routes are covered.* The rules in §§ 1910.34 through 1910.39 cover the minimum requirements for exit routes that employers must provide in their workplace so that employees may evacuate the workplace safely during an emergency. Sections 1910.34 through 1910.39 also cover the minimum requirements for emergency action plans and fire prevention plans.

(c) *Definitions.*

Electroluminescent means a light-emitting capacitor. Alternating current excites phosphor atoms when placed between the electrically conductive surfaces to produce light. This light source is typically contained inside the device.

Exit means that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge. An example of an exit is a two-hour fire resistance-rated enclosed stairway that leads from the fifth floor of an office building to the outside of the building.

Exit access means that portion of an exit route that leads to an exit. An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway (the Exit).

Exit discharge means the part of the exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside. An example of an exit

discharge is a door at the bottom of a two-hour fire resistance-rated enclosed stairway that discharges to a place of safety outside the building.

Exit route means a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas). An exit route consists of three parts: The exit access; the exit; and, the exit discharge. (An exit route includes all vertical and horizontal areas along the route.)

High hazard area means an area inside a workplace in which operations include high hazard materials, processes, or contents.

Occupant load means the total number of persons that may occupy a workplace or portion of a workplace at any one time. The occupant load of a workplace is calculated by dividing the gross floor area of the workplace or portion of a workplace by the occupant load factor for that particular type of workplace occupancy. Information regarding ''Occupant load'' is located in NFPA 101–2000, Life Safety Code.

Refuge area means either:

(1) A space along an exit route that is protected from the effects of fire by separation from other spaces within the building by a barrier with at least a one-hour fire resistance-rating; or

(2) A floor with at least two spaces, separated from each other by smoke-resistant partitions, in a building protected throughout by an automatic sprinkler system that complies with § 1910.159 of this part.

Self-luminous means a light source that is illuminated by a self-contained power source (*e.g.*, tritium) and that operates independently from external power sources. Batteries are not acceptable self-contained power sources. The light source is typically contained inside the device.

§ 1910.35 Compliance with NFPA 101–2000, Life Safety Code.

An employer who demonstrates compliance with the exit route provisions of NFPA 101–2000, the Life Safety Code, will be deemed to be in compliance with the corresponding requirements in §§ 1910.34, 1910.36, and 1910.37.

§ 1910.36 Design and construction requirements for exit routes.

(a) *Basic requirements.* Exit routes must meet the following design and construction requirements: (1) *An exit route must be permanent.* Each exit route must be a permanent part of the workplace.

(2) *An exit must be separated by fire resistant materials.* Construction materials used to separate an exit from other parts of the workplace must have a one-hour fire resistance-rating if the exit connects three or fewer stories and a two-hour fire resistance-rating if the exit connects four or more stories.

(3) *Openings into an exit must be limited.* An exit is permitted to have only those openings necessary to allow access to the exit from occupied areas of the workplace, or to the exit discharge. An opening into an exit must be protected by a self-closing fire door that remains closed or automatically closes in an emergency upon the sounding of a fire alarm or employee alarm system. Each fire door, including its frame and hardware, must be listed or approved by a nationally recognized testing laboratory. Section 1910.155(c)(3)(iv)(A) of this part defines ''listed'' and § 1910.7 of this part defines a ''nationally recognized testing laboratory.''

(b) *The number of exit routes must be adequate.* (1) *Two exit routes.* At least two exit routes must be available in a workplace to permit prompt evacuation of employees and other building occupants during an emergency, except as allowed in paragraph (b)(3) of this section. The exit routes must be located as far away as practical from each other so that if one exit route is blocked by fire or smoke, employees can evacuate using the second exit route.

(2) *More than two exit routes.* More than two exit routes must be available in a workplace if the number of employees, the size of the building, its occupancy, or the arrangement of the workplace is such that all employees would not be able to evacuate safely during an emergency.

(3) *A single exit route.* A single exit route is permitted where the number of employees, the size of the building, its occupancy, or the arrangement of the workplace is such that all employees would be able to evacuate safely during an emergency.

Note to paragraph 1910.36(b): For assistance in determining the number of exit routes necessary for your workplace, consult NFPA 101–2000, Life Safety Code.

(c) *Exit discharge.* (1) Each exit discharge must lead directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside.

(2) The street, walkway, refuge area, public way, or open space to which an exit discharge leads must be large enough to accommodate the building occupants likely to use the exit route.

(3) Exit stairs that continue beyond the level on which the exit discharge is located must be interrupted at that level by doors, partitions, or other effective means that clearly indicate the direction of travel leading to the exit discharge.

(d) *An exit door must be unlocked.* (1) Employees must be able to open an exit route door from the inside at all times without keys, tools, or special knowledge. A device such as a panic bar that locks only from the outside is permitted on exit discharge doors.

(2) Exit route doors must be free of any device or alarm that could restrict emergency use of the exit route if the device or alarm fails.

(3) An exit route door may be locked from the inside only in mental, penal, or correctional facilities and then only if supervisory personnel are continuously on duty and the employer has a plan to remove occupants from the facility during an emergency.

(e) *A side-hinged exit door must be used.* (1) A side-hinged door must be used to connect any room to an exit route.

(2) The door that connects any room to an exit route must swing out in the direction of exit travel if the room is designed to be occupied by more than 50 people or if the room is a high hazard area (*i.e.*, contains contents that are likely to burn with extreme rapidity or explode).

(f) *The capacity of an exit route must be adequate.* (1) Exit routes must support the maximum permitted occupant load for each floor served.

(2) The capacity of an exit route may not decrease in the direction of exit route travel to the exit discharge.

Note to paragraph 1910.36(f): Information regarding ''Occupant load'' is located in NFPA 101–2000, Life Safety Code.

(g) *An exit route must meet minimum height and width requirements.* (1) The ceiling of an exit route must be at least seven feet six inches (2.3 m) high. Any projection from the ceiling must not reach a point less than six feet eight inches (2.0 m) from the floor.

(2) An exit access must be at least 28 inches (71.1 cm) wide at all points. Where there is only one exit access leading to an exit or exit discharge, the width of the exit and exit discharge must be at least equal to the width of the exit access.

(3) The width of an exit route must be sufficient to accommodate the maximum permitted occupant load of each floor served by the exit route.

(4) Objects that project into the exit route must not reduce the width of the exit route to less than the minimum width requirements for exit routes.

(h) *An outdoor exit route is permitted.* Each outdoor exit route must meet the minimum height and width requirements for indoor exit routes and

must also meet the following requirements:

(1) The outdoor exit route must have guardrails to protect unenclosed sides if a fall hazard exists;

(2) The outdoor exit route must be covered if snow or ice is likely to accumulate along the route, unless the employer can demonstrate that any snow or ice accumulation will be removed before it presents a slipping hazard;

(3) The outdoor exit route must be reasonably straight and have smooth, solid, substantially level walkways; and

(4) The outdoor exit route must not have a dead-end that is longer than 20 feet (6.2 m).

§ 1910.37 Maintenance, safeguards, and operational features for exit routes.

(a) *The danger to employees must be minimized.* (1) Exit routes must be kept free of explosive or highly flammable furnishings or other decorations.

(2) Exit routes must be arranged so that employees will not have to travel toward a high hazard area, unless the path of travel is effectively shielded from the high hazard area by suitable partitions or other physical barriers.

(3) Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor. Stairs or a ramp must be provided where the exit route is not substantially level.

(4) Safeguards designed to protect employees during an emergency (*e.g.*, sprinkler systems, alarm systems, fire doors, exit lighting) must be in proper working order at all times.

(b) *Lighting and marking must be adequate and appropriate.* (1) Each exit route must be adequately lighted so that an employee with normal vision can see along the exit route.

(2) Each exit must be clearly visible and marked by a sign reading ''Exit.''

(3) Each exit route door must be free of decorations or signs that obscure the visibility of the exit route door.

(4) If the direction of travel to the exit or exit discharge is not immediately apparent, signs must be posted along the exit access indicating the direction of travel to the nearest exit and exit discharge. Additionally, the line-of-sight to an exit sign must clearly be visible at all times.

(5) Each doorway or passage along an exit access that could be mistaken for an exit must be marked ''Not an Exit'' or similar designation, or be identified by a sign indicating its actual use (*e.g.*, closet).

(6) Each exit sign must be illuminated to a surface value of at least five foot-candles (54 lux) by a reliable light source and be distinctive in color. Self-luminous or electroluminescent signs that have a minimum luminance surface value of at least .06 footlamberts (0.21 cd/m^2) are permitted.

(7) Each exit sign must have the word ''Exit'' in plainly legible letters not less than six inches (15.2 cm) high, with the principal strokes of the letters in the word ''Exit'' not less than three-fourths of an inch (1.9 cm) wide.

(c) *The fire retardant properties of paints or solutions must be maintained.* Fire retardant paints or solutions must be renewed as often as necessary to maintain their fire retardant properties.

(d) *Exit routes must be maintained during construction, repairs, or alterations.* (1) During new construction, employees must not occupy a workplace until the exit routes required by this subpart are completed and ready for employee use for the portion of the workplace they occupy.

(2) During repairs or alterations, employees must not occupy a workplace unless the exit routes required by this subpart are available and existing fire protections are maintained, or until alternate fire protection is furnished that provides an equivalent level of safety.

(3) Employees must not be exposed to hazards of flammable or explosive substances or equipment used during construction, repairs, or alterations, that are beyond the normal permissible conditions in the workplace, or that would impede exiting the workplace.

(e) *An employee alarm system must be operable.* Employers must install and maintain an operable employee alarm system that has a distinctive signal to warn employees of fire or other emergencies, unless employees can promptly see or smell a fire or other hazard in time to provide adequate warning to them. The employee alarm system must comply with § 1910.165.

§ 1910.38 Emergency action plans.

(a) *Application.* An employer must have an emergency action plan whenever an OSHA standard in this part requires one. The requirements in this section apply to each such emergency action plan.

(b) *Written and oral emergency action plans.* An emergency action plan must be in writing, kept in the workplace, and available to employees for review. However, an employer with 10 or fewer employees may communicate the plan orally to employees.

(c) *Minimum elements of an emergency action plan.* An emergency action plan must include at a minimum:

(1) Procedures for reporting a fire or other emergency;

(2) Procedures for emergency evacuation, including type of evacuation and exit route assignments;

(3) Procedures to be followed by employees who remain to operate critical plant operations before they evacuate;

(4) Procedures to account for all employees after evacuation;

(5) Procedures to be followed by employees performing rescue or medical duties; and

(6) The name or job title of every employee who may be contacted by employees who need more information about the plan or an explanation of their duties under the plan.

(d) *Employee alarm system.* An employer must have and maintain an employee alarm system. The employee alarm system must use a distinctive signal for each purpose and comply with the requirements in § 1910.165.

(e) *Training.* An employer must designate and train employees to assist in a safe and orderly evacuation of other employees.

(f) *Review of emergency action plan.* An employer must review the emergency action plan with each employee covered by the plan:

(1) When the plan is developed or the employee is assigned initially to a job;

(2) When the employee's responsibilities under the plan change; and

(3) When the plan is changed.

§ 1910.39 Fire prevention plans.

(a) *Application.* An employer must have a fire prevention plan when an OSHA standard in this part requires one. The requirements in this section apply to each such fire prevention plan.

(b) *Written and oral fire prevention plans.* A fire prevention plan must be in writing, be kept in the workplace, and be made available to employees for review. However, an employer with 10 or fewer employees may communicate the plan orally to employees.

(c) *Minimum elements of a fire prevention plan.* A fire prevention plan must include:

(1) A list of all major fire hazards, proper handling and storage procedures for hazardous materials, potential ignition sources and their control, and the type of fire protection equipment necessary to control each major hazard;

(2) Procedures to control accumulations of flammable and combustible waste materials;

(3) Procedures for regular maintenance of safeguards installed on

heat-producing equipment to prevent the accidental ignition of combustible materials;

(4) The name or job title of employees responsible for maintaining equipment to prevent or control sources of ignition or fires; and

(5) The name or job title of employees responsible for the control of fuel source hazards.

(d) *Employee information.* An employer must inform employees upon initial assignment to a job of the fire hazards to which they are exposed. An employer must also review with each employee those parts of the fire prevention plan necessary for self-protection.

''Appendix E To Part 1910—Exit Routes, Emergency Action Plans, and Fire Prevention Plans.''

* * * * *

Subpart H—Hazardous Materials

3. The authority citation for subpart H of part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059, 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), as applicable; and 29 CFR part 1911.

Sections 1910.103, 1910.106 through 1910.111, and 1910.119, 1910.120, and 190.122 through 126 also issued under 29 CFR part 1911.

Section 1910.119 also issued under section 304, Clean Air Act Amendments of 1990 (Pub. L. 101–549), reprinted at 29 U.S.C. 655 Note.

Section 1910.120 also issued under section 126, Superfund Amendments and Reauthorization Act of 1986 as amended (29 U.S.C. 655 Note), and 5 U.S.C. 553.

4. In § 1910.119, the first sentence of paragraph (n) is revised to read as follows:

§ 1910.119 Process safety management of highly hazardous chemicals.

* * * * *

(n) *Emergency planning and response.* The employer shall establish and implement an emergency action plan for the entire plant in accordance with the provisions of 29 CFR 1910.38.* * *

* * * * *

5. In § 1910.120, paragraphs (l)(1)(ii), (p)(8)(i), (q)(1), and the first sentence of paragraph (q)(11)(ii) are revised to read as follows:

§ 1910.120 Hazardous waste operations and emergency response.

* * * * *

(l) * * *

(1)(i) * * *

(ii) Employers who will evacuate their employees from the danger area when an emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from the requirements of this paragraph if they provide an emergency action plan complying with 29 CFR 1910.38.

* * *

* * * * *

(p) * * *

(8) * * *

(i) *Emergency response plan.* An emergency response plan shall be developed and implemented by all employers. Such plans need not duplicate any of the subjects fully addressed in the employer's contingency planning required by permits, such as those issued by the U.S. Environmental Protection Agency, provided that the contingency plan is made part of the emergency response plan. The emergency response plan shall be a written portion of the employer's safety and health program required in paragraph (p)(1) of this section. Employers who will evacuate their employees from the worksite location when an emergency occurs and who do not permit any of their employees to assist in handling the emergency are exempt from the requirements of paragraph (p)(8) if they provide an emergency action plan complying with 29 CFR 1910.38.

* * * * *

(q) * * *

(1) *Emergency response plan.* An emergency response plan shall be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations. The plan shall be in writing and available for inspection and copying by employees, their representatives and OSHA personnel. Employers who will evacuate their employees from the danger area when an emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from the requirements of this paragraph if they provide an emergency action plan in accordance with 29 CFR 1910.38.

* * * * *

(11) * * *

(i) * * *

(ii) Where the clean-up is done on plant property using plant or workplace employees, such employees shall have completed the training requirements of the following: 29 CFR 1910.38, 1910.134, 1910.1200, and other appropriate safety and health training made necessary by the tasks they are expected to perform such as personal protective equipment and decontamination procedures. * * *

* * * * *

Subpart L—Fire Protection

6. The authority citation for subpart L of part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 F 35736), 6–96 (62 FR 111), or 3–2000 (65 FR 50017), as applicable; and 29 CFR part 1911.

7. In § 1910.157, paragraphs (a) and (b)(1) are revised to read as follows:

§ 1910.157 Portable fire extinguishers.

(a) *Scope and application.* The requirements of this section apply to the placement, use, maintenance, and testing of portable fire extinguishers provided for the use of employees. Paragraph (d) of this section does not apply to extinguishers provided for employee use on the outside of workplace buildings or structures. Where extinguishers are provided but are not intended for employee use and the employer has an emergency action plan and a fire prevention plan that meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39 respectively, then only the requirements of paragraphs (e) and (f) of this section apply.

(b) *Exemptions.* (1) Where the employer has established and implemented a written fire safety policy which requires the immediate and total evacuation of employees from the workplace upon the sounding of a fire alarm signal and which includes an emergency action plan and a fire prevention plan which meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39 respectively, and when extinguishers are not available in the workplace, the employer is exempt from all requirements of this section unless a specific standard in part 1910 requires that a portable fire extinguisher be provided.

* * * * *

Subpart R—Special Industries

8. The authority citation for subpart R of part 1910 is revised to read as follows:

Authority: Sections 4, 6, 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), or 3–2000 (65 FR 50017), as applicable; and 29 CFR part 1911.

9. In § 1910.268, paragraph (b)(1)(iii) is revised to read as follows:

§ 1910.268 Telecommunications.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(ii) * * *

(iii) *Working spaces.* Maintenance aisles, or wiring aisles, between equipment frame lineups are working spaces and are not an exit route for purposes of 29 CFR 1910.34.

* * * * *

10.a. In § 1910.272, paragraph (d) is revised.

b. In Appendix A to § 1910.272, under the heading ''2. Emergency Action Plans'' the second sentence is revised.

The revised text is set forth as follows:

§ 1910.272 Grain handling facilities.

* * * * *

(d) *Emergency action plan.* The employer shall develop and implement an emergency action plan meeting the requirements contained in 29 CFR 1910.38.

* * * * *

Appendix A to § 1910.272 Grain Handling Facilities

* * * * *

2. Emergency Action Plan

* * * The emergency action plan (§ 1910.38) covers those designated actions employers and employees are to take to ensure employee safety from fire and other emergencies. * * *

* * * * *

Subpart Z—Toxic and Hazardous Substances

11. The authority citation for subpart Z of part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), and 3–2000 (65 FR 50017), as applicable, and 29 CFR part 1911.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C 653), except those substances that have exposure limits in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. Section 1910.1000 also issued under section (6)(a) of the Act (29 U.S.C. 655(a)). Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553, but not under 29 CFR part 1911, except for the inorganic arsenic, benzene, and cotton dust listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553, but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029, and 1910.1200 also issued under 29 U.S.C. 653.

12. In § 1910.1047, paragraph (h)(1)(iii) is revised to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(h) * * *

(1) * * *

(i) * * *

(ii) * * *

(iii) The plan shall include the elements prescribed in 29 CFR 1910.38 and 29 CFR 1910.39, ''Emergency action plans'' and ''Fire prevention plans,'' respectively.

* * * * *

13. In § 1910.1050, paragraph (d)(1)(iii) is revised to read as follows:

§ 1910.1050 Methylenedianiline

* * * * *

(d) * * *

(1) * * *

(i) * * *

(ii) * * *

(iii) The plan shall specifically include provisions for alerting and evacuating affected employees as well as the elements prescribed in 29 CFR 1910.38 and 29 CFR 1910.39, ''Emergency action plans'' and ''Fire prevention plans,'' respectively.

* * * * *

14. In § 1910.1051, paragraph (j) is revised to read as follows:

§ 1910.1051 1,3–Butadiene

* * * * *

(j) *Emergency situations. Written plan.* A written plan for emergency situations shall be developed, or an existing plan shall be modified, to contain the applicable elements specified in 29 CFR 1910.38 and 29 CFR 1910.39, ''Emergency action plans'' and ''Fire prevention plans,'' respectively, and in 29 CFR 1910.120, ''Hazardous Waste Operations and Emergency Response,'' for each workplace where there is the possibility of an emergency.

* * * * *

[FR Doc. 02–27251 Filed 11–6–02; 8:45 am]

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November 7, 2002

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Eriodictyon capitatum* (Lompoc yerba santa) and *Deinandra increscens* ssp. *villosa* (Gaviota tarplant); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG88

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Eriodictyon capitatum* (Lompoc yerba santa) and *Deinandra increscens* ssp. *villosa* (Gaviota tarplant)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for *Eriodictyon capitatum* (Lompoc yerba santa) and *Deinandra increscens* ssp. *villosa* [= *Hemizonia increscens* ssp. *villosa*] (Gaviota tarplant). Approximately 6,519 hectares (ha) (16,110 acres (ac)) in Santa Barbara County, California, are within the boundaries of the critical habitat designation.

Critical habitat identifies specific areas, both occupied and unoccupied, that are essential to the conservation of a listed species and that may require special management considerations or protection.

Section 7(a)(2) of the Act requires that each Federal agency shall, in consultation with and with the assistance of the Service, insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. Section 4 of the Act requires us to consider economic and other relevant impacts of specifying any particular area as critical habitat.We solicited data and comments from the public on all aspects of the proposal, including data on economic and other impacts of the designation.

DATES: This rule is effective December 9, 2002.

ADDRESSES: Comments and materials received, as well as supporting documentation, used in the preparation of this final rule are available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003.

FOR FURTHER INFORMATION CONTACT: Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office (see **ADDRESSES** section) (telephone 805/644–1766; facsimile 805/644–3958). Information regarding this designation is available in alternate formats upon request.

SUPPLEMENTARY INFORMATION:

Background

We proposed to designate critical habitat for *Eriodictyon capitatum* (Lompoc yerba santa) and *Deinandra increscens* ssp. *villosa* (Gaviota tarplant) on November 15, 2001 (66 FR 57559). In the proposed rule, we also included a proposal to designate critical habitat for *Cirsium loncholepis* (La Graciosa thistle).

During the public comment period, we received a recommendation from a peer reviewer to delay the publication of a final rule for *Cirsium loncholepis* pending the determination of its taxonomic status. Recent research on *C. loncholepis* raises significant questions regarding the taxonomy of the species. The taxonomic relationship between *C. loncholepis* and *C. scariosum* (elk thistle), which is widespread in montane wetland areas in California, is under review (Dr. David Keil, California Polytechnic University, San Luis Obispo, California, pers. comm., 2002). *Cirsium loncholepis* may be proposed as a new taxon, *C. scariosum* var. *citrinum,* in *The Flora of North America,* which will be submitted for peer review in December of 2002. Due to the uncertainty in the taxonomic status of *C. loncholepis,* we and the plaintiffs agreed to a 1-year extension to the date by which the final rule for *C. loncholepis* critical habitat is to be submitted for publication.

Eriodictyon capitatum and *Deinandra increscens* ssp. *villosa* [=*Hemizonia increscens* ssp. *villosa*] occur along the south central California coast. They are restricted to a narrow area in northern and western Santa Barbara County, in declining or altered habitats including central maritime chaparral, valley needlegrass grassland, and southern bishop pine forest (Holland 1986; Schoenherr 1992).

Eriodictyon capitatum

Eriodictyon capitatum (Lompoc yerba santa) was collected by Hoffman in 1932, near Lompoc, growing under *Pinus muricata* (bishop pine), and described the following year (Eastwood 1933). *Eriodictyon capitatum* is a shrub in the waterleaf family (Hydrophyllaceae) with narrow, sticky stems up to 3 meters (m) (10 feet (ft)) tall. The head-like inflorescence has lavender corollas that are 6 to 15 millimeters (mm) (0.2 to 0.6 inch (in)) long. It is distinguished from related species by its narrow, entire (margins with smooth or continuous edges) leaves and its head-like inflorescence. The fruits are 4-valved capsules that are 1 to 3 mm (0.03 to 0.1 in) wide, and contain up to 5 seeds (Halse 1993). However, seed set is typically much less; Elam (1994) found that flowers that were intentionally cross-pollinated produced a mean of 1.77 seeds per fruit, while flowers that were intentionally self-pollinated produced an average of 0.03 seeds per fruit.

Eriodictyon capitatum also spreads vegetatively through the production of rhizomes. New stems emerging from these rhizomes are referred to as ramets. For plants that spread vegetatively, ramet is a general term used to describe above-ground stems, regardless of their underground physiological connection. In recent observations, new stems were found to be emerging 30 m (100 ft) or more away from the nearest visible ramet, suggesting there is a long distance spread of the root system (Diane Pratt and Connie Rutherford, Service, pers. obs., 2002; Chris Gillespie, Vandenberg Air Force Base, pers. comm., 2002).

Eriodictyon capitatum occurs in maritime chaparral with *Dendromecon rigida* (bush poppy), *Quercus berberidifolia* (California scrub oak), *Q. parvula* (scrub oak), and *Ceanothus cuneatus* (buck brush), and in southern bishop pine forests that intergrade with chaparral comprised primarily of *Arctostaphylos* spp. (manzanita) and *Salvia mellifera* (black sage) (Smith 1983). These maritime chaparral and bishop pine forests are found inland from the active dunes, where there are remnants of prehistoric uplifted dunes that have formed a weakly cemented sandstone that has weathered to produce a sandy, extremely well drained, and nearly infertile soil (Davis *et al.* 1988). This substrate has a limited distribution, occurring on the following mesas in San Luis Obispo and Santa Barbara counties: Nipomo Mesa; Casmalia Hills; San Antonio Terrace; Burton Mesa; Lompoc Terrace; and Purisima Hills. Central coast maritime chaparral is the primary habitat that occurs on the sand hills and has been the focus of several studies (Ferren *et al.* 1984; Davis *et al.* 1988; Philbrick and Odion 1988; Davis *et al.* 1989; Odion *et al.* 1992). Seven local endemic plant species, and at least 16 other uncommon plant species, are also components of this habitat. This community type is an exceptional biological resource due to the concentration of rare plants found within it, but most of it has been converted to other land uses, fragmented, or degraded by non-native species invasion (Davis *et al.* 1988;

Odion *et al.* 1992). Central coast maritime chaparral is considered threatened and sensitive by the California Department of Fish and Game's (CDFG) Natural Heritage Division (Holland 1986). Southern bishop pine forest is scattered in the Purisima Hills and intergrades with the central coast maritime chaparral (Holland 1986).

The soils associated with *Eriodictyon capitatum* are extremely variable, but all tend to be slightly to strongly acidic. Sites on ridgetops have very shallow soils that consist of exposed parent material. Permeability ranges from low (high clay content), in the Santa Ynez Mountains, to excessively drained (Arnold sands with a low clay content) in the Solomon Hills. The Burton Mesa population occurs on an upper highly permeable soil (Tangair sands) underlain by a shale substrate of low permeability. The Pine Canyon population occurs in the bottom of the drainage in a highly gullied landscape (C. Gillespie, Vandenberg Air Force Base, pers. comm., 2002).

The four locations currently known to be occupied by *Eriodictyon capitatum* are in western Santa Barbara County. Based on the presence of appropriate soils and associated species, we believe that other populations may occur on the mesas listed above, but have not yet been detected by botanists.

Two of the known locations of *Eriodictyon capitatum* are on Vandenberg Air Force Base (Vandenberg); these two locations are referred to herein as Vandenberg East (comprised of two groups) and Vandenberg West (comprised of one group). The other two locations are in oil fields south of Orcutt, referred to as the Solomon Hills location (comprised of one group), and Santa Ynez Mountains location (comprised of three groups) found at the western end of the mountains, all on private land. Based on enzyme analysis, Elam (1994) determined that all of the Santa Ynez Mountains groups, and one of the Vandenberg groups (within the Vandenberg East location), were made up of several genetically distinct individuals (genets). Each genet is typically composed of many ramets produced by its spreading root system. The genetic information to date suggests that the other two Vandenberg groups are composed of a single genet, that is to say that there is only one genetic individual with several above surface ramets that may encompass a large area (Elam 1994). However, other genetic individuals may exist in the soil seed bank. The Solomon Hills location was not studied due to inaccessibility. The three Santa Ynez Mountains groups ranged from 11 to 20 genets each; the single group on Vandenberg that was composed of multiple genetic individuals had 18 genets. *Eriodictyon capitatum* is self-incompatible (*i.e.*, it requires pollen from genetically different plants to produce seed), and its fruits appear to be parasitized by an insect (Elam 1994).

Because *Eriodictyon capitatum* evolved in fire-adapted vegetation communities, fire likely plays an important role in the persistence and reproduction of populations of the taxon. Fire cues, such as heat and charate (charred wood) have been found to significantly increase germination of other *Eriodictyon* species (Keeley 1987). If a seed bank remains within a location of *Eriodictyon capitatum*, it may be expressed following fire. However, if the soil seed bank is depauperate (impoverished), an intense burn that kills existing plants may eliminate an entire clone or population.

A study of one of the groups at Vandenberg that is potentially composed of one genet showed that *Eriodictyon capitatum* resprouted successfully from the base of the plant after a prescribed fire. However, several stems died, and no seedling recruitment occurred, which is consistent with Jacks *et al.* (1984) theory that a single genetic, self-incompatible individual would be expected to produce little or no seed. Following a burn in 1999, the group potentially composed of one genet at Vandenberg West expanded from approximately 80 to 150 individual ramets. Since that time, there have been no observations of evidence of seed production at this location (C. Gillespie, *in litt.,* 2002).

Some biologists have suggested that disturbance other than fire (*e.g.*, road scraping) favors persistence, growth, and reproduction of populations of *Eriodictyon capitatum* (Dr. Neil Havlik, botanist, City of San Luis Obispo, *in litt.,* 2002). The population of *Eriodictyon capitatum* in the Solomon Hills appears to have responded well to ongoing disturbance along roads and near facilities associated with fire control practices (Sue Foley, Nuevo Energy Company, pers. comm., 2002). Such disturbance may encourage stem production and the spread of individual genets. However, road scraping and ongoing maintenance and removal of vegetation for fire control may destroy individual ramets or damage the root structure of *Eriodictyon capitatum* plants. It is not known how these activities may affect sexual reproduction and influence the dispersal and expression of the soil seed bank.

Incompatible fire management practices (*e.g.*, prescribed fires that are too frequent or poorly-timed), habitat loss, invasive non-native plant species, low seed productivity, residential and commercial development, and naturally occurring catastrophic events pose significant threats to the long-term survival of this species. Habitat for *Eriodictyon capitatum* may be degraded by the presence of non-native species, such as veldt grass and iceplant, that may compete with native vegetation. These fast-spreading species are difficult to control, particularly after an area has been denuded by wildfire. *E. capitatum* was listed as rare by the State of California in 1979 (CDFG 1992).

Deinandra increscens ssp. villosa

Deinandra increscens ssp. *villosa* is a member of the sunflower family. Tanowitz (1982) described this plant from collected material, as well as a specimen gathered from Gaviota in 1902 by Elmer, as *Hemizonia increscens* ssp. *villosa.* Recent studies on the evolution of a related group of the tarplants of North America have resulted in the reinstatement of the genus name *Deinandra* for *Hemizonia increscens* ssp. *villosa* (Baldwin 1999). *Deinandra increscens* spp. *villosa* is a yellow-flowered, variable gray-green, soft, hairy annual that is 30 to 90 cm (12 to 35 in) tall with stems branching near the base. The lower leaves are 5 to 8.6 cm (2 to 3.4 in) long. The inflorescence is rounded to flat-topped typically with mostly 13-ray flowers and 18 to 31 usually sterile, disk flowers. The seeds produced by the ray flowers (achenes) are three-angled and about 2 mm (0.08 in); the seeds of this genus lack the long set of awns that assist in wind dispersal, as are found in many other members of the sunflower family (Keil 1993). The seeds most likely are dispersed by adhesion of the sticky bracts clasping the ray achenes to animal fur or feathers (B. Baldwin, *in litt.,* 2001). Two other subspecies, *D. increscens* ssp. *increscens* (grassland tarweed) and *D. increscens* ssp. *foliosa* (leafy tarplant), differ from *D. increscens* ssp. *villosa* by their stiff-bristly, deep green foliage; however, chemical composition is the best means to differentiate these species (Keil 1993; Katherine Rindlaub, biological consultant, *in litt.,* 1998). There are occasional observations of 13-rayed *D. increscens* ssp. *increscens* that are reported as *D. increscens* ssp. *villosa* (K. Rindlaub, i*n litt.,* 1998).

Deinandra increscens ssp. *villosa* blooms from June through September. Pollinators observed on the flowers of *D. increscens* ssp. *villosa* include several species of flies, bees, skippers, and

butterflies (Tanowitz in Howald 1989). *Deinandra increscens* ssp. *villosa* depends on the successful transfer of pollen between plants in order to produce seeds. Most *Deinandra* species are strongly self-incompatible (Tanowitz 1982; B. Baldwin, *in litt.,* 2001), meaning that self-fertilization is impossible and insects are necessary for the transfer of pollen. The type of incompatibility system that *Deinandra* species possess (sporophytic) makes their ability to reproduce particularly vulnerable to loss of genetic variation within and between populations (B. Baldwin, *in litt.,* 2001).

As is typical of annual plant species, the number of individuals present above-ground from one year to the next varies dramatically, most likely depending on climatic conditions such as amount of rainfall, timing of rainfall, and temperature regimes during critical stages of germination and seedling growth. There are some years when patches may contain few to no individuals (Howald 1989), but a seed bank likely persists in the soil. In 1995 and 1997, the species was not abundant at the locations known at the time (K. Rindlaub, *in litt.,* 1998).

Deinandra increscens ssp. *villosa* has a highly localized distribution in western Santa Barbara County, where it is associated with needlegrass grasslands comprised of native *Nassella* spp. (needlegrass), the non-native *Avena* spp. (wild oats) and *Bromus diandrus* (ripgut brome), and other herbs and grasses. The grasslands intergrade with coastal sage scrub composed of *Artemisia californica* (California sagebrush), *Baccharis pilularis* (coyote bush), *Hazardia squarrosa* (sawtooth golden bush), and *Eriogonum fasciculatum* (California buckwheat) (CNDDB 2001).

Until several years ago, populations of *Deinandra increscens* ssp. *villosa* were only known from marine terraces in the vicinity of Gaviota. However, populations were recently observed at approximately seven new locations ranging westward from Gaviota along the coast and in the Santa Ynez Mountains to Point Arguello (Mary Meyer, CDFG, pers. comm., 2001; Hendrickson *et al.* 1998). This species is found on sandy soils associated with marine terraces and uplifted marine sediments, ranging from 46 m (150 ft) in elevation along the lowest terraces to 305 m (1000 ft) (Hendrickson *et al.*1998; CNDDB 2001; Dieter Wilken, *in litt.,* 1998). At this higher elevation, the taxon is known to occur in grasslands above the 215 m (700 ft) contour line west of Sudden Peak (CNDDB 2001; D. Wilken, *in litt.,* 1998). One disjunct population occurs in grassland and openings within coastal sage scrub just south of Point Sal on Vandenberg Air Force Base (C. Gillespie, pers. comm., 2001; CNDDB 2001).

Soil characteristics have been studied most extensively near the Gaviota location. There, the plant is restricted to Conception and Milpitas-Positas soils, which consist of acidic, fine, sandy loams (All American Pipeline Company (AAPC) 1995). A subsurface clay layer 2.5 to 90 cm (1 to 36 in) deep may serve as a reservoir of soil moisture in an area otherwise characterized by summer drought (Howald 1989). However, *Deinandra increscens* ssp. *villosa* consistently occurs where the depth to clay is only 2.5 to 5 cm (1 to 2 in) (K. Rindlaub, *in litt.,* 1998).

The narrow coastal terrace at Gaviota is bisected lengthwise by Highway 101, a railroad, and several pipelines. Most of the habitat for *Deinandra increscens* ssp. *villosa* lies on the north side of the highway on private lands owned by the petroleum industry; CDFG is in the process of acquiring an 86 ha (35 ac) parcel to establish a *D. increscens* ssp. *villosa* preserve. A few colonies occur on the south side of Highway 101 on land owned by California Department of Parks and Recreation (CDPR). Most of the other populations west of Gaviota are located on private land; certain petroleum companies have leased land for their facilities and access to them at Government Point, just east of Point Conception. Two populations, one near Point Arguello and one near Point Sal, are located on Vandenberg Air Force Base (CNDDB 2001; C. Gillespie, pers. comm., 2001).

Deinandra increscens ssp. *villosa* is threatened by destruction of individual plants, habitat loss, and habitat degradation from the development and decommissioning of oil and gas facilities, including pipelines, incompatible fire management practices, residential and commercial development, and competition with non-native weeds (65 FR 14892). Within the last 5 years, two aggressive non-native grasses, *Ehrharta calycina* (veldt grass) and *Phalaris aquaticus* (harding grass), have invaded the Gaviota site and pose a serious threat to *D. increscens* ssp. *villosa* and the remaining coastal prairie habitat at this site (K. Rindlaub, pers. comm., 2001; M. Meyer, pers. comm., 2001).

Until recently, the overall trend for this species has been characterized as one of decline (CDFG 1992); this was based primarily on impacts occurring on the Gaviota populations. The populations in the vicinity of Point Conception and Government Point were discovered in the year 2000. The populations in this area face similar threats to those in the Gaviota area, specifically from activities associated with the decommissioning of oil and gas facilities, and from alteration of habitat due to the spread of iceplant (*Carpobrotus edulis*) and veldt grass (M. Meyer, pers. comm., 2001). However, some of the populations found within the last 3 years are in remote areas in the Santa Ynez Mountains and do not appear to be threatened at this time.

Deinandra increscens ssp. *villosa* was listed as endangered by the State of California in 1990 (CDFG 1992). In 1989, when the species was first proposed for State listing, CDFG recommended several recovery and management actions including: (1) Research on the reproductive biology and habitat requirements so that essential habitat can be more clearly defined and protection requirements can be formulated; (2) working with Santa Barbara County and private landowners to establish a long-term monitoring program and protected status for *D. increscens* ssp. *villosa*; and (3) working with Santa Barbara County and private landowners to assure that future impacts to *D. increscens* ssp. *villosa* are avoided or adequately mitigated (Howald 1989). In their role as the lead permitting agency for the California Environmental Quality Act, the County has worked with CDFG and the petroleum industry over the past decade to develop a strategy to mitigate for impacts to *D. increscens* ssp. *villosa* resulting from oil and gas activities in the Gaviota area.

At least two decommissioning efforts will be undertaken in the near future in areas where *Deinandra increscens* ssp. *villosa* has been found within the last 3 years. These include the decommissioning of Texaco's Hollister Ranch facility pipelines that stretch from Gaviota west to Saint Augustine, and Unocal's production facilities from Point Conception east to the Cojo Marine Terminal. The County will be working with CDFG, the Service, and the California Coastal Commission to ensure appropriate measures are taken to conserve the *D. increscens* ssp. *villosa*, as well as other federally listed wildlife species that occur in these areas. Unocal is proposing to restore disturbed areas and contribute towards CDFG's Gaviota Tarplant Ecological Reserve, which was established to compensate for impacts resulting from previous oil and gas activities along the Gaviota Coast (Padre Associates 2002).

Previous Federal Action

Federal action on these plants began as a result of section 12 of the Act (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be threatened, endangered, or extinct in the United States. This report (House Document No. 94–51) was presented to Congress on January 9, 1975, and included *Eriodictyon capitatum* as endangered. We published a notice in the July 1, 1975, **Federal Register** (40 FR 27823) of our acceptance of the Smithsonian Institution report as a petition within the context of section 4(c)(2) (petition provisions are now found in section 4(b)(3)) of the Act), and our intention to review the status of the plant species named therein.

On June 16, 1976, we published a proposal in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. *Eriodictyon capitatum* was included in that **Federal Register** publication. Comments received in relation to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). The Endangered Species Act Amendments of 1978 required that all proposals more than two years old be withdrawn. A one-year grace period was given to those proposals already more than 2 years old. On December 10, 1979 (44 FR 70796), we published a notice of withdrawal of the June 16, 1976, proposal along with four other proposals that had expired.

We published an updated Notice of Review (NOR) for plants on December 15, 1980 (45 FR 82480). This notice included *Eriodictyon capitatum* as category 1 candidate species. Category 1 candidates were those species for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals, but issuance of the proposed rule was precluded by other pending listing activities of higher priority.

The NOR for plants was revised on September 27, 1985 (50 FR 39526). In this notice, *Eriodictyon capitatum* was again included as a category 1 candidate. On February 21, 1990 (55 FR 6184), and September 30, 1993 (58 FR 51144), revised NORs were published that included *E. capitatum* and *Deinandra increscens* ssp. *villosa* as category 1 candidates. On February 28, 1996, the NOR for Plant and Animal Taxa that are Candidates for Listing as Endangered or Threatened Species (61 FR 7596) included as candidates only those species meeting the former definition of category 1, and included *E. capitatum* and *D. increscens* ssp. *villosa.*

A proposed rule to list *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa,* along with *Cirsium loncholepis* and *Lupinus nipomensis* (Nipomo mesa lupine), as endangered was published in the **Federal Register** on March 30, 1998 (63 FR 15164). The final rule listing *C. loncholepis, E. capitatum, D. increscens* ssp. *villosa,* and *L. nipomensis* as endangered species was published on March 20, 2000 (65 FR 14888).

Section 4(a)(3) of the Act, as amended, and our implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species. At the time *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* were listed, we found that designation of critical habitat for these taxa was prudent but not determinable, and that designation of critical habitat would occur once we had gathered the necessary data.

On June 17, 1999, our failure to issue final rules for listing *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* and seven other plant species as endangered or threatened, and our failure to make a final critical habitat determination for the nine species, was challenged in *Southwest Center for Biological Diversity and California Native Plant Society* v. *U.S. Fish and Wildlife Service et al.* (Case No. C99–2992 (N.D.Cal.)). On May 22, 2000, the judge signed an order for us to propose critical habitat for the species by September 30, 2001 and to make a final critical habitat designation by May 1, 2002. In mid-September 2001, plaintiffs agreed to a brief extension of this due date until October 19, 2001. Subsequently, the parties agreed to extend the date by which a proposal of critical habitat was to be submitted for publication to November 2, 2001, and the final critical habitat designation submitted for publication on or before October 25, 2002.

The proposed rule to designate critical habitat for the species was signed on November 2, 2001, and sent to the **Federal Register**. It was published on November 15, 2001 (66 FR 57559). In the proposal, we proposed to designate approximately 27,046 ha (66,830 ac) of land in Santa Barbara and San Luis Obispo Counties as critical habitat for *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa.* Publication of the proposed rule opened a 60-day public comment period, which closed on January 14, 2002.

On May 7, 2002, we published a notice announcing the reopening of the comment period on the proposal to designate critical habitat for *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa,* and a notice of availability of the draft economic analysis on the proposed determination (67 FR 30641). This second public comment period closed on June 6, 2002.

In August 2002, we agreed through a joint stipulation with the plaintiffs (Southwest Center for Biological Diversity and California Native Plant Society) to extend the deadline by which the Service shall submit for publication the final rule for *Cirsium loncholepis* critical habitat to October 25, 2003. Please refer to the Background section of this rule for more information regarding *C. loncholepis* taxonomic issues.

Summary of Comments and Recommendations

We contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposal to designate critical habitat for *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa.* In addition, we invited public comment through the publication of a notice in the San Luis Obispo Tribune on November 18, 2001, and the Santa Barbara News-Press on November 27, 2001.

We received individually written letters from 11 parties, which included 4 designated peer reviewers, 1 Federal agency, and 1 State agency. Of the 11 parties responding individually, 6 supported the proposed designation, 3 were neutral, and 2 were opposed.

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from four knowledgeable individuals who have expertise with the species, with the geographic region where the species occurs, and/or familiarity with the principles of conservation biology. All four of the peer reviewers supported the proposal

and provided us with comments, which are included in the summary below and incorporated into the final rule.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat and *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa.* Comments regarding *E. capitatum* and *D. increscens* ssp. *villosa* critical habitat are addressed in the summary below. We also addressed the peer review comment relating to the uncertainty in taxonomic status of *C. loncholepis.* However, we do not include comments on *C. loncholepis* critical habitat because of the removal of this species from this final designation of critical habitat for the three taxa.

Similar comments were grouped according to peer review or public comments into three general issues relating specifically to the proposed critical habitat determination. We did not receive any comments on the draft economic analysis of the proposed determination. However, we did receive one comment on economic issues during the first comment period on the proposed designation.

Peer Review Comments

(1) *Comment:* One reviewer suggested that we delay publication of a final rule for *Cirsium loncholepis* pending the determination of its taxonomic status. Recent research on *C. loncholepis* raises significant questions regarding the taxonomy of the species.

Our Response: We acknowledge the uncertainty in the taxonomy of *Cirsium loncholepis.* We concur that the publication of a final rule for *C. loncholepis* critical habitat should be delayed until the results of further research can direct future action relating to the status of the species. Please refer to the Background section of this rule for information regarding the study of the taxonomic relationship between *C. loncholepis* and *C. scariosum.*

We discussed with the plaintiffs, the Center for Biological Diversity and CNPS, appropriate action on the critical habitat designation given the questions raised by the recent review of *Cirsium loncholepis* taxonomy. We agreed, through a joint stipulation with the plaintiffs, to a one-year extension to the date by which a final rule for *C. loncholepis* critical habitat must be submitted for publication.

(2) *Comment:* One peer reviewer recommended that we include all apparently suitable unoccupied habitat within the range of the species in our critical habitat designation. The reviewer stated that it is unclear from the proposed rule how many unoccupied areas or unsurveyed areas within the historical range of these taxa have been excluded from the proposed rule. Including these areas would improve the chances for recovery by increasing the habitat that would be protected and thus available for colonization.

Our Response: We acknowledge that all areas within the historical range of *Deinandra increscens* ssp. *villosa* and *Eriodictyon capitatum* have not been surveyed. It is possible that suitable habitat for the two taxa exists but remains unidentified. While additional surveys would help in further defining the distribution of these taxa, we are required to designate those areas we know to be critical habitat, using the best information available to us. We included in our critical habitat designation areas that we know contain the soil types and vegetation communities necessary to support *D. increscens* ssp. *villosa* and *E. capitatum* and that are contiguous with known locations of these taxa.

We agree that future conservation of the species depends not only on the areas that it currently occupies, but also on providing the opportunity for it to shift in distribution over time, and to expand its current distribution. We have addressed this by designating as critical habitat the areas that surround existing populations and that contain the primary constituent elements. This is particularly important for annual plant species such as *Deinandra increscens* ssp. *villosa,* whose populations of observable plants fluctuate in extent from year-to-year. The number and location of standing plants (*i.e.*, above-ground expression) in a population varies annually due to a number of factors, including the amount and timing of rainfall, temperature, soil conditions, and the extent and nature of the seedbank.

Within the geographic area occupied by the species, we designate only areas currently known to be essential. Essential areas already have the features and habitat characteristics that are necessary to sustain the species. We do not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation did not show that an area provides essential life cycle needs of the species, then the area was not included in the critical habitat designation. Within the geographic area occupied by the species, we do not designate areas that do not now have the primary constituent elements, as defined at 50 CFR 424.12(b), which provide essential life cycle needs of the species.

We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. Critical habitat designations do not signal that habitat outside the designation is unimportant or not required for recovery. Areas outside the critical habitat designation continue to be subject to the regulatory protections afforded by section 7 and the applicable prohibitions of section 9 of the Act, as determined on the basis of the best available information at the time of the action.

(3) *Comment:* A peer reviewer noted that the information on which the designation of *Deinandra increscens* ssp. *villosa* was based was not as complete as the information used for *Eriodictyon capitatum.* The list of sites visited for development of the proposed rule did not explicitly include any for *D. increscens* ssp. *villosa.* Since Dr. Bruce Baldwin and his colleagues are working on the taxonomic revision of the subspecies, they may possess additional information on the presence of *Deinandra* in other locations.

Our Response: We have incorporated all available information on the *Deinandra increscens* ssp. *villosa* localities in our critical habitat designation. Most of the distribution information on *D. increscens* ssp. *villosa* is a result of findings from within the past 5 years. During the development of this rule, we visited Gaviota State Beach (within Gaviota-Point Conception unit), and the Point Arguello and Sudden Peak units at Vandenberg, as we mention in the methods section of this rule. We also contacted Dr. Bruce Baldwin of the Jepson Herbarium and Department of Integrative Biology (University of California at Berkeley), who is investigating relationships within *D. increscens* and the classification of the currently recognized subspecies, including *D. increscens* ssp. *villosa.* In conjunction with this work, he has not discovered any information on additional localities of *D. increscens* ssp. *villosa* (Dr. Bruce Baldwin, pers. comm., 2002). Dr. Baldwin and his colleagues hope to visit sites within the known range of the taxon in the summer of 2002 to acquire additional samples for the purpose of investigating fine-scale diversity within *D. increscens* (B. Baldwin, *in litt.,* 2002).

While additional surveys would help in further defining the distribution of the taxon, we are required to designate those areas we know to be critical habitat, using the best information available to us. Due to time constraints

inherent in the critical habitat process, we may not have the information necessary at the time of designation to identify all areas that are essential for the conservation of the species. As the reviewer commented, we have acknowledged that there are gaps in what is known about the distribution and abundance of the taxon by stating that additional habitat outside the designated areas may later be discovered to be critical for the recovery of the species.

Public Comments

Issue 1: Biological Justification and Methodology

(4) *Comment:* One commenter stated that designation of critical habitat for *Deinandra increscens* ssp. *villosa* is premature until there is more definitive information on the habitats on which this taxon is likely to occur; the subspecies has been found recently in several distinct habitats.

Our Response: Most of the distribution information on *Deinandra increscens* ssp. villosa is a result of findings from within the past 5 years. *D. increscens* ssp. *villosa* occurs in grasslands and openings in coastal sage scrub. We have taken into account that this taxon is an annual species with a soil seed bank that likely covers a larger area than the extent of observable plants seen in a given year. Therefore, it is reasonable to assume that the entire spatial distribution of all populations has not been mapped.

When we designate critical habitat we are required to use the best available information. This final critical habitat designation is based on our best assessment at this time of the areas that are needed for the conservation of the taxon. We have encompassed those areas we believe provide some or all of the habitat components that are currently known to be essential for the conservation of *Deinandra increscens* ssp. *villosa.*

Issue 2: Site-Specific Areas and Other Comments

(5) *Comment:* We received a comment that designation of critical habitat for *Eriodictyon capitatum* on Vandenberg Air Force Base would not provide any additional benefit for the species. Protection of areas beyond the limits of the existing populations on Vandenberg is not essential to the conservation of the species because expansion or creation of new populations is not likely, considering the ecology of the species.

Our Response: Existing populations of *Eriodictyon capitatum* may expand into adjacent areas through continued vegetative spread, as well as through seed germination following fire (see the Background section for more information on the species). We determined that the populations of *E. capitatum* on Vandenberg are important and that habitat adjacent to the existing populations is essential to the conservation of the species. However, we are excluding Vandenberg Air Force Base from the final designation of critical habitat because the Air Force has committed to include long-term conservation measures and adaptive management for Eriodictyon capitatum in their INRMP. We have determined that lands on Vandenberg Air Force Base should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species. See the section entitled ''Relationship of Critical Habitat to Military Lands'' for further information.

(6) *Comment:* Arguello, Inc. (Arguello) requested exclusion of its oil and gas facilities from the Conception-Gaviota Unit of *Deinandra increscens* ssp. *villosa* critical habitat. Specifically, Arguello requested exclusion of its Gaviota Facility until such time as it is removed and the site restored. Arguello also requested exemption for maintenance and repair activities to crude oil and natural gas pipelines and their associated right of way (ROW). In situations where Arguello would need a section 404 authorization from the U.S. Army Corps of Engineers (Corps), any additional consultation requirements to address critical habitat would result in a three to four month delay in completing urgent and/or critical maintenance and repairs of the Gaviota Facility, pipelines, and associated ROW.

Our Response: Industrial sites that are paved and developed, such as the Gaviota Facility, would not contain the primary constituent elements and therefore, are not considered critical habitat. Due to mapping and time constraints, we did not map critical habitat in sufficient detail to exclude all developed areas that lack the primary constituent elements essential for the conservation of these taxa, but such areas that remain within the mapped units are not considered critical habitat. Federal activities limited to paved and developed areas would not trigger a section 7 consultation unless they affect the species or primary constituent elements in adjacent critical habitat.

While the developed site itself may not currently be considered critical habitat, the area within which Aruguello's facilities is located is essential to the conservation of *Deinandra increscens* ssp. *villosa.* The Conception-Gaviota Unit supports most of the known populations of *D. increscens* ssp. *villosa* that occur along the immediate coast. Arguello's Gaviota Facility is within the area of the historical Gaviota population, which was once large but is currently in decline; *D. increscens* ssp. *villosa* was first collected from the Gaviota area in 1902. The pipelines and ROW stretch along the portion of the Gaviota coastline that currently supports the taxon. The unit is essential because it encompasses multiple populations that occur on marine terraces supporting coastal grasslands, as well as intervening suitable habitat that is important for the expansion of existing populations, and maintenance of connectivity for pollinators and dispersal between these populations. Therefore, we have determined that the conservation of the entire Conception-Gaviota critical habitat unit is necessary to the conservation of the species. We did not exclude Arguello's Gaviota Facility or pipeline ROW from the final designation, although paved and developed areas are excluded by definition from the designation.

For ongoing pipeline maintenance activities that require Corps permits or other Federal authorization, consultation requirements under the Act can be addressed through a programmatic biological opinion. In the event that emergency repair or maintenance of the Gaviota Facility, pipelines and associated ROW is necessary, regulations for section 7 provide a modified consultation procedure allowing us to respond in an expedited manner if consultation on *Deinandra increscens* ssp. *villosa* or its critical habitat is needed (50 CFR 402.05). This procedure allows emergency consultation to occur through informal means (*e.g.*, a telephone call) and, therefore, promotes rapid responses to emergency situations. The emergency consultation provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc. (50 CFR 402.05).

(7) *Comment:* California Department of Transportation (Caltrans) requested an exclusion of areas within the Caltrans operating ROW in several, unspecified units of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa,* where they overlap with the transportation system of California. Caltrans requested an exclusion to reduce the need for habitat effects determinations for the taxa where routine disturbance occurs as a

result of regular maintenance and operational improvements.

Our Response: In the region covered by this critical habitat designation, State and Federal roads appear to be within the Conception-Gaviota unit of *Deinandra increscens* ssp. *villosa.* Within this unit, the majority of the documented occurrences of the taxon are north and south of Highway 101 along a narrow coastal terrace; we have determined that the coastal terrace is essential for the conservation of the species.

We are not including roads that border the critical habitat units in our designation. For this final rule, we adjusted unit boundaries to exclude roads whenever possible. However, due to mapping and time constraints, we did not map critical habitat in sufficient detail to exclude all roads, although these would not contain the primary constituent elements essential for the conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* Federal activities limited to roads and other paved or gravelled areas would not trigger a section 7 consultation unless they affect the species or one or more of the primary constituent elements in adjacent critical habitat. To streamline the regulatory process, Caltrans may request section 7 consultation at a programmatic level for ongoing activities that would result in adverse effects to the taxon or its critical habitat.

Issue 3: Economic Issues

(8) *Comment:* We received one comment recommending that we use the contingent valuation method (CVM) to determine the hypothetical non-use values for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* and their habitats that comprise this rulemaking.

Our Response: Some economists recognize that in addition to a ''use value'' that society places on natural resources these goods may also exhibit a ''non-use value'' by society. For example, while many people may elect to visit a public park and ''use'' it for a variety of recreational purposes, the presence of this park may provide a variety of benefits to additional members of society even though their enjoyment may not be directly observable. Certain individuals may also derive benefits from the park because of the protection it offers to certain natural resources including a diverse ecosystem that harbors endangered and threatened species. While these members of society may value the park merely for its existence, their behavior is not directly observable and thus economists have developed certain tools, including the CVM, for measuring these values.

CVM is an approach used by some economists to directly elicit non-use values from individuals through the use of carefully designed survey instruments. A CVM study will provide respondents with a framework wherein they are asked to value the resource given the parameters of the framework. For the CVM to work properly, and provide meaningful information on non-use values, considerable resources must be expended to adequately design and administer this tool. We have not employed CVM studies to capture the non-use values certain individuals may place on critical habitat designation.

Summary of Changes From the Proposed Rule

In preparation for development of our final designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa,* we reviewed comments received on the proposed designation of critical habitat. Other than minor clarifications and incorporation of additional information on the species' biology, we made three changes to our proposed designation, as follows:

(1) For *Eriodictyon capitatum,* we shortened the list of the primary constituent elements from three to two elements. We removed the third primary constituent element (habitat directly adjacent upslope and downslope from known populations, as this species appears to spread primarily through vegetative reproduction) because it did not add any additional value or purpose in defining critical habitat. We determined that the two primary constituent elements adequately captured the habitat features necessary for the conservation of the species.

(2) We deleted one of the units of *Eriodictyon capitatum* and two units of *Deinandra increscens* ssp. *villosa* proposed critical habitat. These units are comprised entirely of lands under the Federal jurisdiction of Vandenberg Air Force Base. In addition, we modified boundaries to exclude portions of the Sudden Peak and Conception-Gaviota Units of *Deinandra increscens* ssp. *villosa* critical habitat that consisted of lands on Vandenberg Air Force Base. The Sudden Peak Unit of *Deinandra increscens* ssp. *villosa* critical habitat was reduced from 694 ha (1,715 ac) in the proposed rule to 320 ha (791 ac) in the final designation. The Conception-Gaviota Unit of *Deinandra increscens* ssp. *villosa* critical habitat was reduced from 3,668 ha (9,115 ac) in the proposed rule to 3,176 ha (7,848 ac) in the final designation.

In total, the removal of lands on Vandenberg resulted in a reduction of 2,126 ha (5,253 ac), approximately 23 percent of the area that had been proposed as *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* critical habitat. The reasons for excluding Vandenberg from this final critical habitat designation are discussed in the section entitled ''Relationship of Critical Habitat to Military Lands''.

(3) We modified the boundaries of one unit of *Eriodictyon capitatum* (Solomon Hills) and one unit of *Deinandra increscens* ssp. *villosa* (Santa Ynez) critical habitat due to the availability of better mapping resources and additional information received during the development of the final rule. In total, these modifications resulted in a reduction of 467 ha (1,152 ac), approximately 5 percent of the area proposed as critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

The new boundary lines were drawn within the boundaries previously defined; in no case was the new boundary line drawn outside of that described in the legal description for the units in the proposed designation. The purpose of these changes was to exclude areas that do not appear to contain the primary constituent elements, and for which we were unable to draw more precise boundaries at the time of the proposed designation. New information provided during the preparation of the final rule, along with recently acquired high resolution aerial photographs dating from April 2000, enabled us to undertake the more precise mapping. We received maps of vegetation within the Santa Ynez, Santa Ynez Mountains, and Conception-Gaviota Units from the Hollister Ranch Conservancy, and information from the Nuevo Energy Company regarding the Solomon Hills Unit. We found it appropriate to modify boundaries of the Solomon Hills and Santa Ynez Unit, upon consideration of the new information and high resolution aerial photographs, as described below

(1) The Solomon Hills Unit of *Eriodictyon capitatum* critical habitat was reduced from 1,311 ha (3,239 ac) in the proposed rule to 906 ha (2,239 ac) in the final designation. According to high resolution aerial photography and communication with representatives of Nuevo Energy Company, portions of the low-lying areas are characterized primarily by grassland that do not contain vegetation associated with *E. capitatum.*

(2) The Santa Ynez Unit of *Deinandra increscens* ssp. *villosa* critical habitat was reduced from 495 ha (1,222 ac) in

the proposed rule to 433 ha (1,070 ac) in the final designation. Using vegetation maps from Hollister Ranch Conservancy and aerial photography, we modified the western boundary of the unit to exclude a portion that appears to be dominated by chaparral and oak woodland vegetation communities.

Critical Habitat

Section 3 of the Act defines critical habitat as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat that with regard to actions authorized, funded, or carried out by a Federal agency. Section 7 of the Act also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation would not afford any additional regulatory protections under the Act against such activities.

Critical habitat also provides non-regulatory benefits to the species by informing the public and private sectors of areas that are important for species recovery and where conservation actions would be most effective. Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features essential for the conservation of that species, and can alert the public as well as land-managing agencies to the importance of those areas. Critical habitat also identifies areas that may require special management considerations or protection, and may help provide protection to areas where significant threats to the species have been identified, by helping people to avoid causing accidental damage to such areas.

In order to be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known, and using the best scientific and commercial data available, habitat areas that are essential to the conservation of the species. Section 3(5)(C) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat except in those circumstances determined by the Secretary. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.''

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. This policy requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments or other unpublished materials.

Section 4 of the Act requires that we designate critical habitat based on what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, it is important to understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the applicable prohibitions of section 9 of the Act, as determined on the basis of the best available information at the time of the action. Federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific and commercial data available to determine areas that contain the physical and biological features that are essential for the conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* This information included information from the CNDDB (2001), soil survey maps (U.S. Soil Conservation Service 1972, 1981), aerial photography, recent biological surveys and reports, additional information provided by interested parties, and discussions with representatives of CDFG, the County of Santa Barbara Planning Department, and botanical experts. We also conducted site visits at several locations managed by local, State or Federal agencies, including Vandenberg Air Force Base and Gaviota State Beach. We also visited the Solomon Hills site, which is owned by Nuevo Energy Company.

The proposed critical habitat units for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* were delineated by creating data layers in a geographic information system (GIS) format of the areas of known occurrences of the two taxa using the information sources

described above and aerial photographs available through TerraServer (*http://terraserver.homeadvisor.msn.com*). These data layers were created on a base of USGS 7.5′ quadrangles obtained from the State of California's Stephen P. Teale Data Center. We defined the boundaries for the proposed critical habitat units using roads and known landmarks and, where necessary, township, range, and section numbers from the public land survey.

For the final rule, we then modified the boundaries of proposed critical habitat using recent aerial imagery dated from April 2000 (AirPhoto USA), and additional maps of vegetation submitted by the Hollister Ranch Conservancy. The boundaries of the final critical habitat units are defined by Universal Transverse Mercator (UTM).

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth, and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

All areas designated as critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* are within each species' historic range and contain one or more of the physical or biological features (primary constituent elements) identified as essential for the conservation of each taxon. Much of what is known about the specific physical and biological requirements of *E. capitatum* and *D. increscens* ssp. *villosa* is described in the Background section of this final rule.

The designated critical habitat, combined with those areas located on Vandenberg Air Force Base that are critical to the species' survival but were excluded from the final designation, is intended to provide sufficient habitat to maintain self-sustaining populations of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* throughout each species' range, and provide those habitat components essential for the conservation of each taxon. Habitat components that are essential for *E. capitatum* are found in vegetation communities classified as maritime chaparral and in southern bishop pine forests that intergrade with chaparral where physical processes, such as occasional dry-season fires, support patch dynamics within the pine forest and chaparral communities. Habitat components that are essential for *D. increscens* ssp. *villosa* are found in needlegrass grassland and coastal sage scrub communities with a clay layer found below the sandy soil surface.

Eriodictyon capitatum

Based on our knowledge to date, the primary constituent elements of critical habitat for *Eriodictyon capitatum* consist of:

(1) Soils with a large component of sand and that tend to be acidic; and

(2) Plant communities that support associated species, including maritime chaparral, particularly where the following associated species are found: *Dendromecon rigida* (bush poppy), *Quercus berberidifolia* (California scrub oak), Quercus parvula (Santa Cruz Island oak), and Ceanothus cuneatus (buck brush); and in southern bishop pine forests that intergrade with chaparral *Arctostaphylos* spp. (manzanita) and *Salvia mellifera* (black sage).

Deinandra increscens ssp.villosa

Based on our knowledge to date, the primary constituent elements of critical habitat for *Deinandra increscens* ssp. *villosa* are:

(1) Sandy soils associated with coastal terraces adjacent to the coast or uplifted marine sediments at interior sites up to 5.6 km (3.5 mi) inland from the coast; and

(2) Plant communities that support associated species, including needlegrass grassland and coastal sage scrub communities, particularly where the following associated species are found: needlegrass species (*Nassella* spp.), California sagebrush (*Artemisia californica*), coyote bush (*Baccharis pilularis*), sawtooth golden bush (*Hazardia squarrosa*), and California buckwheat (*Eriogonum fasciculatum*).

Special Management Considerations or Protections

Special management considerations or protections may be needed to maintain the primary constituent elements for the two taxa within the units being designated as critical habitat. In some cases, protection of existing habitat and current ecological processes may be sufficient to ensure that populations of the plants are maintained at those sites, and have the ability to reproduce and disperse in surrounding habitat. In other cases, however, active management may be needed to maintain the primary constituent elements for the two taxa. We have outlined below the kinds of special management and protection that these two taxa would most likely require. These recommendations for management and protection are general in nature. Specific management actions should be developed according to local site conditions. Not all of these will apply to each plant taxon equally.

(1) Existing soil conditions should be protected by avoiding activities that cause the erosion or compaction of soils. Maintaining an intact soil profile may be necessary to maintain edaphic features such as a horizon of permeable sandy soils on the surface layer. For example, *Deinandra increscens* ssp. *villosa* is thought to be restricted to acidic, fine sandy loams with a subsurface clay layer that may act as a reservoir of soil moisture.

(2) Existing hydrologic conditions should be protected by avoiding activities that cause a change in surface or subsurface water flows upon which the plant taxa depend. For example, development of areas adjacent to a population may result in an increase in runoff and surface water flow. This alteration may affect the soil moisture content to which the local population has adapted.

(3) In all plant communities where these taxa occur, invasive, non-native species, such as harding grass (*Phalaris aquaticus*), veldt grass (*Ehrharta calycina*), and iceplant (*Carpobrotus edulis*), should be actively managed. Invasive non-natives pose a serious threat to the survival of *Deinandra increscens* ssp. *villosa* and *Eriodictyon capitatum* and remaining habitat of the taxa. For example, accumulated dead leaves and stems (thatch) from non-native grass species that dominate the habitat effectively prevent the establishment of *D. increscens* ssp. *villosa* at a site. Iceplant is known to invade native maritime chaparral vegetation occupied by *Eriodictyon capitatum.* Once non-native grasses and other invasive plants (*e.g.*, iceplant) have become established, they cannot be removed without great expenditure of time and effort.

(4) The composition of the native plant and animal communities associated with the taxa must be maintained. Native plant diversity may limit the ability of aggressive non-native plants to invade a population (Dukes 2002). In addition, a decline in biodiversity may increase the potential impact of invasive plants on a

community (*e.g.*, suppression of growth). Recent research suggests that grassland communities with fewer species may be more likely to decline as a consequence of invasion (Dukes 2001). In addition, native plant diversity may increase pollinator activity and therefore enhance the conservation of a plant species. Biologists have suggested that a plant population may persist as long as it occurs within an area of a diversity of plant species that are attractive to pollinators (Kwak 1988). Habitat fragmentation and isolation of species-rich grasslands, with intervening areas of no or low diversity of native plants, has been found to negatively affect plant-pollinator interactions (Stephann-Dewenter and Tscharntke 1999).

(5) The local distribution of plant communities should be managed to provide for the physical requirements of the taxa (*e.g.*, space for establishment). For some grassland areas, it may be important to maintain openings within or between coastal scrub communities that might otherwise encroach upon grassland patches that support *Deinandra increscens* ssp. *villosa.*

(6) Certain areas where these taxa occur may need fencing to protect them from accidental or intentional trampling by humans and livestock. Portions of three of the five units are currently used by livestock.

Criteria Used To Identify Critical Habitat

Throughout this designation, when selecting areas of critical habitat we made an effort to avoid developed areas, such as housing developments, that are unlikely to contribute to the conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* However, we did not map critical habitat in sufficient detail to exclude all developed areas, or other lands unlikely to contain the primary constituent elements essential for the conservation of *E. capitatum* and *D. increscens* ssp. *villosa.* Areas within the boundaries of the mapped units, such as buildings, roads, parking lots, railroads, airport runways and other paved areas, lawns, and other urban landscaped areas will not contain any of the primary constituent elements. Therefore, Federal actions limited to these areas would not trigger a section 7 consultation unless it is determined that such actions may affect the species and/or adjacent designated critical habitat (*e.g.* certain actions may affect the species or its critical habitat in an adjacent area).

During the development of this rule, we considered the role of unoccupied habitat in the conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* Due to the historic loss of the habitats that supported the two taxa, we believe that future conservation and recovery of these taxa depends not only on protecting them in the limited areas that they currently occupy, but also on providing the opportunity to expand their distribution by protecting currently unoccupied habitat that contains the necessary primary constituent elements within their historic ranges.

Portions of the critical habitat units designated for *Deinandra increscens* ssp. *villosa* include areas that are currently unoccupied by the taxon. Determining the specific areas that this taxon occupies is difficult for several reasons: (1) The methods for mapping the current distribution of *D. increscens* ssp. *villosa* can be variable, depending on the scale at which groups of individuals are recorded (*e.g.*, many small groups versus one large group); and (2) depending on the climate and other annual variations in habitat conditions, the extent of the above-ground distributions may either shrink and temporarily disappear, or, as a residual soil seed bank is expressed, enlarge and cover a more extensive area. Therefore, the inclusion of currently unoccupied habitat interspersed with patches of occupied habitat in the critical habitat units reflects the essential conservation needs of this species, the dynamic nature of the habitat, and the life history characteristics of this taxon.

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protections. We considered the status of habitat conservation plan (HCP) efforts during the development of this rule. As discussed in the section entitled ''Relationship to Habitat Conservation Plans'', we may exclude HCPs from critical habitat designation if the benefits of excluding them would outweigh the benefits of including them. Currently, there are no HCPs that include *Eriodictyon capitatum* or *Deinandra increscens* ssp. *villosa* as covered species.

If we determine that essential areas on military lands do not require special management considerations or protections, we may be able to exclude them from critical habitat, as discussed in the section entitled ''Relationship of Critical Habitat to Military Lands.'' The Air Force has developed a Draft Integrated Natural Resources Management Plan (INRMP) for Vandenberg. Although measures to provide for the conservation of *Eriodictyon capitatum* or *Deinandra increscens* ssp. *villosa* are not currently included in the draft INRMP, the Air Force has committed to incorporate into their INRMP, and implement, specific measures that will address the conservation of these species and their habitat where they occur on Vandenberg. Based on this commitment, we have, therefore, determined that lands on Vandenberg Air Force Base should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits inclusion and will not cause the extinction of the species. For this reason, we are excluding from the designated critical habitat those proposed units and portions of proposed units that were located on Vandenberg. This is discussed in greater detail in the section on military lands referred to above.

We also evaluated areas that may be in need of special management considerations or protections in the context of a recovery strategy and broader regional planning efforts. Because *Deinandra increscens* ssp. *villosa* and *Eriodictyon capitatum* were federally listed in the year 2000, we have not yet developed recovery plans for these taxa. *Eriodictyon capitatum* has been State-listed since 1979 and *D. increscens* ssp. *villosa* has been State-listed since 1990. Therefore, the conservation needs of these taxa have been considered during the review of individual projects by the County of Santa Barbara, as lead California Environmental Quality Act agency, and CDFG. Numerous initiatives and planning efforts, described below, all recognize the significance and sensitivity of the coastal habitats and biological resources along this portion of the central California coast that supports the two taxa. These local and regional projects aid in identifying essential areas that are in need of special management or protection. Ongoing conservation planning efforts may also provide the opportunity to develop more focused management plans that would ensure that the essential areas for *E. capitatum* and *D. increscens* ssp. *villosa* are adequately protected.

Certain areas, such as the Gaviota Coast, have been the target of broader planning efforts due to the development and operation of oil and gas facilities and pipelines in environmentally sensitive areas. The Gaviota Coast constitutes one of the critical habitat units for *Deinandra increscens* ssp. *villosa.* This taxon overlaps in large part

with the South Coast Consolidation Planning Area, which is a designation conferred by the SBPDED. The South Coast Consolidation Planning Area is where multiple oil and gas facilities already exist and additional oil and gas production and processing could occur (SBPDED 1982). The South Coast Consolidation Planning Area designation concentrates the establishment and operation of oil and gas facilities into two areas, one of which is near the historic *D. increscens* ssp. *villosa* Gaviota location.

As mitigation for the development of its oil and gas facilities in this area, All-American Pipeline and Chevron provided for the establishment of the Gaviota Tarplant Reserve as a mitigation bank in its Mitigation and Management Plan (AAPC, *in litt.,* 1993; AAPC 1995; K. Rindlaub, *in litt.,* 1996). Arguello, a subsidiary of All-American and the property owner, is in the process of transferring the 35 ha (86 ac) parcel to CDFG for the Gaviota Tarplant Reserve. In its mitigation plan for the Molino Gas Project, located within the South Coast Consolidation Planning Area (described above) along the coast east of Gaviota, Molino Energy Company committed to purchase mitigation credits and contribute an endowment for the management of the Gaviota Tarplant Reserve (K. Rindlaub, *in litt.,* 1996). The Gaviota Tarplant Reserve was intended to provide mitigation for oil and gas projects along this stretch of the Gaviota coast that historically supported an abundance of *Deinandra increscens* ssp. *villosa* (M. Meyer, pers. comm., 2002). Unocal is proposing to contribute a management endowment for the reserve to mitigate for impacts that would result from the decommissioning of its Cojo Marine Terminal and Point Conception Facilities, located near Government Point along the Gaviota coast (Padre Associates 2002). The Gaviota tarplant reserve has been included in the designation because there are currently no restrictions on public use of this area, and the threat of accidental or intentional trampling by humans and livestock to the species still exists.

The County established Coastal Resource Enhancement Fund (CREF) in 1987 to help mitigate significant impacts of offshore oil and gas development to environmentally sensitive coastal resources, among other impacts (SBPDED 2002b). Santa Barbara County has awarded 195 grants for a total of $13.3 million from its CREF. Half of these mitigation funds have been used to acquire or establish conservation easements on coastal properties to protect environmentally sensitive coastal habitats. One of the grants from the CREF contributed to the purchase of Rancho Arroyo Hondo by the Land Trust of Santa Barbara (SPDED 2002c). Rancho Arroyo Hondo consists of 316 ha (782 ac) that extend from the top of the Santa Ynez Mountains down to the ocean along the Gaviota Coast. The boundaries of the ranch follow the ridgelines on either side of the canyon, encompassing nearly the entire watershed of Arroyo Hondo Creek. This area overlaps with one of the *Eriodictyon capitatum* critical habitat units and one of the *Deinandra increscens* ssp. *villosa* critical habitat units.

Critical Habitat Designation

The critical habitat areas described below include one or more of the primary constituent elements described above and constitute our best assessment at this time of the areas needed for the conservation of each of the two taxa. Critical habitat includes habitat throughout the species' current range in Santa Barbara County, California. Lands designated as critical habitat are under State, local, and private ownership. State lands include areas owned and managed by the CDPR and the CDFG. Local lands include parks owned by the County of Santa Barbara. Private lands include areas that are being managed for conservation by private landowners, as well as those that are being managed for agriculture, ranchlands, or oil production. We are designating critical habitat on lands that are considered essential to the conservation of each of the two taxa. Each of the critical habitat units is considered to be occupied by either seeds as part of the seed bank or standing plants, and contain habitat that includes the specific soils, hydrology, and plant communities that are associated with each of the two species. Portions within the units may be currently unoccupied by the species, but still contain habitat that includes the specific soils, hydrology, and plant communities that are associated with the species.

Eriodictyon capitatum

We are designating critical habitat for *Eriodictyon capitatum* in two units encompassing two of the locations currently occupied by the species. The areas being designated as critical habitat are in western Santa Barbara County and include the appropriate sandy, acidic soils and chaparral and southern bishop pine forest habitat that supports *E. capitatum.*

Protection of each of the locations where *Eriodictyon capitatum* occurs is essential for the conservation of this species to reduce the risks inherent in having so few extant populations. The sizes of the *E. capitatum* populations and elevation, coastal influence, and soil type vary between the two critical habitat units. Environmental variations such as these are important in shaping the phenological (*e.g.*, timing of reproduction), morphological (*i.e.*, physical structure and form), and physiological adaptations of plant populations to specific environments (Clausen *et al.* 1948; Clausen 1951). For example, elevation and distance from the coast influence precipitation and average daily temperatures to which a population is subjected, while soil type can influence nutrient and water availability. The heritable local adaptations that develop as a result of such environmental variations reflect genetic variability within the species. Preserving this genetic variability in endemic species that allows for adaptation to changing climatic and other environmental influences is important to improve the likelihood that the species will be able to survive and adapt to such future environmental changes (Falk 1992).

We are designating approximately 2,590 ha (6,401 ac) of land as critical habitat for *Eriodictyon capitatum.* The area that we are designating as critical habitat consists entirely of private lands (Table 1).

TABLE 1.—APPROXIMATE DESIGNATED CRITICAL HABITAT UNIT AREAS FOR *Eriodictyon capitatum* IN HECTARES (HA) (ACRES (AC)) BY LAND OWNERSHIP [1]

Unit name	State	Private	County and other local jurisdictions	Federal	Total
Solomon Hills	0 ha (0 ac)	906 ha (2,239 ac)	0 ha (0 ac)	0 ha (0ac)	906 ha (2,239 ac).
Santa Ynez Mountains	0 ha (0 ac)	1,684 ha (4,162 ac)	0 ha (0 ac)	0 ha (0 ac)	1,684 ha (4,162 ac).
Total	0 ha (0 ac)	2,590 ha (6,401 ac)	0 ha (0 ac)	0 ha (0 ac)	2,590 ha (6,401 ac).

[1] Approximate hectares have been converted to acres (1 ha = 2.47 ac).

The two units of critical habitat for *Eriodictyon capitatum* support populations of the species and contain surrounding habitat essential for maintaining the ecological processes that allow the populations and the primary constituent elements to persist. Areas within the units that are adjacent to, but not currently occupied by *E. capitatum,* also provide habitat for the expansion of existing populations.

In summary, these critical habitat units support two of the four locations of a species endemic to western Santa Barbara County, California. They support the ecological associates (*e.g.* pollinators, seed dispersers, mycorhizzal fungi) that maintain the extant populations and the primary constituent elements, as well as provide space for population expansion that is essential to the conservation of the species.

A brief description of each critical habitat unit is given below:

Solomon Hills Unit

The Solomon Hills Unit consists of a low hill (locally known as Orcutt Hill) located southeast of the community of Orcutt and west of Highway 1. This unit encompasses 906 ha (2,239 ac) and is privately owned, primarily by a single corporation. Habitat in this unit has been dissected by roads, pads, and pipelines associated with oil well drilling. This unit is approximately 24 km (15 mi) from the nearest *Eriodictyon capitatum* location to the south at Vandenberg.

The Solomon Hills Unit includes watersheds from the ridgelines downslope to the bottoms of the nearest drainages. Sites on the ridgetops have very shallow soils consisting of exposed parent material; soils in this unit are unique in that they are excessively drained (Arnold sands with a low clay content). The inland location of this unit, combined with its well-drained soils, may subject this population to warmer, drier, conditions than the other known populations. It is likely that the *Eriodictyon capitatum* population here is locally adapted to the conditions unique to this unit. Preserving genetic variability in the species that has allowed it to adapt to these slightly different environmental influences is important to improve the likelihood that the species will be able to survive and adapt to future environmental changes (Faulk 1992).

The unit contains scattered Bishop pine and live oak, along with maritime chaparral comprised primarily of *Arctostaphylos* spp. (manzanita) and *Salvia mellifera* (black sage), which is a habitat type that supports *Eriodictyon capitatum* at only one other location (Vandenberg East). This bishop pine-chaparral community type is an exceptional biological resource because of the concentration of rare plants found within it, including *E. capitatum.*

The *Eriodictyon capitatum* population in this unit has been documented to occur along the ridgelines and has recently been observed to extend further downslope than previously known (S. Foley, pers. comm., 2002). Therefore, it is important to preserve the downslope habitat, encompassed within this designation, to allow expansion of the existing population.

Santa Ynez Mountains Unit

The Santa Ynez Mountains Unit consists of an 8 km (5 mi) long segment of the Santa Ynez Mountains between the Canada del Coho and Arroyo Bullito drainages. This is the larger of the two units, encompassing 1,684 ha (4,162 ac), and is privately owned. This unit includes several populations of *Eriodictyon capitatum* scattered among *Lithocarpus densiflorus* (tanbark oak), *Quercus agrifolia* (live oak), and numerous chaparral species. The downslope limit of this unit on its south-facing side lies along the shift in vegetation from chaparral at the higher elevations to grasslands at the lower elevations. The vegetation community in this unit differs in its species composition from the other unit. In addition, the soils here are of low permeability (high clay content), unlike those at any other location that supports *E. capitatum.* The populations in this unit are likely subjected to greater seasonal temperature extremes than the other known populations, as they are at the highest elevation (455 m (1500 ft)). In addition, very large individuals (7.6 cm (3 in) diameter at base) have been documented from this unit that were not found at other locations (Melissa Mooney, *in litt.,* 1986).

Deinandra increscens ssp. villosa

We are designating critical habitat for *Deinandra increscens* ssp. *villosa* in three units that encompass areas currently known to be occupied by the species. The areas being designated as critical habitat are in the Santa Ynez Mountains and along the Gaviota coast of western Santa Barbara County. They include the appropriate soils and associated grassland and coastal sage scrub plant communities that support *D. increscens* ssp. *villosa.*

Protection of each of the units where *Deinandra increscens* ssp. *villosa* occurs is essential for conservation of this species in order to reduce the risks inherent in having so few extant populations. The three critical habitat units for *D. increscens* ssp. *villosa* vary in their elevation, coastal influence, and topography. Environmental variations such as these are important in shaping the phenological, morphological, and physiological adaptations of plant populations to specific environments (Clausen *et al.* 1948; Clausen 1951). For instance, elevation and distance from the coast influence the precipitation levels and average daily temperatures to which a population is subjected. The heritable local adaptations that develop as a result of such environmental variations are indicative of genetic variability in the species. Preserving this genetic variability in endemic species that allows for adaptation to changing climatic and other environmental influences is important to improve the likelihood that the species will be able to survive and adapt to such future environmental changes (Falk 1992).

Encompassed within each critical habitat unit we are designating for *Deinandra increscens* ssp. *villosa* are the areas currently occupied by the populations, as well as intervening

suitable habitat that provides space for population expansion, formation of new colonies, and shifts in population location which may occur over decades as habitat suitability changes due to geomorphic or other events (*e.g.*, slope failure, wildfire). In addition, the three units contain habitat needed to support the ecological associates (*e.g.*, pollinators, seed dispersal agents, mycorhizzal fungi) that maintain the extant populations and primary constituent elements for *D. increscens* ssp. *villosa.*

Preserving habitat within a population and the surrounding area is essential to maintain the plant-animal interactions on which movement of pollen and seeds depends. For example, groups of flowering plants that are isolated from native plant communities (*e.g.*, grasslands) can have diminished abundance and species richness of pollinators (Steffan-Dewenter and Tscharntke 1999). Most *Deinandra* species are strongly self-incompatible (Tanowitz 1982; B. Baldwin, *in litt.*, 2001), meaning that self-fertilization is impossible and insects are necessary for the transfer of pollen. *Deinandra increscens* ssp. *villosa* depends on the successful transfer of pollen between plants in order to produce seeds. Pollinators observed on the flowers of *D. increscens* ssp. *villosa* include several species of flies, bees, skippers, and butterflies (Tanowitz in Howald 1989). A decrease in abundance and species richness of pollinators due to habitat isolation can directly reduce seed set in a self-incompatible species such as *D. increscens* ssp. *villosa.*

Intervening native habitat between populations within each unit is also necessary to promote gene flow between populations of *Deinandra increscens* ssp. *villosa* through pollinators and dispersal agents. Gene flow is necessary to maintain genetic variation within and between populations; loss of genetic variation is harmful for reasons discussed below. Habitat connectivity provides opportunity for long-distance movement by pollinators as well as dispersal agents between existing populations. Seed dispersal agents for the taxon are likely the same as those for other *Deinandra* species. Seeds of these species are thought to be dispersed by large and small mammals and birds when the sticky parts of reproductive structures adhere to animal fur and feathers (B. Baldwin, *in litt.*, 2001).

Isolation of small populations from one another can lead to loss of genetic variation due to genetic drift and increased inbreeding (Hamrick and Godt 1996). Genetic drift, which are genetic changes in the allelic composition or allelic frequencies, occurs in small or suddenly depauperate bottleneck populations. A population bottleneck is an episode of reduction in population size due to such things as environmental stress or habitat fragmentation. Genetic consequences of drift and loss of genetic variation include loss of adaptability to change and inbreeding, which is the mating of individuals likely to share some of their genes due to common ancestry. Inbreeding depression is thought to reduce fitness of individual plants; it may negatively affect components such as seed viability, germination success, and flower and fruit production (Falk 1992). Therefore, preservation of genetic variation is essential to promote adaptability to change and the reproductive success necessary for the conservation of the species.

Preserving gene flow between colonies that are scattered across the landscape, as in the Conception-Gaviota Unit, is especially important for this species due to its breeding system. The type of incompatibility system that *Deinandra* species possess makes their ability to reproduce particularly vulnerable to loss of genetic variation within and between populations (B. Baldwin, *in litt.*, 2001). The critical need to preserve gene flow between a large number of individuals and populations has been emphasized for other rare plant species which share this type of incompatibility system (*e.g. Aster furcatus*) (Les *et al.* 1991).

In summary, maintaining the habitat surrounding and between the current *Deinandra increscens* ssp. *villosa* populations is essential to allow the expansion, movement, and founding of populations; to provide habitat for the pollinators and other associates which directly affect the conservation of the *D. increscens* ssp. *villosa*; and to sustain gene flow between populations of *D. increscens* ssp. *villosa* to conserve the genetic variation in this taxon.

We are designating approximately 3,929 ha (9,709 ac) of land as critical habitat for *Deinandra increscens* ssp. *villosa.* Almost all of the area designated as critical habitat consists of private lands (98 percent). Approximately 2 percent consists of State lands (Table 2).

TABLE 2.—APPROXIMATE DESIGNATED CRITICAL HABITAT UNIT AREAS FOR *Deinandra increscens* SSP. *villosa* IN HECTARES (HA) (ACRES (AC)) BY LAND OWNERSHIP [1].

Unit name	State	Private	County and other local jurisdictions	Total
Sudden Peak	0 ha (0 ac)	320 ha (791 ac)	0 ha (0 ac)	320 ha (791 ac).
Santa Ynez	0 ha (0 ac)	433 ha (1,070 ac)	0 ha (0 ac)	433 ha (1,070 ac).
Conception Gaviota	76 ha (187 ac)	3,100 ha (7,661 ac)	0 ha (0 ac)	3,176 ha (7,848 ac).
Total	76 ha (187 ac)	3,853 ha (9,522 ac)	0 ha (0 ac)	3,929 ha (9,709 ac).

[1] Approximate acres have been converted to hectares (1 ha = 2.47 ac).

A brief description of each critical habitat unit is given below:

Sudden Peak Unit

The Sudden Peak Unit consists of a 5-km (3-mi) stretch of ridgeline in the western portion of the Santa Ynez Mountains west of Sudden Peak, and generally includes grasslands above the 215-meter (700-foot) contour line. This unit is 320 ha (791 ac) and is comprised entirely of privately owned lands. Vandenberg Air Force Base holds an easement on a portion of these private lands. This unit includes two populations of *Deinandra increscens* ssp. *villosa* that comprised over 1,000 individuals in 1998. This unit is known to support populations away from the immediate coast and is at higher elevation than any other known *D. increscens* ssp. *villosa* location (425 m (1400 ft)). As a result, the populations in this unit experience more extreme seasonal temperatures and a lack of summer fog than most other populations which occur directly on the coast.

Santa Ynez Unit

The Santa Ynez Unit consists of a 9.7-km (6-mi) stretch of ridgeline of the Santa Ynez Mountains, ranging from Cañada de las Agujas east to Cañada del

Agua Caliente. This unit of 433 ha (1,070 ac) is comprised entirely of privately owned lands. *Deinandra increscens* ssp. *villosa* occurs at 305 m (1,000 ft) in this unit, on the sandy mountain ridgelines. This unit supports two known populations of *D. increscens* ssp. *villosa* that comprised approximately 400 individuals in 1998. The terrain here differs from most other known locations in that it is characterized primarily by slopes that intergrade with flatter areas, rather than a flat marine terrace.

Conception-Gaviota Unit

The Conception-Gaviota Unit consists of a 51.5-km (23-mi) long stretch of habitat along the coast from Point Conception, east to Gaviota, and encompasses 3,176 ha (7,848 ac). At its widest point, this unit extends inland approximately 3.2 km (2 mi). This unit is comprised almost entirely of privately owned lands (98 percent). This unit also consists of State lands at Gaviota State Beach and lands in the process of being transferred to CDFG for the Gaviota Tarplant Reserve (2 percent). This unit is particularly important because it supports most of the known populations of *Deinandra increscens* ssp. *villosa* that occur along the immediate coast. This includes the Gaviota population which was once extensive but is currently in decline, two small patches discovered in 1998 between Gaviota and Point Conception, and an extensive population discovered in 2000 that ranges from Government Point to the area near Jalama Beach County Park. Given these recent observations and the proximity to existing populations, we believe that there may be additional unsurveyed areas within the unit that may support *D. increscens* ssp. *villosa*. The populations here occur on a flat marine terrace along the immediate coast and likely experience summer fog and a mild maritime climate.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat. Destruction or adverse modification of critical habitat occurs when a Federal action directly or indirectly alters critical habitat to the extent it appreciably diminishes the value of critical habitat for the conservation of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing, or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the action agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species, or resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation previously has been completed if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* or their critical habitat will require consultation under section 7 of the Act. Activities on private or State lands that require a permit from a Federal agency, such as a permit from the Corps under section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*), a section 10(a)(1)(B) permit from the Service, or any other activity requiring Federal action (*i.e.*, funding or authorization) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, as well as actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultation with respect to these taxa.

All of the units we are designating are known to be occupied by either above-ground plants or a seed bank of the two taxa, and Federal agencies already consult with us on activities in areas where the species may be present to ensure that their actions do not jeopardize the continued existence of the species. Each unit also contains some areas which are considered unoccupied. However, we believe, and the economic analysis discussed below illustrates, that the designation of critical habitat is not likely to result in a significant regulatory burden above that already in place due to the presence of the listed taxa. Few additional consultations are likely to be conducted due to the designation of critical habitat. Actions on which Federal agencies

consult with us include, but are not limited to:

(1) Development on private lands requiring permits from Federal agencies, such as 404 permits from the U.S. Army Corps of Engineers or permits from other Federal agencies such as Housing and Urban Development;

(2) Military activities of the U.S. Department of Defense (Air Force) on their lands or lands under their jurisdiction;

(3) Activities of the BLM on their lands or lands under their jurisdiction;

(4) Watershed management activities sponsored by the Natural Resources Conservation Service;

(5) Activities of the Federal Aviation Authority on their lands or lands under their jurisdiction;

(6) The release or authorization of release of biological control agents by the U.S. Department of Agriculture;

(7) Regulation of activities affecting point source pollution discharges into waters of the United States by the Environmental Protection Agency under section 402 of the Clean Water Act; and

(8) Construction of communication sites licensed by the Federal Communications Commission, and authorization of Federal grants or loans.

Where federally listed wildlife species occur on private lands proposed for development and an HCP is submitted by an applicant to secure a permit to take according to section 10(a)(1)(B) of the Act, our issuance of such a permit would be subject to the section 7 consultation process. In those situations where *Eriodictyon capitatum* or *Deinandra increscens* ssp. *villosa* may occur or their critical habitat is present within the area covered by the HCP, the consultation process would include consider all federally listed species affected by the HCP, including plants.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat would be those that alter the primary constituent elements to the extent that the value of critical habitat for the conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat for *Eriodictyon capitatum* include, but are not limited to:

(1) Activities that alter watershed characteristics in ways that would appreciably alter or reduce the ability of the chaparral habitat to maintain a mosaic of stands in different age classes, such as maintaining an unnatural fire regime either through fire suppression or prescribed fires that are too frequent or poorly-timed; residential and commercial development, including road building and golf course installations; agricultural activities, including orchardry, viticulture, row crops, and livestock grazing; and vegetation manipulation such as brush clearance in the watershed upslope from *Eriodictyon capitatum;* and

(2) Activities that appreciably degrade or destroy native maritime chaparral and oak woodland communities at interior sites, including but not limited to livestock grazing, clearing, discing, introducing or encouraging the spread of nonnative species, and heavy recreational use.

Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat for *Deinandra increscens* ssp. *villosa* include, but are not limited to:

Activities that alter watershed characteristics in ways that would appreciably alter or reduce the ability of the coastal terraces to maintain healthy grassland communities, such as maintaining an unnatural fire regime either through fire suppression or prescribed fires that are too frequent or poorly-timed; residential and commercial development, including road building and golf course installations; agricultural activities, including orchardry, viticulture, row crops, and livestock grazing, oil field development, oil contamination remediation, and construction and decommissioning of pipelines and utility corridors.

Several other wildlife species that are listed under the Act occur in the same general areas as *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* Along the coast between Jalama Beach County Park and Gaviota, Western snowy plovers (*Charadrius alexandrinus nivosus*) and their critical habitat, California red-legged frogs (*Rana aurora draytonii*) and their critical habitat, and tidewater gobies (*Eucyclogobius newberryi*) overlap with the Conception-Gaviota unit being designated for *Deinandra increscens* ssp. *villosa* critical habitat. When federally listed wildlife species occur on private lands for development, any HCPs submitted by the applicant to secure a permit for take under section 10(a)(1)(B) of the Act would be subject to the section 7 consultation process.

If you have questions regarding whether specific activities will likely constitute adverse modification of critical habitat, contact the Field Supervisor, Ventura Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Portland Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181 (telephone 503/231–6131; facsimile 503/231–6243).

Relationship of Critical Habitat to Military Lands

Section 3(5)(A) and Exclusions Under Section 4(b)(2)

Special management and protection for the species are not required if adequate management and protection are already in place. Adequate management or protection is provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species, and that manages for the long-term conservation of the species. If any areas containing the primary constituent elements are currently being managed to address the conservation needs of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* management or protection, these areas would not meet the definition of critical habitat in section 3(5)(A)(i) of the Act and would not be included in this final rule.

We consider several factors to determine if a plan provides adequate management or protection. These factors are: (1) Whether there is a current plan specifying the management actions and whether such actions provide sufficient conservation benefit to the species; (2) whether the plan provides assurances that the conservation management strategies will be implemented; and (3) whether the plan provides assurances that the conservation management strategies will be effective (*i.e.*, provide for periodic monitoring, adaptive management, and revisions as necessary). If all of these criteria are met, then the lands covered under the plan would likely no longer meet the definition of critical habitat and designation would no longer be appropriate.

In determining if management strategies are likely to be implemented, we consider whether: (a) A management plan or agreement exists that specified the management actions being

implemented or to be implemented; (b) there is a timely schedule for implementation; (c) there is a high probability that the funding source(s) or other resources necessary to implement the actions will be available; and (d) the party(ies) have the authority and long-term commitment to implement the management actions, as demonstrated, for example, by a legal instrument providing enduring protection and management of the lands.

In determining whether an action is likely to be effective, we consider whether: (a) The plan specifically addresses the management needs, including reduction of threats to the species; (b) such actions have been successful in the past; (c) there are provisions for monitoring and assessment of the effectiveness of the management actions; and (d) adaptive management principles have been incorporated into the plan.

The Sikes Act Improvements Act of 1997 (Sikes Act) requires each military installation that encompasses land and water suitable for the conservation and management of natural resources to have completed, by November 17, 2001, an Integrated Natural Resources Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs of the installation, including needs to provide for the conservation of species listed as threatened or endangered pursuant to the Endangered Species Act; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan.

As required by section 7 of the Act, consultation is conducted on the development and implementation of INRMPs for installations with listed species. We believe that military installations that have completed and approved INRMPs which address the needs of species generally do not meet the definition of critical habitat discussed above, as they require no additional special management or protection. Therefore, we generally do not include these areas in critical habitat designations if they meet the following three criteria: (1) A current INRMP must be complete and provide a benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would not meet the definition of critical habitat.

As discussed above, the Sikes Act requires that Vandenberg Air Force Base develop an INRMP. In 1997, the Air Force developed and submitted for Service review a Draft INRMP for the Air Force Base, which is intended to provide an adaptive management approach to natural resource issues on Vandenberg (Tetra Tech, Inc. 1997). Because we determined that the 1997 Draft INRMP did not provide any specific measures to address the conservation and recovery of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa,* it is not considered at this time to provide adequate special management for the plants such that the Service could exclude Vandenberg from the critical habitat designation pursuant to section 3(5)(A) of the Act. Vandenberg is currently revising the Draft INRMP to include provisions for special management and protection for the two taxa. In a letter dated October 9, 2002, the Air Force committed to include a management strategy for *E. capitatum* and *D. increscens* ssp. *villosa* in Vandenberg's INRMP that will contribute to the long-term conservation of these taxa. The management strategy consists of designation of populations of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* and their habitats as Sensitive Resource Protection Areas (SRPA). Within these areas, no development of new facilities or build-out will occur unless mission requirements necessitate such development. If development is required, the Air Force will designate, upon mutual agreement with the Service, SRPAs in adjacent similar habitat equivalent to that lost to development. The areas included in Vandenberg's SRPAs will include all areas proposed by the Service for critical habitat designation for the species. The Air Force further indicates that where additional populations of *Deinandra increscens* ssp. *villosa* are located, the SRPA for that area may be changed by mutual agreement but the total acreage for the SRPA on Vandenberg will be maintained at the 3,100 acres proposed by the Service for designation for this species.

As part of its management strategy, the Air Force will also address measures to meet management goals for the following activities on Vandenberg Air Force Base: Grazing; fire control; maintenance activities, and vegetation management. The Air Force will work with the Service and research groups to develop methods for enhancement of *Eriodictyon capitatum* populations on Vandenberg. In the INRMP, the Air Force will also include plans to conduct ongoing surveys of suitable habitat for *Deinandra increscens* ssp. *villosa.*

The INRMP will also provide for an annual assessment of the Air Force's management plan. As part of the INRMP, the Air Force will develop a peer-reviewed monitoring plan to assess the status of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* on Vandenberg Air Force Base. An annual report including data on the abundance and distribution of populations of *E. capitatum* and *D. increscens* ssp. *villosa* on Vandenberg Air Force Base, the success of management activities designed to promote the taxa, and the effects of Air Force activities and natural events on these taxa will be provided to the Service for our review. Each year, based on the results of the annual monitoring report, the Air Force will assess its current management goals and activities for *E. capitatum* and *D. increscens* ssp. *villosa* and their habitats, and adjust them as needed to best benefit their recovery.

The Air Force will give their proposed protection and management actions a high funding and implementation priority. The Air Force has committed to submit the revised Draft INRMP to the Service by January 15, 2003, and will implement the Final INRMP no later than 90 days following our approval.

The Service considers these proposed measures for the protection and management of the two species to be sufficient to constitute adequate ''special management.'' However, because the measures have not yet been included in the INRMP, the Service cannot conclude at this time that Vandenberg does not meet the definition of critical habitat under section 3(5)(A) of the Act for these species. However, section 4(b)(2) of the Act allows the Service to exclude areas form critical habitat designation if the benefits of such exclusion outweigh the benefits of specifying such areas as critical habitat, unless exclusion would result in the extinction of the species.

The Service has analyzed the benefits of including Vandenberg Air Force Base as part of the critical habitat designation and the benefits of excluding these areas, and determined that the benefits of exclusion outweigh those of inclusion. A major factor in that analysis was that, even if excluded, the proposed units on Vandenberg will nonetheless receive special management and protection through Vandenberg's revised INRMP, due to be submitted in

January 2003, which will designate the proposed critical habitat units as Sensitive Resource Protection Areas. Under Vandenberg's proposal, the species will also benefit from monitoring, restoration, enhancement, and survey efforts. The Service has also determined that exclusion would not result in the extinction of the species.

(1) Benefits of Inclusion

There are few additional benefits of including Vandenberg Air Force Base in this critical habitat designation beyond what will be achieved thru implementation of Vandenberg's INRMP. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. If adequate protection can be provided in another manner, the benefits of including any area in critical habitat are minimal.

Because Vandenberg's INRMP is not complete, the area may require special management. However, we have evaluated the protection measures the Air Force has proposed for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* on Vandenberg and have found them to be adequate and of benefit to the species. The Air Force has provided assurances that it will provide mechanisms by which the conservation management strategies will be implemented, monitored, and revised as necessary. Because the Air Force has committed to incorporating these measures into its INRMP, protections for the species will be available without designation. Section 7 consultation under the jeopardy standards will still be required for activities affecting these listed plants on Vandenberg. Vandenberg has committed not to develop or build-out in the areas proposed for critical habitat (thus, including those areas of units which are unoccupied) unless the military mission so requires. If development or build-out is required, then, in consultation with the Service, Vandenberg will designate additional areas for protection in similar habitat equivalent to that lost to the development. Therefore, designation of critical habitat in these areas would provide minimal, if any, benefit to the species beyond the protections to which the Air Force has committed. The designation would provide only additional certainty that Vandenberg will adequately address the conservation needs of the species.

The development and implementation of Vandenberg's amended INRMP will provide other important conservation benefits, including the development of biological information to guide conservation efforts and assist in species recovery and the creation of innovative solutions to conserve species while allowing for development. The educational benefits that might follow critical habitat designation, such as providing information to the military of areas that are important for the long-term survival and conservation of the species, are essentially the same as those that will occur in the development of the INRMP. For these reasons, then, we believe that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation under the jeopardy standard and Vandenberg's revision of its draft INRMP to provide for species management and protection.

(2) Benefits of Exclusion

The benefits of excluding Vandenberg from being designated as critical habitat are more significant. Our economic analysis prepared for this rule cites an impact of approximately $650,000 on activities relating to Vandenberg. As noted above, designation of unoccupied areas within units may require consultation under section 7 of the Act for projects affecting those areas; absent the designation of critical habitat, these consultations may not be required if there are no plants present.

The proposed critical habitat designation included 4,532 acres of Vandenberg land. Most of this land is zoned as open space by Vandenberg's INRMP, but various activities on these lands may be affected by the designation. Lompoc Federal Penitentiary has a lease to graze cattle on 23,500 acres within Vandenberg. Approximately 1,470 of these acres (six percent) are within the designation. Of these, approximately 150 acres are in the Arguello unit, 850 acres are in the Sudden Peak unit, and 470 acres are in the Conception-Gaviota unit. The Service does not expect that the penitentiary will stop grazing these areas but may recommend a modified grazing plan to accommodate the needs of the tarplant. One formal consultation will likely be initiated on behalf of the grazing land in all three units.

In order to accommodate the needs of the tarplant, the Lompoc Federal Penitentiary, which leases land from Vandenberg, will likely only graze the proposed units before and after the months during which the tarplant blooms (June through September), stopping one month in advance of the ordinary grazing routine. The penitentiary already operates a grazing system of rest and rotation. As a result, the penitentiary will lose profits on the amount of meat they could have sold if the calves were able to gain weight for an additional month. Assuming that the calves gain two and a half pounds (lbs) per day and there are 30 days in a month, this would be 75 lbs per calf per month. At a price of $.90 per lb, this would be a loss of $68 per calf. This per calf amount probably overstates losses, because the costs of caring for the calves for an additional month are not netted out of the sale price. Approximately 390 calves would graze these lands, which would result in a total loss of $26,520. Over a ten-year period, this will be a $265,200 loss for the penitentiary.

The Arguello unit also contains a site, Space Lodge Complex-6 (SLC–6), that will begin space launches in 2003. Because the site is fully constructed and acidic deposition resulting from each launch is likely to be very localized, the impact of this activity is not anticipated to be great. A formal consultation was initiated with Vandenberg in December 1999, over a different space launch site; this consultation addressed the beach layia, a federally listed plant, as well as the snowy plover and the southwestern willow flycatcher. Based on this similar past consultation, and because it is difficult to state conclusively at this time whether the PCEs for the tarplant are present at the site, the analysis conservatively predicted that there will be a formal consultation regarding the activity.

For the SLC–6 launch site, located within the Arguello unit, the project modifications are likely to be similar to those proposed by the Service in the December 1999, consultation over a different launch site. In that case, the Service suggested a program of monitoring both the level of acid deposition around the site and the state of the plants before and after each launch. Vandenberg anticipates that this type of monitoring program will cost approximately $10,000 per launch and that there will be approximately 32 launches in the next ten years, for a total cost of $320,000.

Some of the economic effects to Vandenberg resulting from the critical habitat designation would remain if critical habitat were not designated on the base. However, the Service concludes that not designating critical habitat on Vandenberg would have benefits beyond those of a reduced economic effect. Moreover, the economic losses discussed above may still result, at least in part, if

Vandenberg is excluded from the designation due to the effects of consultation under the jeopardy standard. This would have the practical effect of reducing the benefits of exclusion. Due to the extent that this is true, whatever minimal benefits of inclusion exist will likewise be reduced, leading to the same conclusion in the balancing of the benefits of inclusion versus exclusion. The benefits of excluding Vandenberg will include encouraging the continued development of good management practices on the base. For instance, Vandenberg commits to several ongoing management, restoration, enhancement, and survey activities that would not necessarily result from the critical habitat designation. Vandenberg has committed not to develop or build-out in the areas proposed for critical habitat (thus, including those areas of units which are unoccupied) unless the military mission so requires. If development or build-out is required, then, in consultation with the Service, Vandenberg will designate additional areas for protection in similar habitat equivalent to that lost to the development.

In summary, the benefits of including Vandenberg in critical habitat for these species are small, and are limited to additional certainty about the availability of adequate special management for the species. The benefits of excluding Vandenberg from being designated as critical habitat for the two plant species are more significant, and include encouraging the continued development and implementation of the protective measures Vandenberg plans to take to establish Sensitive Resource Protection Areas for the plants in the areas proposed for critical habitat designation; the monitoring, survey, enhancement, and restoration activities Vandenberg will undertake that will provide additional benefits to the species; and the encouragement that this decision provides to Vandenberg for positive environmental protection programs on base and partnerships that may lead to future conservation. We find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas. We intend to complete a section 7 of the Act consultation on the amended INRMP when it becomes available, and will be able to address any effects that might pose jeopardy at that time. However, we are not expecting any such effects.

(3) Risk of Extinction

Under section 4(b)(2) of the Act, the Service may exclude areas from the critical habitat designation, as discussed above, but only if it is determined, ''based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.'' Here, we have determined that exclusion of Vandenberg from the critical habitat designation for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* will not result in the extinction of these two species. This determination is based upon the following:

(1) Activities on Vandenberg that may affect *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* will still require consultation under section 7 of the Act. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species. Therefore, even without critical habitat designation on lands managed by Vandenberg, they are still required to ensure that the activities on the base do not jeopardize the continued existence of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

(2) Vandenberg has committed to designating the areas proposed as critical habitat for both species as Sensitive Resource Protection Areas (SRPA), that will be protected and managed according to the revised INRMP. Vandenberg has committed that no development of new facilities or build-out will occur in these areas unless its military mission so requires; and in this eventuality, that it will identify other adjacent similar habitat for replacement lands for the SRPAs. In short, Vandenberg has committed to protect the same acreage amounts for these two species as were proposed for critical habitat.

With these protections in place, we have concluded that this exclusion from critical habitat will not result in the extinction of these two species. Accordingly, we have determined that lands on Vandenberg Air Force Base should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species. For this reason, we are excluding from this critical habitat designation those proposed units and portions of proposed units that were located on Vandenberg.

Relationship to Habitat Conservation Plans

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. Although take of listed plants is not prohibited by the Act, listed plant species may also be covered in an HCP for wildlife species. Currently, there are no HCPs that include *Eriodictyon capitatum* or *Deinandra increscens* ssp. *villosa* as covered species.

Subsection 4(b)(2) of the Act allows us to exclude from critical habitat designation areas where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We believe that in most instances the benefits of excluding HCPs from critical habitat designations will outweigh the benefits of including them. In the event that future HCPs are developed within the boundaries of proposed or designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of the species. This will be accomplished by either directing development and habitat modification to nonessential areas, or appropriately modifying activities within essential habitat areas so that such activities will not adversely modify the critical habitat. We will provide technical assistance and work closely with applicants throughout the development of any future HCPs to identify lands essential for the long-term conservation of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* and appropriate management for those lands. Furthermore, we will complete intra-Service consultation on our issuance of section 10(a)(1)(B) permits for these HCPs to ensure permit issuance will not destroy or adversely modify critical habitat.

Economic Analysis

Section 4(b)(2)of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation,

we conducted a draft Economic Analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on May 7, 2002 (67 FR 30641). We accepted comments on the draft analysis until June 6, 2002.

Our draft Economic Analysis evaluated the potential future effects associated with the listing of *Cirsium loncholepis*, *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* as endangered species under the Act, as well as any potential effect of the critical habitat designation above and beyond those regulatory and economic impacts associated with listing. Because *C. loncholepis* was included in the proposed critical habitat rule, the draft Economic Analysis included the potential economic effects resulting from the listing and designation of critical habitat for this species, in addition to those related to *E. capitatum* and *D. increscens* ssp. *villosa*. Therefore, the following discussion of potential economic effects and the values presented below assumes the listing and designation of critical habitat for all three taxa. Because we are not designating critical habitat for *C. loncholepis* at this time, the values presented below are likely an overestimate of the potential economic effects resulting from this final critical habitat rule.

In addition, the draft Economic Analysis analyzed costs incurred through consultations and modifications of activities on lands under the Federal jurisdiction of Vandenberg Air Force Base; the following discussion of potential economic effects and the values presented below assumes the inclusion of these lands in the critical habitat designation. However, we are excluding lands owned by Vandenberg from the area designated as critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa*, resulting in the entire removal of three units and modification of 2 units.

To quantify the proportion of total potential economic impacts attributable to the critical habitat designation, the analysis evaluated a ''without critical habitat'' baseline and compared it to a ''with critical habitat'' scenario. The ''without critical habitat'' baseline represented the current and expected economic activity under all modifications prior to the critical habitat designation, including protections afforded the species under Federal and State laws. The difference between the two scenarios measured the net change in economic activity attributable to the designation of critical habitat. The categories of potential costs considered in the analysis included the costs associated with: (1) Conducting section 7 consultations associated with the listing or with the critical habitat, including reinitiated consultations and technical assistance; (2) modifications to projects, activities, or land uses resulting from the section 7 consultations, (3) uncertainty and public perceptions resulting from the designation of critical habitat; and (4) potential offsetting beneficial costs associated with critical habitat including educational benefits.

Our economic analysis recognizes that there may be costs from delays associated with reinitiating completed consultations after the critical habitat designation is made final. There may also be economic effects due to the reaction of the real estate market to critical habitat designation, as real estate values may be lowered due to a perceived increase in the regulatory burden.

Based on our economic analysis, we concluded that the designation of critical habitat would not result in a significant economic impact, and estimated the potential economic effects over a 10-year period would range from $3.1 to $3.65 million. The total estimated costs associated with the Lompoc Yerba Santa and the Gaviota Tarplant is estimated to range between $2.5 and $2.8 million. Based on the U.S. Office of Management and Budget's prescribed seven percent discount rate, the annualized cost of compliance with the designation of critical habitat for these two species is estimated to be between $247,200 and $286,400 with a corresponding total present value between $1.7 and $2.0 million. While the potential economic impact associated with the listing of the taxa and critical habitat designation appears to be large, it must be considered in the context of the economic activity in the region. Given a total value of $1.09 billion in income (over 10 years) from farming, agricultural services, construction, and oil and gas extraction activities in Santa Barbara County, the annualized total cost of section 7 implementation represents less than 0.3 percent of the total value of affected economic activities, as estimated in the economic analysis.

The total consultation costs attributable exclusively to the critical habitat provision of section 7 may range from $2,300,000 to $2,700,000. Economic impacts due to consultations and modifications of oil and gas activities, primarily in the Conception-Gaviota Unit, are estimated to be approximately $1,481,900. Costs of consultations and modifications of private development projects, primarily in the Santa Ynez Mountains, Santa Ynez, and Conception-Gaviota units, are estimated at $1,083,600. Costs of consultations and modifications of agricultural activities, distributed among six of the units, are estimated to be $194,800. Costs of consultations and modifications of activities at Parks, Recreational Areas, and the National Wildlife Refuge, primarily in the Pismo-Orcutt Unit (of the proposed *Cirsium loncholepis* critical habitat), are estimated to be $249,300. Costs of consultations and modifications of activities at Vandenberg Air Force Base, primarily in the Arguello and Sudden Peak units, were estimated in the Economic Analysis to total approximately $639,800. The cost estimates described above are based on the high estimates for the potential cost of consultations presented in the Economic Analysis.

Total costs resulting from technical assistance, formal and informal consultations, development of biological assessments, and project modifications due to listing and critical habitat designation are presented in the economic analysis, according to land use activities and individual critical habitat units. A per-effort cost is developed for section 7 consultations incurred by the Service, a Federal action agency, and a third party. Cost estimates of an individual formal or informal consultation are developed from a review and analysis of the section 7 history of a number of Service field offices around the country. Cost estimates for technical assistance are based on an analysis of past technical assistance efforts by the Service with agencies in this area. Per-effort costs for project modifications are based on an estimated hourly rate of botanist and total time to implement the project modification.

Costs to third parties (*e.g.*, oil and gas companies) result from technical assistance, consultations, and development of a biological assessment. Costs to Federal action agencies include those incurred from consultations. Costs to the Service result from technical assistance and consultations. Project modifications affect private, State, local, and Federal landowners.

Technical assistance associated with the listing and critical habitat is estimated to occur primarily for agricultural activities; a total of 60 efforts are anticipated over the next 10 years, based on estimates of future consultations. Informal consultations are estimated to occur primarily on private development projects; a total of 10 efforts, most likely associated with

Army Corps of Engineers (ACOE) permits, are expected over the next 10 years, based on estimates of future consultations. Formal consultations are estimated to occur primarily on oil and gas activities; a total of 29 efforts are expected over the next 10 years, based on the likelihood of maintenance of pipeline right of way and decommissioning of oil pipes by 6 oil/gas companies, conducted over the Conception-Gaviota and Pismo-Orcutt units, requiring a permit from the ACOE. Oil and gas (*e.g.*, production and decommissioning) activities in the Conception-Gaviota and Pismo-Orcutt Units and private development in the Pismo-Orcutt, Conception-Gaviota, Santa Ynez, and Santa Ynez Mountains Units would likely be the most affected due to project modifications, because of the current projected activities in these units and the lower probability of similar activities on the other units.

We did not receive any comments on the draft economic analysis of the proposed determination. Following the close of the comment period, the economic analysis was finalized. There were no revisions or additions to the draft economic analysis. The values presented above are likely to be an overestimate of the potential economic effects of this final critical habitat designation because we have removed *C. loncholepis* from the designation, resulting in a reduction of 17,934 ha (44,315 ac). In addition, we reduced the acreage designated as *E. capitatum* and *D. increscens* ssp. *villosa* critical habitat from the proposal by 2,593 ha (6,405 ac).

A copy of the final economic analysis and a description of the exclusion process with supporting documents are included in our administrative record and may be obtained by contacting our Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and has been reviewed by the Office of Management and Budget (OMB), as OMB determined that this rule may raise novel legal or policy issues. As required by Executive Order 12866, we have provided a copy of the rule, which describes the need for this action and how the designation meets that need, and the economic analysis, which assesses the costs and benefits of this critical habitat designation, to OMB for review.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic effect on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. In this rule, we are certifying that the critical habitat designation for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* will not have a significant effect on a substantial number of small entities. The following discussion explains the factual basis for this certification.

Small entities include small organizations, such as independent non-profit organizations, small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting, etc.). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. While SBREFA does not explicitly define either ''substantial number'' or ''significant effect,'' the Small Business Administration as well as other Federal agencies, has interpreted these terms to represent an impact on 20 percent or greater of the number of small entities in any industry and an effect equal to three percent or more of a business' annual sales. Thus a ''substantial number'' of small entities is more than 20 percent of those small entities affected by the regulation, out of the total universe of small entities in the industry or, if appropriate, industry segment. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species may be present, Federal agencies already are required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa*. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities. Since *E. capitatum* and *D. increscens* ssp. *villosa* have only been listed since March 2000, there have not been any consultations on the two species. Therefore, the requirement to reinitiate consultations for ongoing projects will not affect a substantial number of small entities.

Our Economic Analysis found that private development, oil and gas production, and agriculture (particularly, vineyard conversion) are the primary activities anticipated to take

place within the area that was proposed to be designated as critical habitat for *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa.* There are approximately 114 development and real estate, 73 oil and gas, and 93 agriculture small companies within the previously proposed critical habitat area. The area that we are designating as critical habitat in this final rule is substantially smaller than the area proposed as critical habitat. This is primarily a result of our decision to exclude critical habitat from this final rule for *C. loncholepis* and those critical habitat units proposed on Vandenberg. The Economic Analysis included the potential economic effects resulting from the listing and designation of critical habitat for *C. loncholepis* in addition to those related to proposed units for *E. capitatum* and *D. increscens* ssp. *villosa* on Vandenberg, which have been excluded from the final designation.. Therefore, the number of consultations, impacts to small businesses, and total economic costs (discussed below) are likely to be an overestimate of the potential effects of listing and the final designation of critical habitat for *E. capitatum* and *D. increscens* ssp. *villosa.*

To be conservative (*i.e.*, more likely overstate impacts than understate them), the Economic Analysis assumed that a unique business entity would undertake each of the projected consultations in a given year. Therefore, the number of businesses affected annually is equal to the total annual number of consultations (both formal and informal).

On average, over the 10 year period of analysis, in each year there could be between 1 and 2 consultations for private development projects. Assuming each consultation involves a different business, approximately less than 1 percent of the total number of small private development companies could be affected annually by the designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

On average, over the 10 year period of analysis, in each year there could be approximately three consultations for oil and gas production activities. Assuming each consultation involves a different business, approximately 3 to 4 percent of the total number of small gas and oil companies could be affected annually by the designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

On average, over the 10 year period of analysis, in each year there could be approximately less than one consultation for agriculture (vineyard) activities. Assuming each consultation involves a different business, approximately less than 1 percent of the total number of small agriculture companies could be affected annually by the designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

The percentage of small businesses that could be affected by this designation is far less than the 20 percent threshold that would be considered ''substantial.'' Therefore, the economic analysis concludes that the designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* will not result in a significant economic impact on a substantial number of small entities.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* and their habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or resulting in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives. Secondly, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects-including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. As we have no consultation history for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa,* we can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats they face, as described in the final listing rule and this critical habitat designation.

It is likely that a developer or other project proponent could modify a project or take measures to protect *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.* Based on the types of modifications and measures that have been implemented in the past for plant species, a project proponent may take such steps as installing fencing or re-aligning the project to avoid sensitive areas. Potential costs associated with such measures are estimated at $20,000 for materials and labor to install two miles of fencing and $25,000 for costs associated with project redesigns. It should be noted that a developer likely would already be required to undertake such measures due to regulations in the California Environmental Quality Act (CEQA). These measures are not likely to result in a significant economic impact to project proponents.

As required under section 4(b)(2) of the Act, we conducted an analysis of the potential economic impacts of this critical habitat designation, and that analysis was made available for public review and comment before finalization of this designation.

Based on estimates provided in the economic analysis, the total economic costs associated with the listing and critical habitat designation for *Cirsium loncholepis, Eriodictyon capitatum,* and *Deinandra increscens* ssp. *villosa* over

the next 10 years may range from approximately $3,100,000 to $3,650,000. Out of this, about 40 percent ($1,481,900) are expected to result from consultations and modifications of oil and gas activities; 30 percent ($1,083,600) are expected to result from consultations and modifications of private development projects; and 5 percent ($194,800) will result from consultations and modifications of agricultural activities. While the potential economic impact associated with the listing of the taxa and critical habitat designation appears to be large, it must be considered in the context of the economic activity in the region. Given a total value of $1.09 billion in income (over 10 years) from farming, agricultural services, construction, and oil and gas extraction activities in Santa Barbara County, the annualized total cost of section 7 implementation represents approximately 0.3 percent of the total value of affected economic activities, as estimated in the economic analysis.

In summary, we have considered whether this rule would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons, that it will not affect a substantial number of small entities. Furthermore, we believe that the potential compliance costs for the number of small entities that may be affected by this rule will not be significant. Therefore, we are certifying that the designation of critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

OMB's Office of Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. In the economic analysis, we determined whether designation of critical habitat would cause (a) any effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that they must ensure that any activities involving Federal funds, permits, or other authorized activities will not adversely affect the critical habitat.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. In our Economic Analysis, we did not identify energy production or distribution as being significantly affected by this designation, and we received no comments indicating that the proposed designation could significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* in a takings implication assessment. The takings implications assessment concludes that this final rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. As discussed above, the designation of critical habitat in areas currently occupied by *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa* would have little incremental impact on State and local governments and their activities. The designations may have some benefit to these governments in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long range planning, rather than waiting for case-by-case section 7 consultation to occur.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Endangered Species Act, as amended. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Eriodictyon capitatum* and *Deinandra increscens* ssp. *villosa.*

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act is required. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB Control Number.

National Environmental Policy Act

We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations

With Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a Government-to-Government basis. The designated critical habitat for *Eriodictyon capitatum* or *Deinandra increscens* ssp. *villosa* does not contain any federally recognized Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this final rule are Diane Gunderson and Diane Steeck, Ventura Fish and Wildlife Office (See **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. In § 17.12(h), add an entry for *Deinandra increscens* ssp. *villosa,* revise the entry for *Eriodictyon capitatum,* and remove the entry for *Hemizonia increscens* ssp. *villosa,* under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

(h) * * *

Species		Historic Range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common Name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Deinandra increscens ssp. villosa.	Gaviota tarplant	U.S.A. (CA)	Asteraceae sunflower.	E	691	17.96(a)	NA
*	*	*	*	*	*	*	
Eriodictyon capitatum.	Lompoc yerba santa	U.S.A. (CA)	Hydrophyllaceae-waterleaf.	E	691	17.96(a)	NA
*	*	*	*	*	*	*	

3. In § 17.96, amend paragraph (a) by adding entries for *Deinandra increscens* ssp. *villosa,* in alphabetical order under Family Asteraceae, and adding an entry for *Eriodictyon capitatum* under Family Hydrophyllaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family—Asteraceae: Deinandra increscens ssp. villosa (Gaviota tarplant)

(1) Critical habitat units are depicted for Santa Barbara County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Deinandra increscens* ssp. *villosa* are the habitat components that provide:

(i) Sandy soils associated with coastal terraces adjacent to the coast or uplifted marine sediments at interior sites up to 5.6 km (3.5 mi) inland from the coast, and

(ii) Plant communities that support associated species, including needlegrass grassland and coastal sage scrub communities, particularly where the following associated species are found: Needlegrass species (*Nassella* spp.), California sagebrush (*Artemisia californica*), coyote bush (*Baccharis pilularis*), sawtooth golden bush (*Hazardia squarrosa*), and California buckwheat (*Eriogonum fasciculatum*).

(3) Critical habitat does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airports, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.

Critical Habitat Map Units

(i) Data layers defining map units were mapped using Universal Transverse Mercator (UTM) coordinates.

(ii) **Note:** Index map follows:

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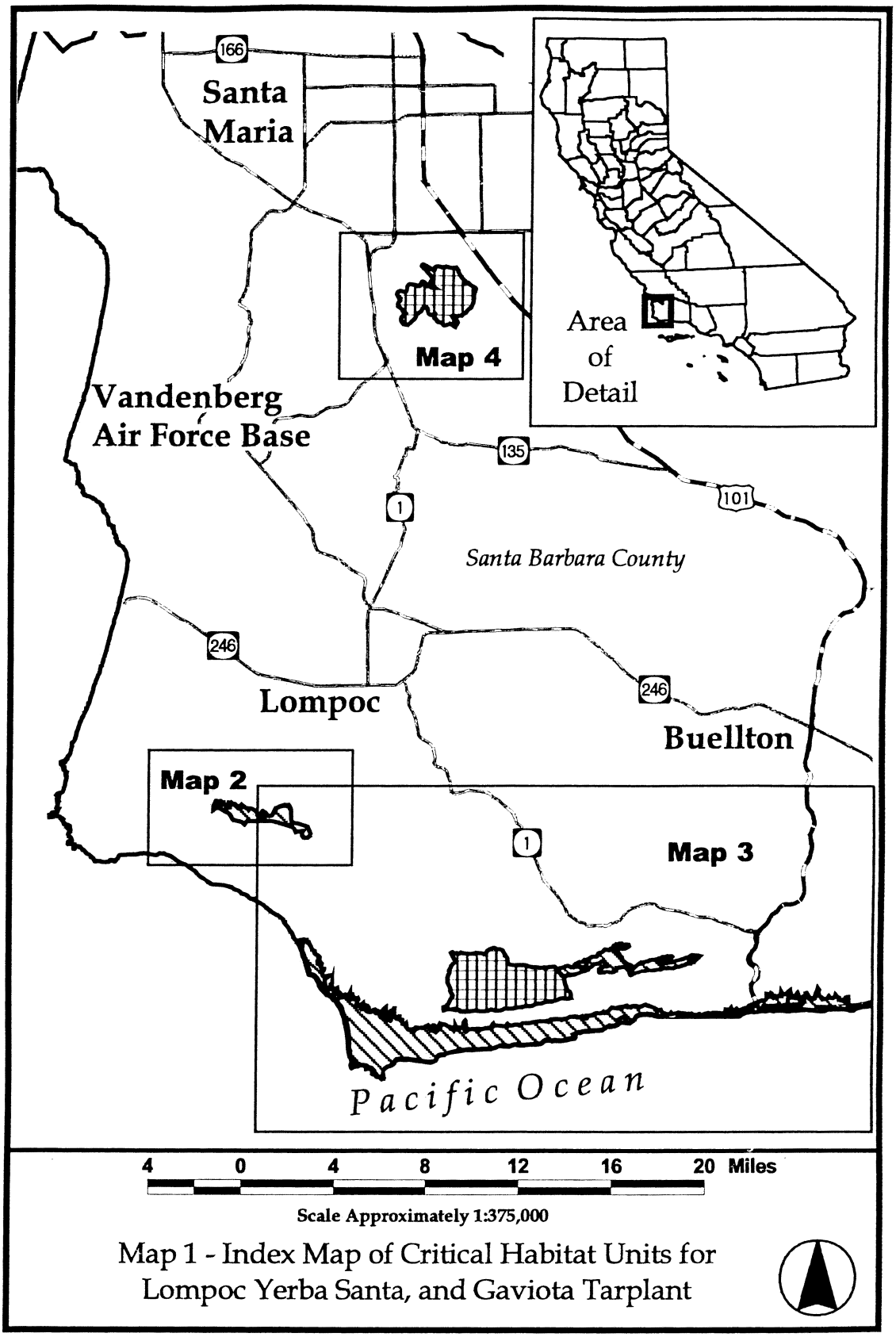
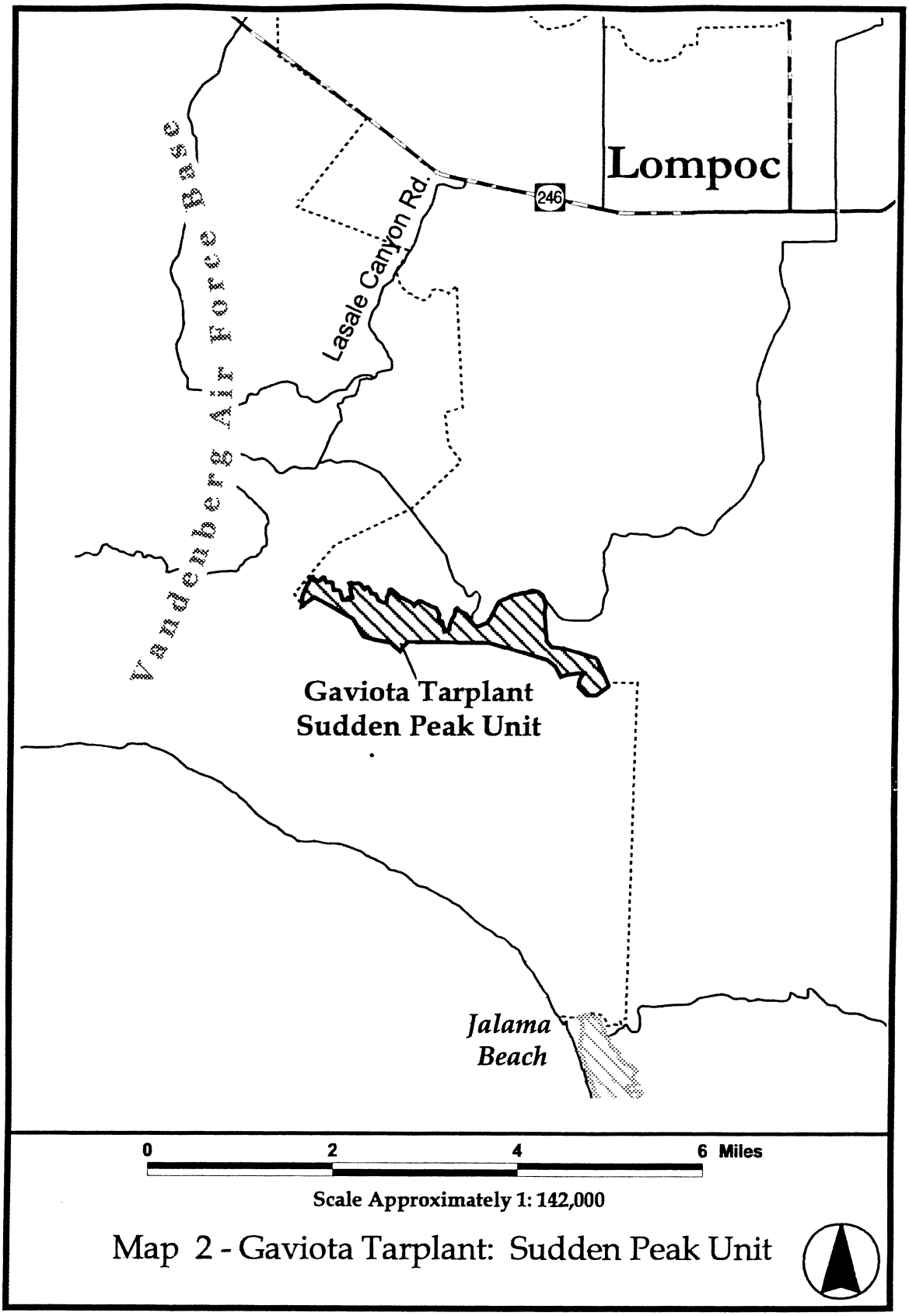


Map 1 - Index Map of Critical Habitat Units for Lompoc Yerba Santa, and Gaviota Tarplant

(4) Sudden Peak Unit: Santa Barbara County, California.

(i) From USGS 1:24,000 quadrangle maps Tranquillon Mountain, Lompoc Hills, Santa Rosa Hills, lands bounded by the following UTM zone 10 NAD83 coordinates (E,N): 729958, 3827610; 729742, 3827440; 729579, 3827450; 729425, 3827600; 729439, 3827710; 729508, 3827830; 729376, 3827830; 729212, 3827800; 729116, 3827760; 729008, 3827960; 728870, 3828070; 727858, 3828370; 727151, 3828380; 726435, 3828390; 726349, 3828300; 726296, 3828210; 726142, 3828370; 725873, 3828420; 725662, 3828470; 725478, 3828790; 724801, 3829170; 724588, 3829000; 724595, 3829180; 724666, 3829350; 724689, 3829390; 724710, 3829420; 724742, 3829500; 724748, 3829510; 724772, 3829520; 724802, 3829490; 724864, 3829440; 724894, 3829450; 724903, 3829460; 724923, 3829490; 724952, 3829510; 724982, 3829500; 724993, 3829460; 725000, 3829450; 725013, 3829430; 725045, 3829430; 725100, 3829430; 725105, 3829430; 725116, 3829420; 725120, 3829410; 725124, 3829350; 725129, 3829320; 725139, 3829300; 725145, 3829290; 725196, 3829290; 725210, 3829290; 725229, 3829280; 725242, 3829270; 725252, 3829260; 725266, 3829230; 725267, 3829200; 725289, 3829140; 725294, 3829130; 725325, 3829110; 725354, 3829110; 725375, 3829150; 725383, 3829160; 725444, 3829140; 725456, 3829150; 725460, 3829160; 725460, 3829180; 725452, 3829200; 725437, 3829230; 725430, 3829260; 725427, 3829310; 725432, 3829350; 725406, 3829410; 725427, 3829420; 725435, 3829420; 725496, 3829400; 725526, 3829410; 725556, 3829420; 725581, 3829410; 725586, 3829410; 725617, 3829380; 725651, 3829330; 725679, 3829310; 725708, 3829340; 725738, 3829340; 725774, 3829300; 725786, 3829260; 725796, 3829240; 725862, 3829220; 725869, 3829220; 725888, 3829190; 725912, 3829130; 725917, 3829120; 725956, 3829090; 725986, 3829080; 726017, 3829070; 726048, 3829070; 726056, 3829090; 726061, 3829130; 726069, 3829170; 726090, 3829220; 726100, 3829280; 726112, 3829300; 726130, 3829310; 726163, 3829290; 726242, 3829220; 726253, 3829200; 726284, 3829170; 726314, 3829160; 726333, 3829160; 726478, 3829080; 726500, 3829060; 726529, 3829020; 726558, 3829050; 726570, 3829080; 726584, 3829090; 726616, 3829100; 726651, 3829100; 726738, 3829050; 726768, 3829040; 726799, 3829020; 726830, 3829000; 726907, 3828970; 726925, 3828950; 726935, 3828920; 726942, 3828910; 726964, 3828860; 726961, 3828830; 726952, 3828800; 726957, 3828760; 726995, 3828750; 727013, 3828740; 727022, 3828720; 727026, 3828680; 727046, 3828620; 727053, 3828560; 727083, 3828570; 727121, 3828590; 727140, 3828600; 727145, 3828620; 727143, 3828660; 727168, 3828720; 727186, 3828780; 727223, 3828840; 727232, 3828870; 727242, 3828940; 727251, 3828960; 727273, 3828970; 727281, 3828970; 727291, 3828960; 727312, 3828930; 727343, 3828910; 727414, 3828880; 727433, 3828870; 727521, 3828760; 727579, 3828670; 727659, 3828660; 727724, 3828680; 727806, 3828720; 727873, 3828820; 728014, 3829090; 728073, 3829130; 728179, 3829170; 728262, 3829210; 728345, 3829230; 728412, 3829250; 728414, 3829240; 728688, 3829280; 728783, 3829210; 728830, 3829050; 728820, 3828900; 728839, 3828590; 728863, 3828400; 728940, 3828300; 729160, 3828270; 729685, 3828110; 729721, 3828100; 729755, 3828070; 729958, 3827610.

(ii) **Note:** Map 2 follows:



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(5) Conception-Gaviota Unit: Santa Barbara County, California.

(i) From USGS 1:24,000 quadrangle maps Gaviota, Lompoc Hills, Point Conception, Sacate, and Tranquillon Mountain, lands bounded by the following UTM zone 10 NAD83 coordinates (E,N): 729837, 3821770; 729855, 3821690; 729971, 3821490; 730078, 3821250; 730181, 3821200; 730191, 3821100; 730302, 3820990; 730393, 3820950; 730490, 3820870; 730490, 3820840; 730445, 3820790; 730431, 3820750; 730455, 3820690; 730520, 3820630; 730464, 3820600; 730344, 3820590; 730333, 3820570; 730346, 3820500; 730377, 3820470; 730496, 3820520; 730587, 3820480; 730593, 3820450; 730530, 3820400; 730514, 3820360; 730523, 3820330; 730625, 3820210; 730716, 3820200; 730731, 3820190; 730718, 3820160; 730653, 3820100; 730646, 3819980; 730614, 3819910; 730617, 3819860; 730679, 3819780; 730729, 3819750; 730822, 3819770; 730967, 3819830; 730997, 3819830; 731013, 3819810; 730970, 3819750; 730793, 3819640; 730748, 3819560; 730764, 3819530; 730761, 3819440; 730779, 3819410; 730783, 3819260; 730921, 3819080; 731051, 3819040; 731073, 3819060; 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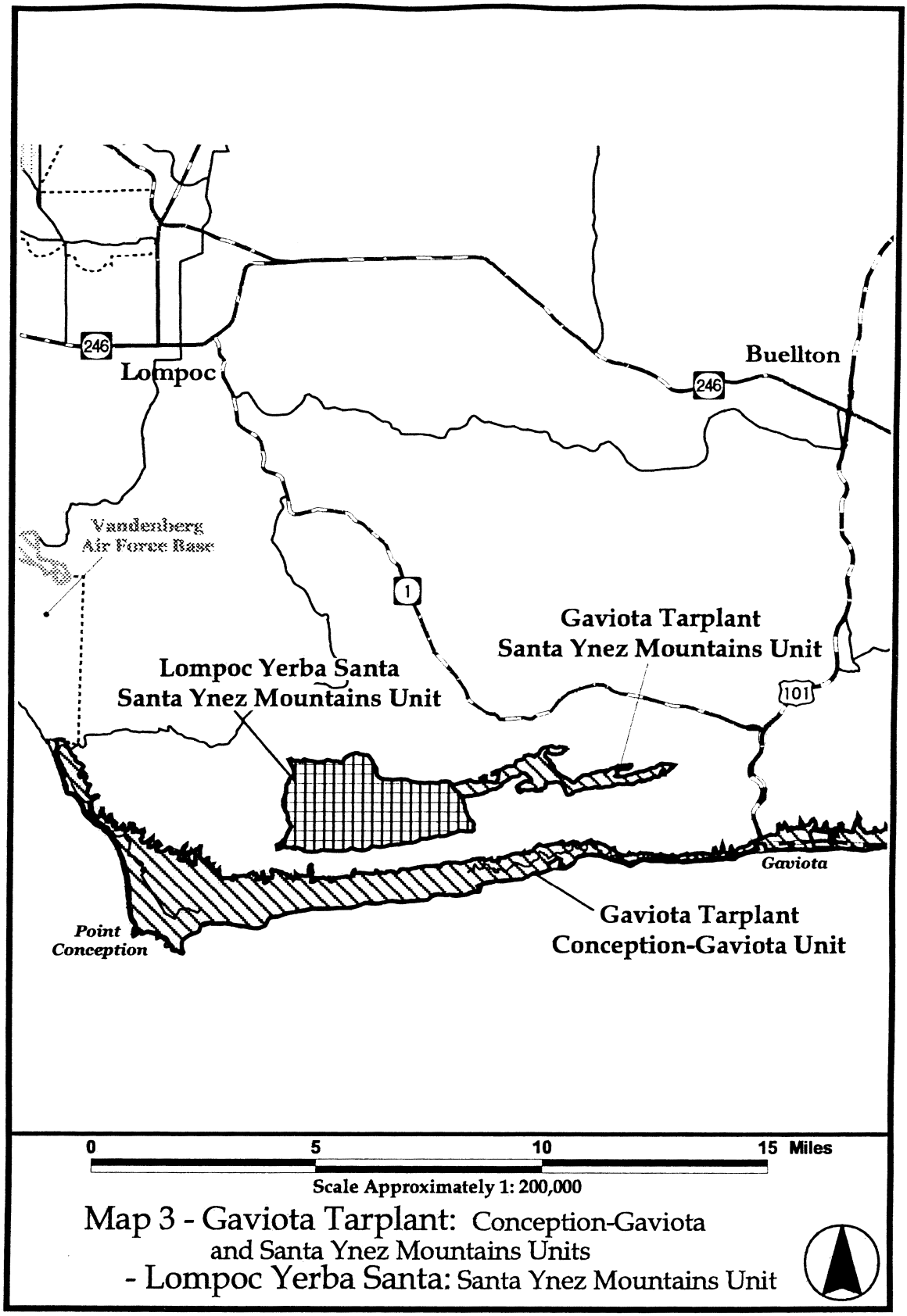
(ii) **Note:** Map 3 follows:

BILLING CODE 4310–55–P



Map 3 - Gaviota Tarplant: Conception-Gaviota and Santa Ynez Mountains Units - Lompoc Yerba Santa: Santa Ynez Mountains Unit

BILLING CODE 4310–55–C

(6) Santa Ynez Mountains Unit (Gaviota tarplant): Santa Barbara County, California.

(i) From USGS 1:24,000 quadrangle maps Santa Rosa Hills and Sacate, lands bounded by the following UTM zone 10 NAD83 coordinates (E,N): 747710, 3821530; 747708, 3821520; 747676, 3821490; 747651, 3821470; 747601, 3821430; 747545, 3821390; 747491, 3821350; 747409, 3821330; 747383, 3821320; 747323, 3821300; 747288, 3821300; 747240, 3821300; 747204, 3821310; 747150, 3821330; 747123, 3821340; 747104, 3821350; 747051, 3821380; 747023, 3821380; 746956, 3821370; 746929, 3821340; 746918, 3821330; 746903, 3821290; 746900, 3821270; 746909, 3821240; 746925, 3821220; 746945, 3821200; 746980, 3821180; 746998, 3821150; 747011, 3821140; 747023, 3821130; 747042, 3821120; 747072, 3821090; 747081, 3821080; 747092, 3821050; 747102, 3820980; 747108, 3820960; 747124, 3820950; 747134, 3820940; 747194, 3820930; 747216, 3820900; 747220, 3820890; 747230, 3820860; 747231, 3820820; 747257, 3820730; 747344, 3820660; 747492, 3820540; 747783, 3820400; 747831, 3820350; 747902, 3820290; 747931, 3820270; 747964, 3820290; 748102, 3820440; 748147, 3820460; 748170, 3820470; 748195, 3820490; 748232, 3820520; 748257, 3820540; 748280,

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Family Hydrophyllaceae: Eriodictyon capitatum (Lompoc yerba santa)

(1) Critical habitat units are depicted for Santa Barbara County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Eriodictyon capitatum* are the habitat components that provide:

(i) Soils with a large component of sand and that tend to be acidic; and

(ii) Plant communities that support associated species, including maritime chaparral, particularly where the following associated species are found: *Dendromecon rigida* (bush poppy), *Quercus berberidifolia* (California scrub oak), *Quercus parvula* (Santa Cruz Island scrub oak), and *Ceanothus cuneatus* (buck brush); and in southern bishop pine forests that intergrade with chaparral *Arctostaphylos* spp. (manzanita) and *Salvia mellifera* (black sage).

(3) Critical habitat does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airports, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.

(4) Critical Habitat Map Units

Data layers defining map units were mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Santa Ynez Mountains Unit (Lompoc yerba santa). Santa Barbara County, California

(i) From USGS 1:24,000 quadrangle maps Lompoc Hills, Point Conception, Sacate, lands bounded by the following UTM zone 10 NAD83 coordinates (E,N): 739493, 3817820; 739352, 3817850; 739008, 3817860; 738828, 3817800; 738440, 3817810; 738377, 3817820; 738294, 3817900; 738288, 3817900; 738104, 3817960; 738034, 3817960; 738028, 3817900; 738026, 3817900; 737925, 3817940; 737892, 3817950; 737726, 3817950; 737666, 3818000; 737619, 3817970; 737540, 3817910; 737423, 3817890; 737416, 3817960; 737414, 3818040; 737489, 3818070; 737612, 3818160; 737622, 3818190; 737676, 3818230; 737715, 3818280; 737744, 3818320; 737757, 3818380; 737791, 3818440; 737809, 3818500; 737838, 3818550; 737862, 3818600; 737916, 3818660; 737924, 3818710; 737903, 3818760; 737865, 3818820; 737823, 3818880; 737791, 3818950; 737804, 3819010; 737791, 3819100; 737774, 3819180; 737701, 3819270; 737662, 3819360; 737624, 3819450; 737611, 3819560; 737633, 3819670; 737661, 3819750; 737679, 3819800; 737708, 3819870; 737731, 3819930; 737729, 3820000; 737717, 3820070; 737725, 3820140; 737753, 3820210; 737777, 3820240; 737816, 3820290; 737829, 3820360; 737868, 3820430; 737942, 3820490; 738005, 3820560; 738019, 3820610; 737996, 3820700; 737947, 3820820; 737893, 3820930; 737840, 3821030; 737813, 3821090; 737897, 3821130; 738005, 3821060; 738136, 3821070; 738167, 3821060; 738214, 3821020; 738264, 3821030; 738308, 3821050; 738328, 3821090; 738373, 3821110; 738439, 3821080; 738520, 3821060; 738581, 3821060; 738652, 3821060; 738698, 3821030; 738759, 3821030; 738830, 3821010; 738891, 3821010; 738951, 3821010; 739027, 3821020; 739077, 3821020; 739111, 3821060; 739161, 3821090; 739227, 3821090; 739288, 3821070; 739384, 3821050; 739541, 3821060; 739607, 3821020; 739669, 3820990; 739714, 3821020; 739762, 3821080; 739796, 3821140; 739825, 3821180; 739969, 3821260; 740158, 3821340; 740234, 3821350; 740295, 3821320; 740387, 3821280; 740453, 3821280; 740503, 3821280; 740575, 3821270; 740631, 3821250; 740677, 3821220; 740710, 3821150; 740767, 3821070; 740784, 3821010; 740786, 3820950; 740822, 3820930; 740869, 3820870; 740917, 3820790; 740919, 3820720; 740917, 3820630; 740945, 3820540; 741007, 3820480; 741084, 3820430; 741186, 3820400; 741298, 3820400; 741383, 3820400; 741510, 3820380; 741666, 3820390; 741747, 3820400; 741808, 3820400; 741863, 3820390; 741990, 3820390; 742184, 3820310; 742250, 3820300; 742356, 3820290; 742458, 3820280; 742554, 3820270; 742604, 3820280; 742645, 3820260; 742690, 3820260; 742741, 3820260; 742817, 3820270; 742907, 3820270; 742973, 3820280; 743029, 3820250; 743100, 3820250; 743139, 3820280; 743224, 3820310; 743315, 3820320; 743406, 3820320; 743461, 3820320; 743528, 3820300; 743579, 3820260; 743632, 3820200; 743644, 3820130; 743686, 3820090; 743727, 3820040; 743779, 3819990; 743826, 3819960; 743857, 3819910; 743889, 3819860; 743926, 3819820; 743958, 3819770; 743999, 3819720; 744026, 3819680; 744028, 3819620; 744039, 3819570; 744061, 3819530; 744067, 3819490; 744074, 3819420; 744096, 3819360;

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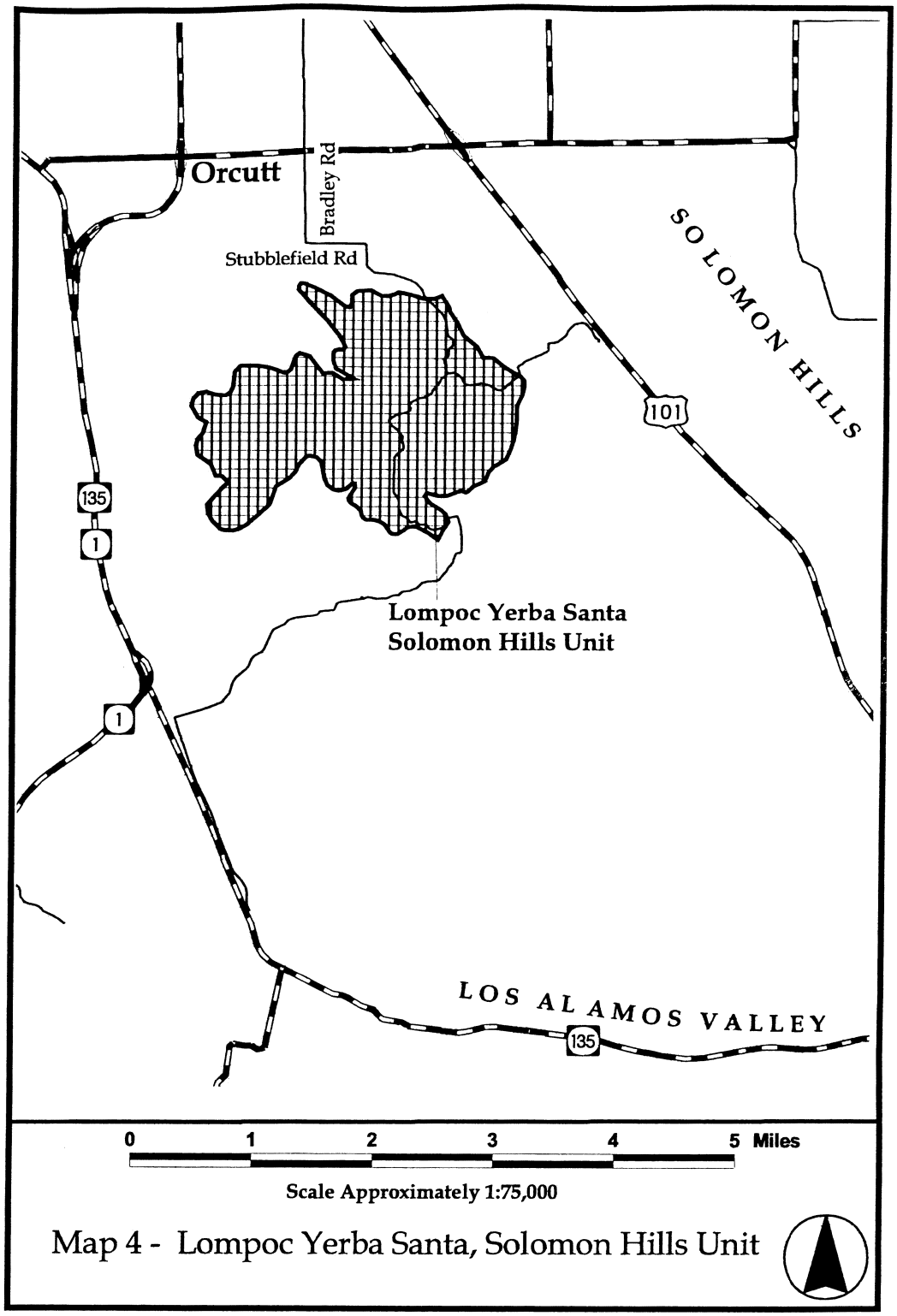
(6) Solomon Hills Unit. Santa Barbara County, California.

(i) From USGS 1:24,000 quadrangle map Orcutt, lands bounded by the following UTM zone 10 NAD83 coordinates (E,N): 737417, 3856100; 737363, 3856080; 737307, 3856040; 737239, 3856000; 737175, 3856000; 737140, 3856010; 737105, 3856070; 737059, 3856130; 736981, 3856170; 736919, 3856190; 736825, 3856180; 736785, 3856210; 736755, 3856250; 736747, 3856310; 736677, 3856370; 736618, 3856410; 736583, 3856440; 736581, 3856480; 736669, 3856620; 736664, 3856670; 736629, 3856680; 736545, 3856600; 736451, 3856570; 736373, 3856590; 736298, 3856650; 736258, 3856730; 736239, 3856830; 736217, 3856960; 736147, 3857020; 736067, 3857040; 736018, 3857030; 735919, 3856920; 735881, 3856830; 735798, 3856740; 735620, 3856630; 735534, 3856390; 735378, 3856240; 735233, 3856110; 735139, 3856060; 735052, 3856040; 734942, 3856040; 734875, 3856060; 734778, 3856160; 734716, 3856270; 734705, 3856380; 734792, 3856490; 734985, 3856680; 734902, 3856760; 734811, 3856770; 734747, 3856930; 734572, 3857050; 734549, 3857170; 734576, 3857260; 734640, 3857350; 734687, 3857490; 734576, 3857560; 734488, 3857710; 734512, 3857810; 734582, 3857880; 734687, 3857900; 734802, 3857860; 734945, 3857850; 735007, 3857890; 735042, 3857970; 735063, 3858170; 735141, 3858250; 735367, 3858250; 735539, 3858220; 735720, 3858150; 735768, 3858170; 735803, 3858200; 735870, 3858370; 735919, 3858410; 736045, 3858370; 736228, 3858140; 736354, 3858150; 736497, 3858060; 736637, 3858070; 736403, 3858210; 736363, 3858320; 736363, 3858410; 736384, 3858450; 736443, 3858460; 736494, 3858470; 736519, 3858500; 736497, 3858560; 736446, 3858650; 736287, 3858850; 736024, 3859120; 735900, 3859270; 735905, 3859310; 735935, 3859340; 735972, 3859350; 736126, 3859280; 736336, 3859170; 736524, 3859030; 736580, 3859030; 736605, 3859080; 736607, 3859190; 736683, 3859240; 736779, 3859250; 736868, 3859260; 737000, 3859190; 737102, 3859190; 737186, 3859210; 737240, 3859240; 737430, 3859200; 737572, 3859160; 737721, 3859160; 737818, 3859200; 737915, 3859040; 737934, 3858970; 738022, 3858840; 738108, 3858670; 738286, 3858510; 738364, 3858370; 738498, 3858350; 738646, 3858230; 738754, 3858160; 738859, 3858100; 738907, 3858050; 738905, 3857960; 738883, 3857860; 738810, 3857710; 738808, 3857600; 738811, 3857490; 738800, 3857370; 738770, 3857240; 738734, 3857130; 738675, 3857000; 738613, 3856960; 738509, 3856890; 738452, 3856830; 738398, 3856710; 738240, 3856630; 738188, 3856580; 738149, 3856550; 738100, 3856580; 738059, 3856570; 737904, 3856510; 737780, 3856510; 737635, 3856540; 737608, 3856510; 737632, 3856470; 737687, 3856410; 737833, 3856320; 737890, 3856260; 737928, 3856160; 737869, 3856080; 737787, 3855920; 737740, 3855950; 737651, 3856020; 737576, 3856050; 737484, 3856100; 737417, 3856100.

(ii) **Note:** Map 4 follows:

BILLING CODE 4310–55–P



Map 4 - Lompoc Yerba Santa, Solomon Hills Unit

Dated: October 25, 2002.

Paul Hoffman,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02–27873 Filed 11–6–02; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Thursday,
November 7, 2002

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Lomatium cookii* (Cook's Lomatium) and *Limnanthes floccosa* ssp. *grandiflora* (Large-Flowered Woolly Meadowfoam) From Southern Oregon; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF84

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Lomatium cookii* (Cook's Lomatium) and *Limnanthes floccosa* ssp. *grandiflora* (Large-Flowered Woolly Meadowfoam) From Southern Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for two plants, *Lomatium cookii* (Cook's lomatium) and *Limnanthes floccosa* ssp. *grandiflora* (large-flowered woolly meadowfoam), pursuant to the Endangered Species Act of 1973, as amended (Act). Both of these plants inhabit seasonally wet habitats known as vernal pools in the Agate Desert, an area north of the city of Medford (Jackson County), Oregon. *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* are known to occur at about 15 sites each, in the Agate Desert. This is based on the last observation of those sites, which vary year to year, depending on location and survey effort. *Lomatium cookii* is also known to occur on seasonally wet soils at about 21 sites in Josephine County, Oregon (referred to as the French Flat/Illinois Valley sites) which are immediately west of Jackson County. The continued existence of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* is threatened primarily by destruction of their specialized habitat by industrial and residential development, including road and powerline construction and maintenance. Agricultural conversion, certain grazing practices, off-road vehicle use, and competition with non-native plants also contribute to population declines and local extirpations. *Lomatium cookii* sites in Josephine County are additionally threatened by habitat alteration associated with gold mining and woody species encroachment resulting from fire suppression. This rule implements Federal protection and recovery provisions of the Act to *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora*.

DATES: This rule is effective December 9, 2002.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE. 98th, Suite 100, Portland, OR 97266.

FOR FURTHER INFORMATION CONTACT: Kemper McMaster, Oregon Fish and Wildlife Office (*see* **ADDRESSES** section) (telephone 503/231–6179; facsimile 503/231–6195). Information regarding this designation is available in alternate formats upon request.

SUPPLEMENTARY INFORMATION:

Background

Vernal pools are seasonal wetlands that form only in regions where specialized soil and climatic conditions exist. During fall and winter rains, water collects in shallow depressions in areas where downward percolation of water is prevented by the presence of an impervious hard pan or clay pan layer below the soil surface (Keeley and Zedler 1998). Later in the spring when rains decrease and the weather warms, the water evaporates, and the pools generally disappear by May. These shallow depressions then remain relatively dry until late fall and early winter with the advent of greater precipitation and cooler temperatures. Vernal pools thus provide unusual ''flood and drought'' habitat conditions to which certain plants and animals have specifically adapted. *Lomatium cookii* (Cook's lomatium) and *Limnanthes floccosa* ssp. *grandiflora* (large-flowered woolly meadowfoam) are two such plant taxa which occur in vernal pool habitats in a small area of Jackson County, southwestern Oregon. *Lomatium cookii* also occurs in seasonally wet habitats at a few sites in Josephine County, the adjacent county to the west. The *Limnanthes floccosa* ssp. *grandiflora* is believed to be extant in only about 15 sites in Jackson County, while *Lomatium cookii* is known to occur at about 15 sites in Jackson and 21 sites in Josephine County (Oregon Natural Heritage Information Center (ONHIF) Database 2002; Mabel Jones, Bureau of Land Management, pers. comm., 2002).

Lomatium cookii

A perennial forb in the carrot family (Apiaceae), *Lomatium cookii* grows 1.5 to 5 decimeters (dm) (6 to 20 inches (in)) tall, from a slender, twisted taproot. Leaves are smooth, finely dissected, and strictly basal (growing directly above the taproot on the ground, not along the stems). One to four groups of clustered, pale yellow flowers produce boat-shaped fruits 8 to 13 millimeters (mm) (0.3 to 0.5 in) long with thickened margins. The taproot can often branch at ground level to produce multiple stems. The branching taproot distinguishes *L. cookii* from *L. bradshawii* (Bradshaw's desert-parsley) that is indigenous to wet prairies from southern Willamette Valley, Oregon to southwest Washington, and *L. humile* (Caraway leaf lomatium) that is found in vernal pools in northern California (Kagan 1986). *Lomatium utriculatum* (Fine-leaved desert-parsley), found on mounds adjacent to pools in the Agate Desert, is distinguished from *L. cookii* by its more intensely yellow flowers, the different shape of its involucel bracklets (leaf-like structures below the flowers), and thin-winged fruits (Kagan 1986). *Lomatium tracyi* (Tracy's lomatium), occurring in California and the Illinois Valley, has a similar appearance to *L. cookii,* but *L. tracyi* has slender-margined fruits and can grow on dry sites. *Lomatium cookii* has boat or pumpkin-shaped fruits and grows on seasonally wet sites (Lincoln Constance, Prof. Emeritus, University of California, Berkeley, pers. comm., 1992). Recent genetic research has shown *L. cookii* to be most closely related to *L. bradshawii*. *Lomatium marginatum* (Butte desert-parsley) and probably *L. tracyi* are likely the next closely related species (M. Gitzendanner, University of Florida, pers. comm., 2002).

James Kagan first collected *Lomatium cookii* in 1981 from vernal pools in the Agate Desert, Jackson County, Oregon, and subsequently described the species (Kagan 1986). Additional populations were found at French Flat in the Illinois Valley, Josephine County, Oregon in 1988 (ONHIC database 2002). Plants in the French Flat/Illinois Valley sites grow on seasonally wet soils. Slight morphological differences exist between *L. cookii* populations in the Agate Desert and French Flat, but these differences are not considered significant enough to separate the species into subspecies. Recent genetic research found no evidence of significant genetic differences between the Agate Desert and French Flat *L. cookii* populations warranting the separation of the species into subspecies (M. Gitzendanner and P. Soltis, pers. comm., 2001).

Limnanthes floccosa ssp. grandiflora

A delicate annual in the meadowfoam, or false mermaid, family (Limnanthaceae), *Limnanthes floccosa* ssp. *grandiflora* grows 5 to 15 centimeters (cm) (2 to 6 in) tall, with 5-cm (2-in) leaves divided into five to nine segments. The stems and leaves are sparsely covered with short, fuzzy hairs. The flowers, and especially the sepals,

are densely covered with woolly hairs. Each of the five yellowish to white petals has two rows of hairs near their base.

In his monograph of the genus *Limnanthes,* Mason (1952) described three varieties of *Limnanthes floccosa*, but did not recognize the subspecies *grandiflora* as distinct. Based on her study of specimens grown under controlled conditions from field-collected seed, Arroyo (1973) elevated Mason's varieties to subspecies and described two additional subspecies, *californica* and *grandiflora.* Arroyo (1973) distinguished *grandiflora* from the other subspecies of *L. floccosa* by a combination of: petal length 7.5 to 9 mm (0.30 to 0.35 in); sepal length 8.5 to 9 mm (0.33 to 0.35 in); sepal pubescence (dense on inner surface and sparse to absent on outer surface); sparsely hairy stems and leaves; two lines of hairs at the petal base; relative flowering time; and, occurrence relative to soil moisture (Arroyo 1973). Over much of its range, the subspecies *grandiflora* is sympatric or closely related with *L. floccosa* ssp. *floccosa*; however, the subspecies *floccosa* grows on the slightly drier, outer fringes of the pools, whereas ssp. *grandiflora* grows on the relatively wetter, inner fringe of the pools (Arroyo 1973; D. Borgias, The Nature Conservancy (TNC), pers. comm., 1998).

Occurrences

Limnanthes floccosa ssp. *grandiflora* and *Lomatium cookii* both occur in and around vernal pools within an 83-square kilometer (km^2) (32-square mile (mi^2)) landform in southwestern Oregon known as the Agate Desert in Jackson County. Located on the floor of the Rogue River basin north of Medford, the Agate Desert is characterized by shallow, Agate-Winlow complex soils; a relative lack of trees; sparse prairie vegetation; and agates commonly found on the soil surface (Oregon Natural Heritage Program (ONHP) 1997).

Lomatium cookii also occurs in another area encompassing some 10-km^2 (4-mi^2) in adjacent Josephine County. This area, referred to as French Flat, is located within the Illinois Valley near the Siskiyou Mountains. The 21 French Flat/Illinois Valley sites are located at: French Flat in south central Josephine County; Rough and Ready Creek Forest Wayside State Park, southwestern Josephine County; both east and west of Cave Junction, Oregon; east and southeast of Woodcock Mountain near Woodcock Creek; and a few scattered sites are northeast of Kerby, Oregon, near Reeves Creeks. These sites are collectively referred to as the French Flat/Illinois Valley sites.

The Agate Desert landscape consists of a gentle mound-swale topography with a characteristic appearance in aerial photographs that is sometimes referred to as ''patterned ground.'' During the fall and winter rainy season, a striking pattern of shallow pools develops in the swales. These vary in size from 1 to 30 meters (m) (3 to 100 feet (ft)) across, and attain a maximum depth of about 30-cm (12-in) (ONHP 1997). Plants native to these pools, including *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii,* are specially adapted to grow, flower, and set seed during the short time that water is available in the spring, finishing their life cycle before the dry hot summers. Special assemblages of plants blooming in concentric rings toward the deepest part of the pools can be seen as soil moisture recedes throughout the spring (ONHP 1997). Native plants that occur with *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* in these vernal pools include: *Plagiobothrys bracteatus* (popcorn flower); *Juncus uncialis* (a rush); *Navarretia* spp. (Navarretia); *Limnanthes floccosa* ssp. *floccosa* (common woolly meadowfoam); *Deschampsia danthonides;* and *Triteliea hyacinthina* (Kagan 1987; D. Borgias, *in litt.* 2002).

The historical range for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* in the Agate Desert may have originally encompassed over 130 km^2 (50 mi^2), within an 18-km (11-mi) radius of White City, Oregon (ONHP 1997). Vernal pool habitat, formerly widespread south of the Rogue River, is now almost completely eliminated (Brock 1987, ONHP 1997).

In the French Flat/Illinois Valley area, *Lomatium cookii* grows in wet meadow areas underlain with floodplain bench deposits that contain sufficient clay to form a clay pan at 60 to 90 cm (24 to 35 in) below the soil surface (U.S. Department of Agriculture 1983). The clay pan creates seasonally wet areas similar to the vernal pools of the Agate Desert, but mostly lacking the latter area's distinctive mound-swale topography. Common plants associated with *Lomatium cookii* in the French Flat/Illinois Valley sites include: *Danthonia californica* (oatgrass); *Plagiobothrys bracteatus; Horkelia congesta* (horkelia); *Calochortus uniflorus* (mariposa lily); and *Erythronium howellii* (trout lily). The surrounding forest contains *Pinus ponderosa* (Ponderosa pine) and *Pinus jeffreyi* (Jeffrey pine). Shrub species that grow on serpentine soils, such as *Ceanothus cuneatus* (buckbrush) and *Arctostaphylos* ssp., are found within the area of *Lomatium cookii* sites (Kaye 2001).

The historical range of *Lomatium cookii* in the French Flat/Illinois Valley area may have included seasonally wet meadows along the East Fork of the Illinois River. Fire suppression, grazing, residential development, and extensive gold mining (Shenon 1933) altered *Lomatium cookii* habitat in this area. However, some native perennial communities remain in wet meadows that were not affected by mining. Gold mining imminently threatens *Lomatium cookii* habitat at the French Flat site (Mark Mousseaux, BLM, pers. comm., 2002).

In the Agate Desert, there are believed to be about 15 sites containing *Lomatium cookii* and about 15 sites containing *Limnanthes floccosa* ssp. *grandiflora.* Mapped habitat compiled in 1998 for these species in the Agate Desert totals approximately 54 hectares (ha) (133 acres (ac)) for *Lomatium cookii* and 80 ha (198 ac) for *Limnanthes floccosa* ssp. *grandiflora* (ONHIC database 2002). However, due to recent alteration and destruction of vernal pools in the Agate Desert (ONHP 1997), areas currently occupied by these plants is considerably less, an estimated 28 ha (69 ac) and 47 ha (116 ac) for *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora,* respectively (ONHIC database 2002). The two plants occur in five of the same vernal pool systems constituting three different sites. At the French Flat/Illinois Valley sites, there are believed to be about 21 known locations of *Lomatium cookii,* occupying up to 61 ha (150 ac) of habitat, but many of these sites are very small (50 individuals or less), and their current status is not well known.

Two sites each of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* occur entirely or partially within the Agate Desert Preserve (Preserve), owned by TNC. The Preserve contains the only large populations on private land specifically managed for the protection of these species.

Two known sites of each taxon are on State land, mainly in the Ken Denman Wildlife Area, where much of the habitat has been altered and planted to grasses. Two sites containing *Lomatium cookii* are located on land managed by Jackson County; one of these has been largely extirpated by construction of a baseball sports complex. Portions of two *Lomatium cookii* and three *Limnanthes floccosa* ssp. *grandiflora* sites are on lands owned by the City of Medford, within an area designated as the Whetstone Industrial Park. Portions of two *Limnanthes floccosa* ssp. *grandiflora* and four *Lomatium cookii*

sites are located in highway or powerline rights-of-way (ONHIC database 2002), where they are subject to herbicide spraying and other maintenance activities conducted by the State or counties. Fifteen sites containing *Lomatium cookii* in Josephine County are located partially or entirely on land managed by BLM. The remaining sites of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* occur primarily on private land.

Each year, plant populations exhibit some natural variation in numbers, related primarily to temperature and rainfall conditions for that year. In general, numbers of annual plants, such as *Limnanthes floccosa* ssp. *grandiflora* may fluctuate more widely than those of perennial plants, such as *Lomatium cookii*. The year 2000 saw a large increase in the number of *Limnanthes floccosa* ssp. *grandiflora* plants due to the wet conditions, but in 2001, a dry year, the number of individuals plummeted in many areas. For example, on a protected site owned by TNC, one *Limnanthes floccosa* ssp. *grandiflora* occurrence declined from 68,000 in 2000 to 39,000 in 2001. However in 2002, even with average rainfall figures still below normal, the population increased back to about 63,000 plants. A site owned by the City of Medford, contained some 10,000 *Limnanthes floccosa* ssp. *grandiflora* individuals in the year 2000, while only 112 individuals were noted at this site in 2001 (D. Borgias, *in litt.* 2002). Year-to-year changes of this magnitude may be within the normal range of variation for this annual plant. However, it is possible that a number of consecutive drought years could eliminate some populations of *Limnanthes floccosa* ssp. *grandiflora*. In contrast, numbers of *Lomatium cookii* in the Agate Desert were generally stable or increased during 2000–2002 (D. Borgias, *in litt.* 2002).

Information regarding three status changes considered outside the natural range of year-to-year variation for these plants became available to the Service between May 15, 2000, when the proposed rule was published in the **Federal Register** (65 FR 30941) and January 14, 2002, when the comment period was reopened for these plants (67 FR 1712). Two of these involve increased population sizes at historical *Lomatium cookii* sites. One of these sites, on private land, was believed to contain some 6,000 plants historically. Surveys in 2000 and 2001 revealed an estimated 580,000 flowering individuals. Another population, located on City of Medford airport property, that was previously estimated at some 1,000 plants, was found in 1999 to contain over 5,000 flowering *Lomatium cookii* plants. However, this larger population was bisected in 2001 by development of a new taxiway at this airport (K. O'Hara, David Evans & Associates, *in litt.* 2002). The third status change is that, in the year 2000, *Limnanthes floccosa* ssp. *grandiflora* was discovered at two new sites on private land. One comprises approximately 1,000 flowering individuals and the other about 170 individuals in three patches.

The 2000–2002 observations of these two vernal pool plant species must be considered within the context of the status and trends of their habitat overall. Recent studies of the Agate Desert vernal pool hydrology and vegetation indicate that no undisturbed vernal pool habitat remains (ONHP 1997, 1999). The latter study (ONHP 1999) indicates that the highest quality remaining Agate Desert vernal pool habitat, that with intact hydrology and altered vegetation, is now present on approximately 17.6 percent of the area that historically contained vernal pools. This is a decrease from the earlier study (ONHP 1997), cited in the May 15, 2000, proposed rule, which estimated that this highest quality remaining habitat occurred on 23.1 percent of the area. This reported decrease in the amount of best available habitat is partially due to better-refined mapping techniques, but there is evidence that additional land leveling also occurred between the two studies (ONHP 1999). Both reported and unreported fills of Agate Desert vernal pool wetlands are occurring continually (C. Tuss, Service biologist, pers. comm., 2001). ONHP (1999) reports that over 19 percent of Agate Desert vernal pool habitat has been leveled, and development (structures, roads, and other impermeable surfaces) has occurred on an additional 41 percent of this area (ONHP 1999). Thus, over 60 percent of the habitat of these plants in the Agate Desert has been destroyed, and none of the remaining habitat has escaped the invasion of weedy competitors. This compares with just under 60 percent habitat destruction reported in ONHP 1997 and in the proposed rule (65 FR 30941).

Recent evidence also indicates that non-native annual grasses, particularly medusahead (*Taeniatherum medusae*), are a greater problem than previously believed for *Lomatium cookii*, particularly in the Agate Desert (D. Borgias, *in litt.* 2002). Unlike native perennial bunchgrasses that originally occupied the area, annual grasses die back each year, creating a buildup of thatch from the dead leaves that interferes with germination of *Lomatium cookii* seeds. Current observations indicate that, without control of annual grasses through mowing, grazing, or prescribed burns, *Lomatium cookii* populations tend to decrease over time, and could be extirpated within a relatively short timeframe due to this competition with non-native grasses (D. Borgias, *in litt.* 2002). In many cases, non-native plants have been purposefully planted for livestock and other reasons in the Agate Desert. For example, the Ken Denman Wildlife Reserve, encompassing some 720 ha (1,780 ac) of Agate Desert land, is managed by the State primarily for waterfowl production. Much of this Reserve has been covered with log deck debris, plowed in strips and planted with non-native wildlife food plants (Brock 1987).

Populations of *Lomatium cookii* in Josephine County are becoming even more highly threatened by off-road vehicle (ORV) use than they were at the time of the proposal. Over the past few years, gates erected by the BLM to direct ORV traffic away from *Lomatium cookii* habitat have been repeatedly vandalized, and the intrusion into these areas continues. Particularly in the springtime, when the ground is wet and muddy (and *Lomatium cookii* plants are flowering), ORVs cause major rutting and disruption of *Lomatium cookii* habitat (L. Mazzu, BLM botanist, pers. comm., 2001).

Previous Federal Action

Federal action on *Limnanthes floccosa* ssp. *grandiflora* began with section 12 of the Endangered Species Act (Act) of 1973 as amended (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct. That report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, we published a notice (40 FR 27823) accepting the Smithsonian Institution report as a petition within the context of section 4(c)(2) (now section 4(b)(3)(A)) of the Act. The notice further indicated our intention to review the status of plant species, which included *Limnanthes floccosa* ssp. *grandiflora*. On June 16, 1976, we published a proposed rule, pursuant to section 4 of the Act, proposing endangered status for approximately 1,700 vascular plant species, including *Limnanthes floccosa* ssp. *grandiflora* (41 FR 24523).

In 1978, amendments to the Act required that all proposals over two

years old be withdrawn. A 1 year grace period was given to proposals already over 2 years old. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) withdrawing that portion of the June 16, 1976, proposal that had not been made final, including the proposal to list *Limnanthes floccosa* ssp. *grandiflora*. We published an updated notice of review (NOR) for plants on December 15, 1980 (50 FR 82480), including *Limnanthes floccosa* ssp. *grandiflora* as a category 1 candidate species. At the time, category 1 species were defined as we presently define candidates, *i.e.*, those species for which we have on file substantial information on biological vulnerability and threats to support the preparation of proposals to list as threatened or endangered. Category 1 status was maintained for *Limnanthes floccosa* ssp. *grandiflora* in the November 28, 1983, supplement to the notice (48 FR 53657). However, in the September 27, 1985, NOR (50 FR 39526), the status of this taxon was changed to category 2. Category 2 was defined at the time to include taxa for which data in our possession indicated that listing was possibly appropriate, but for which substantial information on biological vulnerability and threats was not currently known or on file to support proposed rules. Category 2 status was maintained for *Limnanthes floccosa* ssp. *grandiflora* in the NOR published on February 21, 1990 (55 FR 6184). *Lomatium cookii* was first included in that 1990 NOR as a category 1 candidate species. In the September 30, 1993, NOR (58 FR 51144), the status of both taxa remained unchanged.

Upon publication of the February 28, 1996, NOR (61 FR 7596), we ceased using category designations and included as candidates only those taxa previously designated as category 1, *i.e.*, those for which we had on file sufficient information to support listing proposals. Accordingly, *Lomatium cookii* was maintained as a candidate species, but *Limnanthes floccosa* ssp. *grandiflora* was not. The plant NOR, published on September 19, 1997 (62 FR 49398), includes both *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* as candidate species. The October 25, 1999, (64 FR 57534) and June 13, 2002 (67 FR 40657) NORs list both species as candidates.

Section 4(b)(3)(B) of the Act requires the Secretary to make certain findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This was the case for *Limnanthes floccosa* ssp. *grandiflora* because of our acceptance of the 1975 Smithsonian Report as a petition. On October 13, 1983, we found that the petitioned listing of this species was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act. Notice of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be reviewed annually pursuant to section 4(b)(3)(C)(i) of the Act. For the purpose of making these annual petition findings, we made an administrative decision to treat all candidate plants as if their listings had been petitioned prior to 1982. Therefore, the ''warranted but precluded'' finding also applies to *Lomatium cookii*, which first appeared on the February 21, 1990, NOR. The warranted but precluded finding for both species has been reviewed annually through 1997. Publication of the proposed listing rule for these two species constituted the final finding for the petitioned action.

On May 15, 2000, the Service published a proposed rule to list *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* as endangered species and requested public comment for 60 days (65 FR 30941). On August 28, 2001, Siskiyou Regional Educational Project filed a citizen suit alleging that the Service had failed to make a timely final determination on the listing of these two plants, consistent with the timeframes set forth in section 4 of the Act (*Siskiyou Regional Educational Project* v. *Norton,* Civil No. 01–1208–KI (D. Ore). We entered into a settlement agreement with the plaintiff and agreed to submit a final listing decision for publication in the **Federal Register** on or before October 31, 2002. On January 14, 2002, the Service reopened the comment period on the proposed endangered status of the two plant species to seek updated information on the status, abundance, and distribution of these plants, as well as to provide updated information acquired by the Service since the proposed rule was published. This comment period closed on March 15, 2002 (67 FR 1712). This final rule is made in accordance with the judicially approved settlement agreement.

Summary of Comments and Recommendations

We contacted Federal and State agencies, county governments, scientific organizations, and other interested parties and asked that they comment. We requested that all interested parties submit factual reports or information that might contribute to the development of this final rule. We received a total of 19 comment letters over two comment periods. Four letters were received during the first comment period and fifteen letters were received during the second comment period. Of the nineteen total responses, sixteen were in support and three opposed the listing action. Two responses were from groups that commented during both comment periods, expressing the same or similar viewpoints in both letters. No comments were received from Federal, State, or community government agencies. All responses were submitted by individuals or groups.

This final rule reflects the comments and information we received during the comment period. We addressed opposing comments and other substantive comments concerning the rule below. Comments of a similar nature or point are grouped together (referred to as issues for the purpose of this summary) below, along with our response to each.

Issue 1: The proposed listing rule was not based on the best scientific information available and was not from independent sources.

Our Response: We thoroughly reviewed all available scientific data. We sought and reviewed historic and recent publications and unpublished reports concerning *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* and other related species, as well as literature documenting the decline of the vernal pool ecosystem in general. This included reliable unpublished reports, non-literature documentation, and personal communications with experts. The public reviewed the proposed rule and an update on the species' status when the comment period was reopened. The proposed rule was peer reviewed according to our policy (*see* ''Peer Review'' section). In the process of updating the proposed rule, some citations may have changed due to publication, in peer reviewed journals, of some data originally cited as personal communications, unpublished manuscripts, or thesis. We used our best professional judgment and based our decision on the best scientific and commercial data available, as required by section 4(b)(1) of the Act.

Issue 2: The effects of cattle grazing are not based on research demonstrating the positive and negative effects of cattle grazing and seem to be contradictory.

Our Response: Research conducted by TNC included monitored plots of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* populations on the Agate Desert. The results indicated that both *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora*

populations increased in the plots where livestock grazing was excluded. Ungrazed plots containing *Limnanthes floccosa* ssp. *grandiflora* continued to have population increases over time. However, *Lomatium cookii* population gains of the first year were lost by the third year when thatch build-up impeded plant growth and seedling abundance (D. Borgias, *in litt.* 2002).

The perceived ambiguity between the positive and negative effects of grazing on these species may lie in how the effects differ depending on the time of year, intensity, and duration of grazing within vernal pools. Prevailing livestock practices on the Agate Desert are considered ''moderate'' grazing. In Jackson County, 37,000 head of cattle and 3,000 head of sheep were pastured in 2000. The Natural Resources Conservation Service, U.S. Department of Agriculture, soil survey for Jackson County (Soil Conservation Service 1993) determined that the winter production on the Agate Desert soils amounts to 362 kilograms (kg) (800 pounds (lbs.)) of forage per acre, annually. This amount of forage is just above the estimated requirements of a cow/calf pair for a month (or 353 kg ''animal unit month'' or 12 kg per day) (780 lbs. ''animal unit month'' or 26 lbs. per day). Stocking rates in the Agate Desert are about one cow/calf pair for each 2.5 to 4 or more acres and typically grazing occurs in the late fall, winter and early spring (D. Borgias, *in litt.* 2002). These are averages and can be affected by changes in weather (*e.g.*, above or below normal rainfall). However, even moderate grazing can affect *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* populations either positively and/or negatively since time of year and duration must be considered.

Preliminary survey results indicate early fall grazing may be beneficial to *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* species through reductions in the populations of non-native competitors. Spring grazing may be detrimental to these species' populations from the direct effects of herbivory and trampling (D. Borgias, *in litt.* 2002; Kagan *in litt.* 2002). Precise management recommendations to benefit these species are in development while research continues.

Issue 3: The proposed rule ignores protections already in place.

Our Response: Lomatium cookii and *Limnanthes floccosa* ssp. *grandiflora* are listed by the State of Oregon as State endangered species under the Oregon Endangered Species Act. Despite the State listing, population losses of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* continue to occur. The inadequacy of existing Federal laws and regulations to protect these species are addressed in greater detail in the section titled, ''Summary of Factors Affecting the Species.''

Issue 4: The proposed rule does not address the economic impacts to the surrounding communities, especially the agricultural communities.

Our Response: The Act requires us to base our listing decisions on the best scientific and commercial information available, without regard to the effects, including economic effects, of listing a species. (*See* the section titled ''Summary of Factors Affecting the Species''). However, the range of these species overlaps considerably with the range of the federally-listed vernal pool fairy shrimp, *Branchinecta lynchi,* in southwest Oregon. Actions on Federal property or proposed actions that have a Federal nexus are already required to conduct section 7 consultations if their actions may affect listed species. The listing of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* should not lead to greater restrictions on privately owned property as the Endangered Species Act controls take of endangered plants on private land only when it involves knowing violation of state law. Economic impacts will be analyzed in detail during the process of designating critical habitat.

Issue 5: Rainfall and weather conditions were not discussed to explain population declines.

Our Response: When the proposed rule was published, May 15, 2000, (65 FR 30941) it contained the best available information to us on the status of the species at that time. Additional information on the species was solicited from experts, and public comments were sought to update information on the status, abundance, and distribution of these plants. The proposed rule to reopen the comment period was published in the **Federal Register** on January 14, 2002 (67 FR 1712). It contained updated population numbers and addressed the year to year changes in population size from the effects of annually fluctuating environmental factors such as rainfall and weather conditions.

Issue 6: Critical habitat was not designated.

Our Response: The Northwest Environmental Defense Center wrote in support of the listing of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* and recommended that critical habitat be designated for these two species. Due to funding constraints we are unable to designate critical habitat at this time. We will prepare a critical habitat determination in the future as resources allow. (*See* Critical Habitat section).

Issue 7: Fire, used as an alternative to grazing to remove thatch, would kill plants or overly stress the plants, damaging crown and roots.

Our Response: Research results on the effects of prescribed burning on the Agate Desert have shown that early summer fire is neutral to *Limnanthes floccosa* ssp. *grandiflora* and beneficial toward *Lomatium cookii.* Seedling recruitment in the second year post burn, and juvenile recruitment in the third year post burn far surpassed that in unburned units. The crowns are dry at the time when fire can carry through such stands, and the roots are insulated from the heat generated by the short lasting fuels of a grassland fire (D. Borgias, *in litt.* 2002).

Issue 8: Land that is totally protected could result in decreased population numbers. Because *Lomatium cookii* repopulated an area that was leveled in the 1940's, this indicates that this species is an ''early invader.''

Our Response: Populations of *Lomatium cookii* have not been shown to increase with disturbance. Habitat modification has been shown to be a leading contributor to population declines. One explanation for the ''repopulation'' of the Antelope Road site may be that the seeds lying dormant in the soil were stimulated to grow by the immediate hydrological conditions. Vernal pool species have very specialized conditions in which they have evolved and often have physical structures on the parent plant to hold the seed onto the plant. Almost a fifth of vernal pool species have mechanisms or structures that restrict dispersal (Zedler 1990). This insures the seed will be deposited in the same area where the parent plant successfully reproduced. Dispersal outside the vernal pool environment is not an advantage to highly specialized vernal pool plants because dispersal would increase the chance of landing in inhospitable habitat.

Issue 9: The species range may be wider than acknowledged and is not being looked at on a broad enough scale or on other soils.

Our Response: Many amateur and professional botanists, trained in plant taxonomy and the geographic distribution of plant species, devote large amounts of their time collecting and identifying plants. These experts look specifically for range extensions of known species and species new to science (F. Lang, Prof. Emeritus, Southern Oregon University, pers. comm., 2000). Factors controlling the distribution of *Lomatium cookii* and the

Limnanthes floccosa ssp. *grandiflora* include the local geological and hydrological conditions. The seasonal wetland habitat inhibits plant species not specifically adapted to the wet/dry habitat (D. Borgias, pers. comm., 2000).

Peer Review

In accordance with our July 1, 1994 (59 FR 34270), Interagency Cooperative Policy on Peer Review, we requested the expert opinion of at least three independent specialists regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information in the proposed rule. The purpose of such a review is to ensure that the listing decision is based on scientifically sound data, assumptions and analyses, including input of appropriate experts and specialists.

We requested peer review from six individuals who possess expertise on *Lomatium cookii* or *Limnanthes floccosa* ssp. *grandiflora* natural history and ecology to review the proposed rule and provide any relevant scientific data relating to taxonomy, distribution, or to the supporting biological data used in our analyses of the listing factors. We received responses from four peer reviewers. All expressed their belief that the data supported the protection of the two plant species under the protection of the Act. We have incorporated their comments into the final rule, as appropriate, and briefly summarized their observations below.

All four peer reviewers agreed with our conclusion to list these species as endangered. Each supported the scientific basis for our decision and addressed the urgency of the threats to the species. The peer reviewers' comments included suggestions to correct technical errors, clarify differences between *Limnanthes* subspecies, and a correction regarding an absent referenced citation. The peer reviewers' suggested changes are noted below and/or have been incorporated into this final rule document as appropriate.

Summary of Changes from the Proposed Rule and Reopening of Comment Period

An error was found in our taxonomic description of *Limnanthes floccosa* ssp. *grandiflora* published in the proposed rule which distinguishes it from other *Limnanthes* subspecies. The corrected description and the proper literature citation have been incorporated in this final rule.

Population data regarding the status of both taxa was supplied to us by the ONHP which transferred their data to Oregon State University Institute for Natural Resources. As of June 28, 2002, the organization name was changed to Oregon Natural Heritage Information Center. The change in citation has been noted in this final rule.

A peer reviewer suggested a name change to differentiate three *Lomatium cookii* occurrence sites collectively referred to as the French Flat occurrence located in the Illinois Valley. The peer reviewer believes there is the potential for confusion because the southernmost site is located in an area known as French Flat, while the other populations are further north, some adjacent to Cave Junction and others located at the westernmost edge of the Illinois Valley or further north. Additional descriptors have been added where appropriate to define the specific area being addressed or are referred to as French Flat/Illinois Valley sites in this final rule.

Special concern was expressed regarding the population of *Lomatium cookii* located on the west side of the Illinois Valley. Due to a large wildfire just west of the Illinois Valley, in the Kalmiopsis Wilderness Area, fire suppression related activities, such as fireline construction or the use of heavy equipment, may be a new additional threat to *Lomatium cookii*. Because the effects of the suppression action will not be known until after the publication of the final rule, these potential threats are not likely to reduce the need to list the species as endangered and will not be addressed in the final rule.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The vernal pools and other seasonally wet soils where *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* grow are susceptible to various land-use disturbances. The primary threats to the vernal pool habitat of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* in the Agate Desert are industrial, commercial, and residential development and related road and utilities construction and maintenance, including mowing, herbicide spraying, firebreak construction, and hydrologic alteration, particularly the conversion of non-irrigated land to irrigated agricultural use (D. Borgias, *in litt.* 2002). Competition, particularly from introduced annual grass species (*see* Factor E), and grazing, especially during the fall and winter months, can also reduce or eliminate populations of these species (Kagan 1987; James Kagan, ONHP, pers. comm., 1998; D. Borgias, *in litt.* 2002). Josephine County populations of *Lomatium cookii* are additionally threatened by proposed gold mining operations, the uncontrolled use of ORVs in the areas occupied by this plant, timber sale activities, and tree encroachment into open areas associated with fire suppression.

Human-related impacts to vernal pool habitat in the Agate Desert began in the mid-1800s, when the area was grazed by cattle and sheep (ONHP 1997). In 1905, a land speculation company acquired a large part of the area and attempted to establish pear orchards by constructing an extensive system of shallow irrigation ditches and in some cases, blasting through the hardpan layer. This failed, and grazing continued as the dominant use until 1942, when the U.S. military purchased a large segment of the Agate Desert for a training center. When this center was decommissioned in 1946, a 158-ha (390-ac) portion of the area west of Highway 62 was purchased by a timber industry consortium, and a timber mill industrial center began to grow (ONHP 1997). Other industries were drawn to the area, and around 1980, the City of Medford established the 290-ha (720-ac) Whetstone Industrial Park. Much of this area has been leveled and compacted, destroying any vernal pools, although some potential vernal pool habitat remains in the area (ONHP 1997). Another area west of Highway 62, encompassing some 728-ha (1,800-ac), is State land, managed by the Oregon Department of Fish and Wildlife, as the Ken Denman Wildlife Area (ONHP 1997). Devoted to waterfowl production, much of this area has been covered with log deck debris, plowed in strips, and planted with non-native wildlife food plants (Brock 1987; J. Kagan, pers. comm., 1997).

East of Highway 62, much of the Agate Desert landform was subdivided into 2-ha (5-ac) homesites in the 1950s, many of which were leveled. This area harbors some intact vernal pool habitat (Brock 1987, ONHP 1997).

The southernmost section of the historical Agate Desert has been largely modified by cultivation for pasture. The Medford-Jackson County Airport occupies some 374 ha (925 ac) at the southern limit of the landform. A Foreign Trade Zone at this airport has

been under development (Bern Case, Director, Medford Jackson County Airport, pers. comm., 2002). However, construction associated with this facility has not directly impacted *Lomatium cookii* plants at the site to date.

Jackson County is experiencing a rapid human population increase. Between 1990 and 2000 the population of Jackson County increased 23.8 percent (U.S. Department of Commerce, Census Bureau 2000). It is the seventh fastest growing county in Oregon, and the majority of this growth is centered in the Medford area (Portland State University, Population Research Center. 2000). Much development has occurred in and around *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* habitat near the City of Medford and White City.

A habitat assessment map and report (ONHP 1997) indicated that residential, commercial and industrial development, along with land leveling, have claimed nearly 60 percent of the historic Agate Desert vernal pool landscape. According to this assessment, no pristine vernal pool habitat remains due to the presence of introduced plants throughout the Agate Desert. The highest quality remaining vernal pool habitat occurs on 23 percent of the landform. By overlaying ONHIC plant occurrence polygons on the habitat assessment base map, one can determine that over 50 percent of *Lomatium cookii* sites and nearly 50 percent of *Limnanthes floccosa* ssp. *grandiflora* sites originally mapped in the Agate Desert during the 1980's have been severely altered. Habitat alterations in the Agate Desert are continuing as indicated by numerous examples below.

In 1992, a sewage line was built by the City of Medford across the southwest corner of the Cardinal Avenue site in the Agate Desert. A large department store was built on land adjacent to this site. The Cardinal Avenue site, with a population of approximately 140 *Lomatium cookii* individuals, was graded in January 1993 (J. Kagan, pers. comm., 1998). The landowner was contacted by TNC to request permission to remove some plants for experimental transplantation. The landowner agreed to allow removal of the plants, but TNC was only able to obtain one individual prior to completion of grading, and was unable to successfully transplant the individual (D. Borgias, pers. comm., 1999).

In 1986, private lands with 4 ha (10 ac) of *Lomatium cookii* habitat and some 500 individual plants were developed into a sports park complex by Jackson County with Federal Land and Water Conservation Funds. The area was leveled and playing fields and parking lots were constructed. Approximately 80 percent of the available habitat was removed at this site. Inventory of this site in 1992 documented 150 plants at this location (Kagan 1992). Based on preliminary surveys in 1997, these plants may have since become extirpated (J. Kagan, pers. comm., 1998).

Another project related to development in the Agate Desert area that adversely affected *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* habitat is a 500-kilovolt powerline that Pacific Power and Light constructed in June 1992 (Gerald Nielsen, Pacific Power Co., pers. comm., 1992). The powerline directly affected 7.5 ha (18.5 ac) out of a total of 80 ha (198 ac), or 9.3 percent, of the existing *Limnanthes floccosa* ssp. *grandiflora* habitat in the Agate Desert. About 2.6 ha (6.4 ac), out of a total of 54 ha (133 ac), or 4.8 percent, of the existing *Lomatium cookii* habitat was affected in the Agate Desert. Maintenance activities along the powerline corridor may continue to adversely impact *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* habitat.

Two sites where *Limnanthes floccosa* ssp. *grandiflora* was collected in 1969 have been destroyed, one by construction of a mill, and another 1.6 ha (4.0 ac) occurrence by construction of a large industrial plant (J. Kagan, pers. comm., 1997). A number of additional sites with *Limnanthes floccosa* ssp. *grandiflora* occurrences (50 percent of the total extant) have been severely degraded, as follows (J. Kagan, pers. comm., 1998): (1) One site, at the intersection of three major roads, has been reduced to a few fragmented patches. The site is ringed with development with two fast-food restaurants on one side, a powerline on another, and residential development to the east. The isolation of this site may eventually result in the loss of these plants especially if the number of individual plants is too small to be self-sustaining; (2) another site occurs at the corner of a building adjacent to railroad tracks and has been reduced to approximately 5 square meters (54-square feet), again, leaving no avenue for site conservation; (3) a sewer plant for the City of Medford has reduced the type locality for this taxon to two small pools; (4) the two sites on Denman Wildlife Area have been leveled and scraped for planting tall wheatgrass as wildlife food. In 1985, *Limnanthes floccosa* ssp. *grandiflora* was estimated to cover some 16 ha (40 ac) at one of these sites, but by 1993, coverage had been reduced to 1.2 ha (3 ac), a 92 percent reduction; and (5) more recently, over two-thirds of another site (29.5 ha (73 ac) in size) has been leveled, grazed, and piped for irrigation.

In the early 1990's, a proposed highway connector between Interstate 5 and Highway 140 across the Agate Desert would have impacted a number of sites of both *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora*. Although that specific project is no longer under consideration, the Oregon Department of Transportation (ODOT) is currently considering a number of alternatives for moving traffic through the area, some of which could impact vernal pools. An additional potential impact to vernal pool habitat from the highway project is future industrial and residential development that may result from increased access to the area from Interstate 5.

The only *Lomatium cookii* and/or *Limnanthes floccosa* ssp. *grandiflora* habitat currently protected from industrial, residential, or commercial development in the Agate Desert area is the habitat located on the Agate Desert, Whetstone Savanna, and Rogue River Plains Preserves and managed by TNC. These three areas encompass approximately 21 ha, 20 ha, and 53 ha (53, 50, and 132 acres), respectively. The Rogue River Plains Preserve only contains *Limnanthes floccosa* ssp. *grandiflora*, while the other two properties also contain *Lomatium cookii*.

The Agate Desert Preserve, supporting the largest populations of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora*, is located in an area that may soon be surrounded by commercial and industrial developed land. Although the Preserve land is protected, the alteration of land adjacent to the Preserve could disrupt the hydrologic processes within the Preserve. For example, a road was built along the southern edge of the Preserve in 1988. Water runs off the road into a ditch after rainstorms, where it would have normally remained in pools in the Preserve. This ditch drained several of the vernal pools on the southern portion of the Preserve, further reducing approximately 0.2 ha (0.5 ac) of vernal pools available to *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* in the Preserve (J. Kagan, pers. comm., 1998). In addition, potential habitat that borders the west side of the Preserve was partitioned and developed into industrial property in January 1993 (J. Kagan, pers. comm., 1998). Hydrology and available management (*e.g.*, prescribed burning) were also altered by the development.

During development of land west of the Preserve, land-moving equipment

trespassed onto a portion of the Preserve. At the time, vernal pools on the Preserve had no fences or physical barriers to prevent trespass by ORVs or earth-moving equipment (D. Borgias, pers. comm., 1998).

To summarize these plants' current status in the Agate Desert, existing *Limnanthes floccosa* ssp. *grandiflora* plant numbers are relatively stable. However, they do vary considerably from year to year, likely being influenced by seasonal precipitation levels. Two new sites were recorded in 2000, with one site containing about 1,000 plants and the other about 170 in that year. Numbers of *Lomatium cookii* plants over the past few years are stable to increasing in the Agate Desert. One site exhibited a dramatic increase from an average of about 5,500 plants to over 500,000 plants in 2001 in a 6 ha (15 acre) area on private land. Habitat originally mapped for these species and believed to be occupied in the Agate Desert totaled some 54 ha (133 ac) for *Lomatium cookii* and 80 ha (198 ac) for *Limnanthes floccosa* ssp. *grandiflora* (ONHP Database 1998). However, habitat currently occupied by these plants is considerably less, an estimated 28 ha (69 ac) and 47 ha (116 ac) for *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora*, respectively (ONHIC database 2002). Thus, while some populations show local increases in abundance, overall the ranges of both plants have declined by roughly 50 percent in the Agate Desert, and habitat loss or degradation continues to be a significant threat to these species.

Sites containing *Lomatium cookii* in Josephine County in the French Flat and Illinois Valley regions are also subject to numerous threats. The only habitat for this plant on federally-owned land is located near French Flat and managed by BLM. Gold mining operations threaten approximately 10 percent of the federally-owned portion of this habitat. Approximately 600 plants occur in the area threatened by mining. Mining activities could result in direct habitat loss for the species and limit recovery at this site. If existing mining claims on BLM lands are pursued, habitat destruction would be substantially increased beyond 20 percent.

Indirect effects from mining operations in French Flat could also occur due to off-site activities such as road construction, which are likely to alter hydrologic cycles at *Lomatium cookii* habitat sites. These changes could cause seasonally saturated soils to drain and could impede seed germination or lead to death of seedlings and mature plants. Currently, no safeguards exist to protect habitat in the French Flat area from mining operations.

ORV use damages other *Lomatium cookii* habitat on BLM-managed lands at French Flat. In 1992, ORV use damaged a large wet meadow in this area, creating ruts that punctured the clay pan layer and allowed soil moisture to drain from the wet meadow habitat (Linda Knight, pers. comm., 1992). Heavy ORV use of *Lomatium cookii* habitat in the area is continuing. To date, ORV use has caused puncturing and draining of at least 6 ha (15 ac) of meadow habitat in the French Flat population. As a result, at least 20 percent of the remaining *Lomatium cookii* habitat on federally managed land has been destroyed. BLM has gated part of the area and closed access roads to discourage ORV trespass, but restricting access to this large open area is difficult (Linda Mazzu, BLM, pers. comm., 1998; Joan Seevers, Medford District BLM, pers. comm., 1998; Mark Mousseaux, Medford District BLM, pers.com., 2002).

The Oregon Parks & Recreation Department has undertaken protective measures for *Lomatium cookii* in Illinois River Forks State Park. Their entrance road was recently fenced to exclude ORV use from areas near the road where this plant occurs.

Several sites containing *Lomatium cookii* at Indian Hill and Rough and Ready Creek are threatened by encroachment of woody species from the surrounding forest. The invasion of these trees and shrubs, which could shade out *Lomatium cookii* plants and decrease available water, is likely associated with fire suppression activities (L. Mazzu, pers. comm., 1998).

Residential development and road building in the Illinois Valley also threaten populations of *Lomatium cookii.* For example, construction of a residential driveway and roto-tilling on private ground extirpated a Josephine County population of this species in 1991 (J. Kagan, pers. comm., 1998).

Therefore, the on-going and future threats associated with mining, ORV use, and development may lead to continued loss of individual plants and/or habitat throughout the Illinois Valley.

B. *Overutilization for commercial, recreational, scientific, or educational purposes. Lomatium cookii* has no known commercial, recreational, or scientific use at this time. There is no evidence of overcollection by botanists and/or horticulturists at this time. However, *Limnanthes floccosa* ssp. *grandiflora* may be of interest to collectors and researchers since some members of the genus have the potential to become important new crop plants because they possess a seed oil which exhibits stability at high temperature and pressure. This oil could be used as a lubricant for various industrial uses (Savonen, *in litt.* 1998). *Limnanthes alba,* a wildlflower found in California, is now poised to become a multi-million dollar crop in the Willamette Valley of Oregon for its oil (Savonen in litt. 1998). To domesticate the species and improve strains, seeds have been, and continue to be, collected from wild *Limnanthes alba,* as well as other *Limnanthes* species, including *Limnanthes floccosa* ssp. *grandiflora* to cross with the domesticated plants. *Limnanthes floccosa* ssp. grandiflora was crossed with *Limnanthes alba* to develop a self-pollinating *Limnanthes* variety (Jolliff *et al.* 1984). This species may continue to be sought for collection, if its rarity and population locations become well known. The relatively few remaining populations of the species are easily accessed and so small that even limited collecting pressure could have significant adverse impacts.

About 80 percent of the *Lomatium cookii* sites and 40 percent of the *Limnanthes floccosa* ssp. *grandiflora* sites consist of 2 ha (5 ac) of land or less. Easy access exists to these plants in the Agate Desert, and to *Lomatium cookii* sites near Cave Junction, since they occur near heavily traveled roads. Most sites for these species lack fences or other measures to discourage collectors or others from accessing the sites.

C. *Disease or predation.* No data exists to substantiate whether disease threatens *Lomatium cookii* or *Limnanthes floccosa* ssp. *grandiflora.* An unidentified *Ascomycete* fungus was responsible for the mortality of four *Lomatium cookii* plants in a single population (Kagan 1987). Since this fungus has not been observed at other sites, no conclusions can be drawn regarding the threat of the fungus to the species as a whole. Predation has been observed on *Lomatium cookii* from gophers, other rodents, and black-tailed jackrabbits (*Lepus californicus*) feeding on vegetative portions, wireworms and other insect larvae eating the roots of plants, and insects preying on *Lomatium cookii* seeds (Kagan 1987).

Cattle grazing can cause substantial impacts to *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora.* Tracts heavily grazed from October to April are less likely to support these taxa. The majority of the seasonal growth occurs during the winter. If the plants are grazed during fall and winter and spring, they are less likely to survive to produce seed in the spring or early summer (Brock 1987).

The effects of cattle grazing on *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* are exemplified by the history of land use on what is now TNC's Agate Desert Preserve. Prior to TNC's acquisition of this tract, the area was grazed for a number of years. An estimated 480 individuals of *Limnanthes floccosa* ssp. *grandiflora* were noted at this site between 1984–1987. Cattle were removed in 1987, and in 1988, the *Limnanthes floccosa* ssp. *grandiflora* population had soared to over 7,000 individuals. By 1991, the population had grown to an estimated 17,600 plants, and in 2002 was at over 63,000 and is stable or increasing (D. Borgias, *in litt.* 2002). Despite the potential deleterious effects of fall to spring cattle grazing, carefully managed and timed grazing may actually reduce competition with introduced grass species (*see* Factor E).

D. *The inadequacy of existing regulatory mechanisms.* The majority of *Lomatium cookii* and all *Limnanthes floccosa* ssp. *grandiflora* plants grow in association with vernal pools that can contain water from November to March (Brock 1987). In accordance with the Clean Water Act of 1977 (91 Stat. 1566), these vernal pools are classified as wetlands, since they meet the requirement of containing water for at least two weeks during the growing season. Under section 404 of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) regulates discharge of fill into waters of the United States, including wetlands (33 CFR parts 320–330). To be in compliance with the Clean Water Act, parties are generally required to notify the Corps prior to undertaking any activity that would result in the discharge of fill, including soil, into wetlands under the Corps' jurisdiction. An individual permit is required in many cases.

A ruling by the Supreme Court (*Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 148 L. Ed. 2d. 576 (2001)) on January 9, 2001, involved statutory challenges to the assertion of Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds. This Supreme Court ruling provided some limitations to regulatory jurisdiction of isolated, non-navigable waters under the Clean Water Act. Based on our experience with the Portland District's jurisdictional determinations since the SWANCC ruling, we anticipate that the majority of the vernal pools occupied by these species will still be regulated under the jurisdiction of the Corps pursuant to section 404 of the Clean Water Act.

The Nationwide Permit Program (33 CFR Part 330) was recently revised in January 2002 (67 FR 2020) and became effective March 18, 2002. The Nationwide Permit Program was designed to eliminate the need for individual permits, requiring agency review and public comment, for some activities involving relatively small amounts of discharge or fill into waters of the U.S. Nationwide Permit (NWP) number 14, addressing liner transportation projects; NWP 39, addressing residential, commercial, and institutional developments; NWP 40, addressing agricultural activities; NWP 42, addressing recreational activities; and NWP 44, addressing mining activities allow the discharge of fill affecting up to only 0.2 ha (0.5 ac) of non-tidal wetlands. For NWPs 14, 39, 40, and 42 the permittee must notify the Corps prior to discharge if the discharge causes the loss of greater than 0.04-ha (0.10-ac) of non-tidal wetland and must generally provide a compensatory mitigation proposal to offset the permanent loss of wetlands. Under NWP 44, the permittee must avoid and minimize discharges into wetlands to the maximum extent practicable, and the Corps must be notified in a written statement detailing compliance with this provision.

The Clean Water Act does not regulate drainage of wetlands unless that action results in the discharge of dredged or fill material into a wetland. In addition, normal farming, silviculture, and ranching activities do not require permits for discharge or fill activities (*see* 33 CFR 323.4).

Most *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* sites occupy wetlands less than a few hectares in size. Therefore, activities resulting in the filling of even less than 0.2 ha (0.5 ac) of vernal pools can have a measurable effect on their habitats. While compensatory mitigation may be required, vernal pools are location specific and cannot likely be created, but only restored. Currently, the Corps is not required to request consultation on fill activities which may affect *Lomatium cookii, Limnanthes floccosa* ssp. *grandiflora,* or other unlisted species. When *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* are listed, section 7 consultation under the Act would be required by the Nationwide Permit conditions prior to the Corps' authorization of an activity that would affect the species. The Portland District of the Corps has issued General Regulatory Conditions that accompany all nationwide permits. One of these conditions indicates that if at any time the permittee becomes aware of the presence of a listed species within the authorized project area, all work activity must cease immediately, the Corps must be notified, and work must not resume until approved by the Corps. When *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* are listed, these regulatory conditions will offer some Federal protection for them in the ephemeral wetlands they occupy.

State of Oregon wetland laws do not protect many *Lomatium cookii* or *Limnanthes floccosa* ssp. *grandiflora* sites due to their small size and their susceptibility to small fills. The Removal-Fill Law of 1989 (ORS 196.800–196.990), administered by the Oregon Division of State Lands, does not regulate activities that involve less than 38 cubic meters (50 cubic yards) of fill. Such an amount of fill could seriously impact many smaller vernal pool wetlands in which *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* occur.

Lomatium cookii and *Limnanthes floccosa* ssp. *grandiflora* are listed as endangered species under the State of Oregon threatened or endangered plant law (OAR 603–073–0070). In general, State-listed plant populations on private lands are afforded very little protection by this law. The law prohibits the ''take'' of State-listed plants only on State, county, and city-owned or leased lands. On these lands, the State law does not guarantee the protection of State-listed plants because it allows for the loss of populations if a proposed project or activity is considered to be a public benefit. State-listed plants may be ''taken'' on private lands, provided the land owner provides their written permission.

With the listing of *Lomatium cookii,* BLM generally will provide a protection buffer when a plant population may be impacted by a project (L. Mazzu, pers. comm., 1999).

E. *Other natural or manmade factors affecting its continued existence.* Herbicide spraying, mowing, grading, and other road maintenance activities threaten small *Lomatium cookii* sites adjacent to roads, on private lands near Cave Junction in the Illinois Valley. In the Agate Desert, *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* individuals in road or powerline rights-of-way could be accidentally destroyed by local public works departments, highway districts, fire departments, or private citizens when carrying out maintenance activities (Rose Hayden-Owens, ODOT, pers. comm., 1998).

Invasion of non-native annual plants in the Agate Desert has altered native perennial plant communities (Brock 1987) where *Lomatium cookii* and

Limnanthes floccosa ssp. *grandiflora* grow. Native bunch grasses on mounds between vernal pools have been replaced by introduced European grasses such as *Bromus mollis* (brome grass), *Taeniatherum caput-medusae* (medusahead), *Cynosurus echinatus* (dogtail), and *Poa bulbosa* (bluegrass). *Taeniatherum caput-medusae* competes with *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* on seasonally wet mounds between the pools. Seeds of both the native taxa are not able to germinate under the dense thatch produced by introduced annual species. Competition with introduced plant species is exacerbated on the Denman Wildlife Area, where game bird food plots are seeded with non-native plant species. Brock (1987) supports the contention that the main cause of the reduction of *Lomatium cookii* populations has been intensive cattle grazing accompanied by the negative competitive effects of introduced grasses, specifically *Taeniatherum caput-medusae.*

Mowing, burning, light grazing, or even raking of vernal pool habitat after *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* seeds have matured, but before the fall growth period, may help reduce plant cover from exotic annual plants (Brock 1987). In a small experiment conducted on the Preserve, germination and seedling survivorship of the rare plants was increased on plots that were raked, as compared with untreated, or raked and scarified plots (D. Borgias, pers. comm., 1998).

Catastrophic events, such as severe fire, could eliminate the large areas of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora,* located on the Preserve (J. Kagan, pers. comm., 1998). Demographic extinction is possible for nine other sites of *Lomatium cookii,* mostly in the French Flat area, because of their small size (fewer than 100 plants). Many of the known French Flat sites are found directly adjacent to roads, increasing the possibility of extirpation, due to road and road right-of-way maintenance activities, human-caused wildfire, and other activities or effects commonly associated with roads.

Summary of Five Listing Factors

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* in determining to publish this final rule. In the Agate Desert, these species occupy an extremely restricted geographic range, with an estimated 28 ha (69 ac) and 47 ha (116 ac) of known occupied habitat for *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora,* respectively. *Lomatium cookii* is found in an additional approximately 61 ha (150 ac) in the French Flat/Illinois Valley area. The majority of the known sites are small in area and/or contain relatively few individuals which makes them susceptible to extirpation. Individual sites can have widely fluctuating plant numbers from year to year, which is likely at least in part based upon annual weather variation. Even with increased population numbers, their range is limited by specific habitat requirements. Vernal pool habitats are a unique feature in the Agate Desert and they likely cannot be recreated. Past and on-going leveling and drainage activities in both the Agate Desert and Illinois Valley have permanently changed the hydrology in many instances such that restoration is not feasible. The majority of these plants' remaining occupied habitat is threatened by commercial, industrial, and residential development, road and utilities construction and maintenance, including herbicide spraying, leveling for agriculture or pasture, grazing or mowing at the inappropriate time of year, competition with introduced plants, mining, ORV use, certain timber sale activities, encroachment of trees and shrubs associated with fire suppression, and random natural events. In view of the limited, historically available habitat for these plants, the past and present habitat alteration and destruction, and numerous threats cited above, both plants are in danger of extinction throughout all or a significant portion of their range, fitting the definition of endangered under the Act. Based on this evaluation, listing *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* as endangered is warranted.

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Critical habitat designation, by definition, affects Federal agency actions including actions involving private lands, through consultation under section 7(a)(2) of the Act. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)) further state that the designation of critical habitat is not prudent when one or both of the following situations exist—(1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

The Final Listing Priority Guidance for FY 1999/2000 (64 FR 57114) states that the processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will be funded separately from other section 4 listing actions and will no longer be subject to prioritization under the Listing Priority Guidance. Critical habitat determinations, which were previously included in final listing rules published in the **Federal Register**, may now be processed separately, in which case stand-alone critical habitat determinations will be published as notices in the **Federal Register**. We will undertake critical habitat designations as funding and priorities allow. As explained in detail in the Listing Priority Guidance, our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act.

Recent Interior appropriations bills have included language limiting the amount of funds that could be expended on listing actions to only the amount specifically appropriated for that purpose. The Fiscal Year 2002 appropriations bill also placed a cap on the amount that could be spent on designation of critical habitat for already listed species.

Lomatium cookii and *Limnanthes floccosa* ssp. *grandiflora* are potentially

vulnerable to unrestricted over-collection, vandalism, or disturbance due to their small number of known sites and mostly small populations. We are concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, at this time we do not have specific evidence of over-collection or intentional vandalism of these species.

The deferral of the critical habitat designation for these species will allow us to concentrate our limited resources on higher priority listing actions, while allowing us to put in place protections needed for the conservation of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* without further delay. This is consistent with section 4(b)(6)(C)(i) of the Act, which states that final listing decisions may be issued without concurrent designation of critical habitat if it is essential to the conservation of the species that such determinations be promptly published. We will prepare a critical habitat determination for this species in the future at such time as resources allow.

We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species and the magnitude and immediacy of those threats. Currently, and for the immediate future, most of the Service's listing budget must be directed to complying with numerous court orders and settlement agreements, as well as due and overdue final listing determinations.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing results in public awareness and conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery plans be developed for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing, or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

Several Federal agencies are expected to have involvement under section 7 of the Act regarding these species. BLM currently has about 15 sites containing *Lomatium cookii* on its property. The association of *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* with vernal pools and/or areas of wet soil conditions can result in the Corps becoming involved through its responsibilities and permitting authority under section 404 of the Clean Water Act. The Federal Highway Administration may be affected through potential funding of future highway construction or maintenance affecting these species. The Department of Housing and Urban Development may become involved through the granting of loans for housing. The Federal Aviation Administration may become involved through their oversight of the City of Medford Airport. The Natural Resources Conservation Service and the Farm Services Agency of the U.S. Department of Agriculture may become involved through administering their programs and services directed towards farming, ranching, and general land management.

Listing *Lomatium cookii* and *Limnanthes floccosa* ssp. *grandiflora* provides for the development and implementation of recovery plans for these species. Recovery plans bring together Federal, State, local agency, and private efforts for conservation of the species. A recovery plan establishes a framework for interested parties to coordinate their recovery efforts. Recovery plans set recovery priorities, assign responsibilities, and estimate the costs of the tasks necessary to accomplish the priorities. They also describe the site specific management actions necessary to achieve conservation and recovery of the species. Additionally, pursuant to section 6 of the Act, we will be able to grant funds to the state of Oregon for the management actions promoting the protection and recovery of these species. Based on the biology and current status of these species, attention should be given to preservation of as many different sites as possible, and protecting the sites from direct effects of habitat destruction or degradation and the indirect effects of encroachment by invasive non-native species.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions apply to our agents and State conservation agencies.

The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. We anticipate that few trade permits would ever be sought or issued for *Lomatium cookii* because this plant is not in cultivation or common in the wild. Since *Limnanthes* ssp. are being cultivated to produce oil and there continues to be research into developing strains suitable for wide-scale commercial propagation, there may be a greater demand for permits to collect or cultivate *Limnanthes floccosa* ssp. *grandiflora*.

It is our policy, published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of this listing on proposed and

ongoing activities within the species' range. *Limnanthes floccosa* ssp. *grandiflora* is not presently known to occur on Federal land, although two sites are known from the vicinity of Table Rock, near where BLM manages some land. *Lomatium cookii* is known to occur on lands under the jurisdiction of the BLM. Collection, damage, or destruction of endangered plants on public lands is prohibited, although in appropriate cases a Federal endangered species permit may be issued to allow collection. Removal, cutting, digging up, damaging or destroying endangered plants on non-Federal lands also constitutes a violation of section 9 of the Act if conducted in knowing violation of State law or regulations, including State criminal trespass law. We are not aware of any otherwise lawful activities being conducted or proposed by the public that will be affected by application the section 9 to this listing.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the State Supervisor of our Oregon Fish and Wildlife Office (see **ADDRESSES**). Requests for copies of the regulations concerning listed plants and general inquiries regarding prohibitions and issuance of permits under the Act may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 NE. 11th Avenue, Portland, OR, 97232–4181 (telephone 503/231–2063; facsimile 503/231–6243).

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Information collections associated with endangered species permits are covered by an existing OMB approval and are assigned control number 1018–0093, which expires March 31, 2004.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited herein is available upon request from the State Supervisor, Oregon Fish and Wildlife Office (see **ADDRESSES**).

Author(s)

The authors of this final rule are Richard Szlemp, Anne Walker, and Judy Jacobs, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, and Transportation.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under Flowering Plants, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* *	*	*	*	*	*		*
Limnanthes floccosa ssp. *grandiflora*.	large-flowered woolly meadowfoam.	U.S.A. (OR) ...	Limnanthaceae.	E	733	NA	NA
* *	*	*	*	*	*		*
Lomatium cookii	Cook's lomatium	U.S.A. (OR) ...	Apiaceae	E	733	NA	NA
* *	*	*	*	*	*		*

Dated: October 30, 2002.

Steve Williams,

Director, Fish and Wildlife Service.

[FR Doc. 02–28237 Filed 11–6–02; 8:45 am]

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H.R. 2733/P.L. 107–277

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To amend the International Organizations Immunities Act to provide for the applicability of that Act to the European Central Bank. (Nov. 5, 2002; 116 Stat. 1939)

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