



# Federal Register

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3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

**WHEN:** Tuesday, October 25, 2005  
9:00 a.m.–Noon

**WHERE:** Office of the Federal Register  
Conference Room, Suite 700  
800 North Capitol Street, NW.  
Washington, DC 20002

**RESERVATIONS:** (202) 741-6008



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

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# Rules and Regulations

Federal Register

Vol. 70, No. 201

Wednesday, October 19, 2005

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

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

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 97

[Docket No. 30460; Amdt. No. 3136]

#### Standard Instrument Approach Procedures, Weather Takeoff Minimums; Miscellaneous Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and/or Weather Takeoff Minimums for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective October 19, 2005. The compliance date for each SIAP and/or Weather Takeoff Minimums is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 19, 2005.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

*For Examination—*

1. FAA Rules Docket, FAA Headquarters Building, 800

Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

*For Purchase—*Individual SIAP and Weather Takeoff Minimums copies may be obtained from:

1. FAA Public Inquiry Center (APA-200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription—*Copies of all SIAPs and Weather Takeoff Minimums mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

**FOR FURTHER INFORMATION CONTACT:** Donald P. Pate, Flight Procedure Standards Branch (AFS-420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125), telephone: (405) 954-4164.

**SUPPLEMENTARY INFORMATION:** This amendment to Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), establishes, amends, suspends, or revokes SIAPs and/or Weather Takeoff Minimums. The complete regulatory description of each SIAP and/or Weather Takeoff Minimums is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are identified as FAA Forms 8260-3, 8260-4, 8260-5 and 8260-15A. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs and/or Weather Takeoff Minimums, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs and/or Weather Takeoff Minimums but refer to their depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP and/or Weather Takeoff Minimums contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs and/or Weather Takeoff Minimums. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

#### The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and/or Weather Takeoff Minimums as contained in the transmittal. Some SIAP and/or Weather Takeoff Minimums amendments may have been previously issued by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP, and/or Weather Takeoff Minimums amendments may require making them effective in less than 30 days. For the remaining SIAPs and/or Weather Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are

impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

### Conclusion

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. It, therefore—(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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on October 7, 2005.

**James J. Ballough,**

*Director, Flight Standards Service.*

### Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective at 0901 UTC on the dates specified, as follows:

### PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

\* \* \* *Effective 24 November 2005*

Portland, ME, Portland Intl Jetport, ILS OR LOC RWY 11; ILS RWY 11 (CAT II); ILS RWY 11 (CAT III), Amdt 2

Portland, ME, Portland Intl Jetport, RNAV (GPS) RWY 11, Amdt 2

\* \* \* *Effective 22 December 2005*

Mesa, AZ, Falcon Fld, Takeoff Minimums and Textual DP, Amdt 3

Phoenix, AZ, Phoenix Sky Harbor Intl, RNAV (GPS) RWY 25R, Amdt 1  
Phoenix, AZ, Phoenix Sky Harbor Intl, RNAV (GPS) RWY 26, Amdt 1  
Hilo, HI, Hilo Intl, Takeoff Minimums and Textual DP, Amdt 3

[FR Doc. 05–20850 Filed 10–18–05; 8:45 am]

**BILLING CODE 4910–13–U**

## FEDERAL TRADE COMMISSION

### 16 CFR Part 305

#### Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (“Appliance Labeling Rule”)

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Trade Commission (“Commission”) amends its Appliance Labeling Rule (“Rule”) by publishing new ranges of comparability for required labels on central air conditioners, heat pumps, and compact dishwashers. The Commission also announces that the current ranges of comparability for standard dishwashers will remain in effect until further notice. **DATES: Effective Date:** The amendments announced in this document will become effective on January 23, 2006. **FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, Attorney, Division of Enforcement, Federal Trade Commission, Washington, DC 20580 (202–326–2889).

**SUPPLEMENTARY INFORMATION:** The Appliance Labeling Rule was issued by the Commission in 1979, 44 FR 66466 (Nov. 19, 1979), in response to a directive in the Energy Policy and Conservation Act of 1975 (“EPCA”).<sup>1</sup> The Rule covers several categories of major household appliances including dishwashers, central air conditioners, and heat pumps.

The Rule requires manufacturers of all covered appliances to disclose specific energy consumption or efficiency information (derived from the DOE test procedures) at the point of sale in the form of an “EnergyGuide” label and in catalogs. The Rule requires manufacturers to include, on labels and fact sheets, an energy consumption or efficiency figure and a “range of comparability.” This range shows the

<sup>1</sup> 42 U.S.C. 6294. The statute also requires the Department of Energy (“DOE”) to develop test procedures that measure how much energy the appliances use and to determine the representative average cost a consumer pays for the different types of energy available.

highest and lowest energy consumption or efficiencies for all comparable appliance models so consumers can compare the energy consumption or efficiency of other models (perhaps competing brands) similar to the labeled model. The Rule also requires manufacturers to include, on labels for some products, a secondary energy usage disclosure in the form of an estimated annual operating cost based on a specified DOE national average cost for the fuel the appliance uses.

Section 305.8(b) of the Rule requires manufacturers, after filing an initial report, to report certain information annually to the Commission by specified dates for each product type.<sup>2</sup> These reports, which assist the Commission in preparing the ranges of comparability, contain the estimated annual energy consumption or energy efficiency ratings for the appliances derived from tests performed pursuant to the DOE test procedures. Because manufacturers regularly add new models to their lines, improve existing models, and drop others, the data base from which the ranges of comparability are calculated is constantly changing. To keep the required information on labels consistent with these changes, the Commission will publish new ranges if an analysis of the new information indicates that the upper or lower limits of the ranges have changed by more than 15%. Otherwise, the Commission will publish a statement that the prior ranges remain in effect for the next year.

### I. 2005 Dishwasher Ranges

The Commission has analyzed the annual data submissions for dishwashers. The ranges of comparability for standard dishwashers have not changed significantly this year.<sup>3</sup> Therefore, the manufacturers of standard dishwashers should continue to use the ranges published by the Commission on September 9, 2004 (69 FR 54558). The compact dishwasher data, however, indicates a significant change to the high and low of the range. Accordingly, the Commission is amending the range for compact dishwashers in Appendix C1 of the

<sup>2</sup> Reports for dishwashers are due June 1. Reports for central air conditioners and heat pumps are due July 1.

<sup>3</sup> The Commission’s classification of “standard” and “compact” dishwashers is based on internal load capacity. Appendix C of the Commission’s Rule defines “compact” as including countertop dishwasher models with a capacity of fewer than eight (8) place settings and “standard” as including portable or built-in dishwasher models with a capacity of eight (8) or more place settings. The Rule requires that place settings be determined in accordance with appendix C to 10 CFR part 430, subpart B, of DOE’s energy conservation standards program.

Rule. The new ranges of comparability for compact dishwashers supersede the current ranges, which were published on September 9, 2004 (69 FR 54558).

Compact dishwasher manufacturers must base the disclosures of estimated annual operating cost required at the bottom of EnergyGuide labels for compact dishwashers on the 2005 Representative Average Unit Costs of Energy for electricity (9.06 cents per kilowatt-hour) and natural gas (\$1.09 per therm) that were published by DOE on March 11, 2005 (70 FR 12210). The new ranges for compact models will become effective on January 23, 2006.

**II. 2005 Central Air Conditioner and Heat Pump Information**

The annual data submissions for central air conditioners and heat pumps indicate a significant change for split system central air conditioners. In addition, new DOE minimum conservation standards for these products will become effective on January 23, 2006 (see 69 FR 50997 (August 17, 2004)). All models manufactured after that date will have to meet the new DOE minimum efficiency standards (unless the model is subject to a DOE exemption). Accordingly, the Commission has amended all applicable ranges so that they are consistent with DOE's new minimum requirements. The effective date for the new ranges will coincide with the effective date for the new DOE requirements.<sup>4</sup>

**III. Administrative Procedure Act**

The amendments published in this notice involve routine, technical and minor, or conforming changes to the labeling requirements in the Rule. These technical amendments merely provide a routine change to the range and cost information required on EnergyGuide labels and fact sheets. Accordingly, the Commission finds for good cause that public comment for these technical, procedural amendments is impractical

and unnecessary (5 U.S.C. 553(b)(A)(B) and (d)).

**IV. Regulatory Flexibility Act**

The provisions of the Regulatory Flexibility Act relating to a Regulatory Flexibility Act analysis (5 U.S.C. 603–604) are not applicable to this proceeding because the amendments do not impose any new obligations on entities regulated by the Appliance Labeling Rule. These technical amendments merely provide a routine change to the range information required on EnergyGuide labels. Thus, the amendments will not have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. 605. The Commission has concluded, therefore, that a regulatory flexibility analysis is not necessary, and certifies, under section 605 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the amendments announced today will not have a significant economic impact on a substantial number of small entities.

**V. Paperwork Reduction Act**

In a June 13, 1988 notice (53 FR 22106), the Commission stated that the Rule contains disclosure and reporting requirements that constitute “information collection requirements” as defined by 5 CFR 1320.7(c), the regulation that implements the Paperwork Reduction Act.<sup>5</sup> The Commission noted that the Rule had been reviewed and approved in 1984 by the Office of Management and Budget (“OMB”) and assigned OMB Control No. 3084–0068. OMB has reviewed the Rule and extended its approval for its recordkeeping and reporting requirements until December 31, 2007. The amendments now being adopted do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

**List of Subjects in 16 CFR Part 305**

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

■ Accordingly, 16 CFR Part 305 is amended as follows:

**PART 305—[AMENDED]**

■ 1. The authority citation for Part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

■ 2. Appendix C1 to Part 305 is revised to read as follows:

**Appendix C1 to Part 305—Compact Dishwashers**

*Range Information*

“Compact” includes countertop dishwasher models with a capacity of fewer than eight (8) place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operation normal for the model being tested.

Capacity	Range of estimated annual energy consumption (kWh/yr.)	
	Low	High
Compact .....	143	320

**Cost Information**

When the above ranges of comparability are used on EnergyGuide labels for compact-sized dishwashers, the estimated annual operating cost disclosure appearing in the box at the bottom of the labels must be derived using the 2005 Representative Average Unit Costs for electricity (9.06¢ per kilowatt-hour) and natural gas (\$1.09 per therm), and the text below the box must identify the costs as such.

■ 3. Section 1 of Appendix H to Part 305 is revised to read as follows:

**Appendix H to Part 305—Cooling Performance and Cost for Central Air Conditioners**

*1. Range Information*

Manufacturer's rated cooling capacity (Btu's/hr.)	Range of SEER's	
	Low	High
<b>Single Package Units</b>		
Central Air Conditioners (Cooling Only): All capacities .....	10.60	16.05
Heat Pumps (Cooling Function): All capacities .....	10.60	15.60
<b>Split System Units</b>		
Central Air Conditioners (Cooling Only): All capacities .....	10.90	20.50
Heat Pumps (Cooling Function): All capacities .....	10.90	18.60

<sup>4</sup> The ranges for central air conditioners and heat pumps have not been amended since September 16, 1996 (61 FR 48620).

<sup>5</sup> 44 U.S.C. 3501–3520.

\* \* \* \* \*

**Appendix I to Part 305—Heating Performance and Cost for Central Air Conditioners**

■ 4. Section 1 of Appendix I to Part 305 is revised to read as follows:

*1. Range Information*

Manufacturer's rated heating capacity (Btu's/hr.)	Range of HSPF's	
	Low	High
<b>Single Package Units</b>		
Heat Pumps (Heating Function): All capacities .....	7.00	8.20
<b>Split System Units</b>		
Heat Pumps (Heating Function): All capacities .....	7.10	10.55

The HSPF shall be the Region IV value based on the appropriate average design heat loss from the table below.

\* \* \* \* \*

■ 5. Prototype Label 4 in Appendix L to Part 305 is amended to read as follows:

**Appendix L to Part 305—Sample Labels**

\* \* \* \* \*

BILLING CODE 6750-01-P

All copy Arial Narrow Regular or Bold as below.  
 Helvetica Condensed series typeface or other equivalent also acceptable.

All copy x 28 pi.

10/12 Arial Narrow → Based on standard U.S. Government tests

# ENERGYGUIDE

12/14 Arial Narrow Bold → **Central Air Conditioner Cooling Only Split System**

XYZ Corporation Model 12345 ← 12/14 Arial Narrow Bold

20/22 Arial Narrow Bold → **Compare the Energy Efficiency of this Air Conditioner with Others Before You Buy.**

14/14 Arial Narrow → **This Model's Efficiency**

13.2SEER ← 10 Arial Narrow

24pt. Rule → **Energy efficiency range of all similar models**

10/12 Arial Narrow Use bold where indicated → **Least Efficient 10.9**

**Most Efficient 20.50** ← 14/14 Arial Narrow Bold

16 Arial Narrow Bold →

SEER, the Seasonal Energy Efficiency Ratio, is a measure of energy efficiency for central air conditioners. ← 14/14 Arial Narrow Bold

1pt. Rule →

**Central air conditioners with higher SEERs are more energy efficient.** ← 14/14 Arial Narrow Bold

Bullets 10 pt. →

- This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.
- Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information about the efficiency and operating cost of this equipment. Ask for this information.

6/8 Arial Narrow → Important: Removal of this label before consumer purchase violates the Federal Trade Commission's Appliance Labeling Rule (16 C.F.R. Part 305).

Prototype Label 4

\* \* \* \* \*

6. Prototype Label 5 in Appendix L to Part 305 is amended to read as follows:

Appendix L to Part 305—Sample Labels  
\* \* \* \* \*

All copy Arial Narrow Regular or Bold as below.  
Helvetica Condensed series typeface or other equivalent also acceptable.

← All copy x 28 pi. →

10/12 Arial Narrow → Based on standard U.S. Government tests

# ENERGYGUIDE

12/14 Arial Narrow Bold → **Heat Pump Cooling and Heating Split System**

12/14 Arial Narrow Bold ← **XYZ Corporation Model 12345**

**Compare the Energy Efficiency of this Heat Pump with Others Before You Buy.**

14/14 Arial Narrow → **This Model (Cooling)**  
13.4SEER ←



**Energy efficiency range of all similar models**

24 pt. Rule → **Least Efficient**  
10.9
16 Arial Narrow Bold ← **Most Efficient**  
18.60

1pt. Rule → **SEER, the Seasonal Energy Efficiency Ratio, is a measure of energy efficiency for central air conditioners.**

1pt. Rule → **This Model (Cooling)**  
8.4HSPF



**Energy efficiency range of all similar models**

10/12 Arial Narrow Use bold where indicated → **Least Efficient**  
7.10
10/12 Arial Narrow Use bold where indicated ← **Most Efficient**  
10.55

10/12 Arial Narrow Use bold where indicated → **HSPF, the Heating Seasonal Performance Factor, is a measure of energy efficiency for heat pumps when heating.**

Bullets 10 pt. → ● These energy ratings are based on U.S. Government standard tests of this condenser model combined with the most common coil. The ratings will vary slightly with different coils

● Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information about the efficiency and operating cost of this equipment. Ask for this information.

6/8 Arial Narrow → Important: Removal of this label before consumer purchase violates the Federal Trade Commission's Appliance Labeling Rule (16 C.F.R. Part 305).

Prototype Label 5

\* \* \* \* \*

■ 7. Sample Label 8 in Appendix L to Part 305 is amended to read as follows:

Appendix L to Part 305—Sample Labels

\* \* \* \* \*

Based on standard U.S. Government tests

# ENERGYGUIDE

Central Air Conditioner  
Cooling Only  
Split System

XYZ Corporation  
Model 12345

**Compare the Energy Efficiency of this Air Conditioner with Others Before You Buy.**

**This Model's Efficiency**  
13.2SEER

▼

**Energy efficiency range of all similar models**

<b>Least Efficient</b> 10.9	<b>Most Efficient</b> 20.50
--------------------------------	--------------------------------

**SEER, the Seasonal Energy Efficiency Ratio,** is a measure of energy efficiency for central air conditioners.

---

**Central air conditioners with higher SEERs are more energy efficient.**

- This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.
- Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information about the efficiency and operating cost of this equipment. Ask for this information.

Important: Removal of this label before consumer purchase violates the Federal Trade Commission's Appliance Labeling Rule (16 C.F.R. Part 305).

Sample Label 8

\* \* \* \* \*

■ 8. Sample Label 9 in Appendix L to Part 305 is amended to read as follows:

Appendix L to Part 305—Sample Labels  
\* \* \* \* \*

Based on standard U.S. Government tests

# ENERGYGUIDE

Heat Pump  
Cooling and Heating  
Split System

XYZ Corporation  
Model 12345

**Compare the Energy Efficiency of this Heat Pump with Others Before You Buy.**

This Model (Cooling)  
13.4SEER

▼

**Energy efficiency range of all similar models**

Least Efficient 10.9	Most Efficient 18.60
-------------------------	-------------------------

SEER, the Seasonal Energy Efficiency Ratio, is a measure of energy efficiency for central air conditioners.

This Model (Cooling)  
8.4HSPF

▼

**Energy efficiency range of all similar models**

Least Efficient 7.10	Most Efficient 10.55
-------------------------	-------------------------

HSPF, the Heating Seasonal Performance Factor, is a measure of energy efficiency for heat pumps when heating.

- These energy ratings are based on U.S. Government standard tests of this condenser model combined with the most common coil. The ratings will vary slightly with different coils
- Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information about the efficiency and operating cost of this equipment. Ask for this information.

Important: Removal of this label before consumer purchase violates the Federal Trade Commission's Appliance Labeling Rule (16 C.F.R. Part 305).

Sample Label 9

\* \* \* \* \*

By direction of the Commission.  
Donald S. Clark,  
Secretary.

[FR Doc. 05-20922 Filed 10-18-05; 8:45 am]  
BILLING CODE 6750-01-C

**DEPARTMENT OF DEFENSE****Department of the Army****32 CFR Part 504**

RIN 0702-AA49

**Obtaining Information From Financial Institutions****AGENCY:** Department of the Army, DoD.**ACTION:** Final rule.

**SUMMARY:** The Department of the Army is publishing a revision to our rule concerning obtaining information from financial institutions. The regulation prescribes policies for the Department of the Army to obtain information on a customer's financial records from financial institutions.

**DATES:** *Effective Date:* November 18, 2005.

**ADDRESSES:** Headquarters, Department of the Army, Office of the Provost Marshal General, ATTN: DAPM-MPD-LE, 2800 Army Pentagon, Washington, DC 20310-2800.

**FOR FURTHER INFORMATION CONTACT:** James Crumley (703) 692-6721.

**SUPPLEMENTARY INFORMATION:****A. Background**

This part has previously been published. The Administrative Procedure Act, as amended by the Freedom of Information Act requires that certain policies and procedures and other information concerning the Department of the Army be published in the **Federal Register**. The policies and procedures covered by this part fall into that category. The Department of the Army did not receive any responses from potential commentors.

**B. Regulatory Flexibility Act**

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the final rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

**C. Unfunded Mandates Reform Act**

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply because the final rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of \$100 million or more.

**D. National Environmental Policy Act**

The Department of the Army has determined that the National

Environmental Policy Act does not apply because the final rule does not have an adverse impact on the environment.

**E. Paperwork Reduction Act**

The Department of the Army has determined that the Paperwork Reduction Act does not apply because the final rule does not involve collection of information from the public.

**F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)**

The Department of the Army has determined that Executive Order 12630 does not apply because the final rule does not impair private property rights.

**G. Executive Order 12866 (Regulatory Planning and Review)**

The Department of the Army has determined that according to the criteria defined in Executive Order 12866 this final rule is not a significant regulatory action. As such, this rule is not subject to Office of Management and Budget review under section 6(a)(3) of the Executive Order.

**H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)**

The Department of the Army has determined that according to the criteria defined in Executive Order 13045 this final rule does not apply.

**I. Executive Order 13132 (Federalism)**

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this final rule does not apply because it will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**Jeffery B. Porter,**

*Chief, Law Enforcement Policy and Oversight Section.*

**List of Subjects in 32 CFR Part 504**

Banks, Banking, Business, Investigations, Law enforcement, Military law, Privacy.

■ For reasons stated in the preamble the Department of the Army revises Part 504 to Subchapter A of Title 32 to read as follows:

**PART 504—OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS**

Sec.

504.1 General.

504.2 Procedures.

Appendix A to Part 504—Request for Basic Identifying Account Data-Sample Format.

Appendix B to Part 504—Customer Consent and Authorization for Access-Sample Format.

Appendix C to Part 504—Certificate of Compliance with the Right to Financial Privacy Act of 1978-Sample Format.

Appendix D to Part 504—Formal Written Request for Access-Sample Format.

Appendix E to Part 504—Customer Notice of Formal Written Request-Sample Format.

**Authority:** 12 U.S.C. 3401 *et seq.*, Pub. L. 95-630, unless otherwise noted.

**§ 504-1 General.**

(a) *Purpose.* This part provides DA policies, procedures, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations or inquiries.

(b) *Applicability and scope.* (1) This part applies to the Active Army, the Army National Guard of the United States (ARNGUS)/Army National Guard (ARNG), and the United States Army Reserve unless otherwise stated.

(2) The provisions of 12 U.S.C. 3401 *et seq.* do not govern obtaining access to financial records maintained by financial institutions located outside of the territories of the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in § 504.2(d)(4) will be followed in seeking access to financial information from these facilities.

(3) This part also applies to financial records maintained by financial institutions as defined in § 504.1(c)(1).

(c) *Explanation of terms.* (1) For purposes of this part, the following terms apply:

(i) Financial institution. Any office of a—

(A) Bank.

(B) Savings bank.

(C) Card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)).

(D) Industrial loan company.

(E) Trust company.

(F) Savings association.

(G) Building and loan association.

(H) Homestead association (including cooperative banks).

(I) Credit union.

(J) Consumer finance institution.

(ii) This includes only those offices located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(2) *Financial record.* An original record, its copy, or information known to have been derived from the original

record held by a financial institution, pertaining to a customer's relationship with the financial institution.

(3) *Person*. An individual or partnership of five or fewer individuals. (Per DODD 5400.12.)

(4) *Customer*. Any person or authorized representative of that person—

(i) Who used or is using any service of a financial institution.

(ii) For which a financial institution is acting or has acted as a fiduciary for an account maintained in the name of that person.

(5) *Law enforcement inquiry*. A lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, a criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

(6) *Army law enforcement office*. Any army element, agency, or unit authorized to conduct investigations under the Uniform Code of Military Justice or Army regulations. This broad definition of Army law enforcement office includes military police, criminal investigation, inspector general, and military intelligence activities conducting investigations of suspected violations of law or regulation.

(7) *Personnel security investigation*. An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigation includes investigations of subversive affiliations, suitability information, or hostage situations conducted to make personnel security determinations. It also includes investigations of allegations that—

(i) Arise after adjudicative action, and

(ii) Require resolution to determine a person's current eligibility for access to classified information or assignment or retention in a sensitive position. With DA, the Defense Investigative Service conducts personnel security investigations.

(d) *Policy*—(1) Customer consent. It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative means of obtaining the records authorized by this part will be used. (See § 504.2 (c) through (g).)

(2) *Access requests*. Except as provided in paragraph (d)(3) of this section and §§ 504.1(f)(1), 504.2(g) and 504.2(j), Army investigative elements may not have access to or obtain copies

of the information in the financial records of any customer from a financial institution unless the financial records are reasonably described and the—

(i) Customer has authorized such disclosure (§ 504.2(b));

(ii) Financial records are disclosed in response to a search warrant which meets the requirements of § 504.2(d);

(iii) Financial records are disclosed in response to a judicial subpoena which meets the requirements of § 504.2(e); or

(iv) Financial records are disclosed in response to a formal written request which meets the requirements of § 504.2(f).

(3) *Voluntary information*. Nothing in this part will preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying an Army investigative element that such institution, or officer, employee or agent has information which may be relevant to a possible violation of any statute or regulation.

(e) *Authority*. (1) Law enforcement offices are authorized to obtain records of financial institutions per this part, except as provided in § 504.2(e).

(2) The head of a law enforcement office of field grade rank or higher (or an equivalent grade civilian official) is authorized to initiate requests for such records.

(f) *Exceptions and waivers*. (1) A law enforcement office may issue a formal written request for basic identifying account information to a financial institution as part of a legitimate law enforcement inquiry. The request may be issued for any or all of the following identifying data:

(i) Name.

(ii) Address.

(iii) Account number.

(iv) Type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions.

(2) A request for disclosure of the above specified basic identifying data on a customer's account may be issued without complying with the customer notice, challenge, or transfer procedures described in § 504.2. However, if access to the financial records themselves is required, the procedures in § 504.2 must be followed. (A sample format for requesting basic identifying account data is in app. A.)

(3) This part will not apply when financial records are sought by the Army under the Federal Rules for Civil Procedure, Criminal Procedure, Rules for Courts-Martial, or other comparable rules of other courts in connection with litigation to which the Government and the customer are parties.

(4) No exceptions or waivers will be granted for those portions of this part required by law. Submit requests for exceptions or waivers of other aspects of this part to HQDA OPMG (DAPM-MPD-LE), Washington, DC 20310-2800.

#### § 504-2 Procedures.

(a) *General*. A law enforcement official seeking access to a person's financial records will, when feasible, obtain the customer's consent. This section also sets forth other authorized procedures for obtaining financial records if it is not feasible to obtain the customer's consent. Authorized procedures for obtaining financial records follow. All communications with a U.S. Attorney or a U.S. District Court, as required by this part, will be coordinated with the supporting staff judge advocate before dispatch.

(b) *Customer consent*. (1) A law enforcement office may gain access to or a copy of a customer's financial records by obtaining the customer's consent and authorization in writing. (See app. B to this part for a sample format.) Any consent obtained under the provisions of this paragraph must—

(i) Be in writing, signed, and dated.

(ii) Identify the particular financial records being disclosed.

(iii) State that the customer may revoke the consent at any time before disclosure.

(iv) Specify the purpose of disclosure and to which agency the records may be disclosed.

(v) Authorize the disclosure for a period not over 3 months.

(vi) Contain a "Statement of Customer Rights Under the Right to Financial Privacy Act of 1978" (12 U.S.C. 3401 *et seq.*) (app. B).

(2) Any customer's consent not containing all of the elements listed in paragraph (a) of this section will not be valid.

(3) A copy of the customer's consent will be made a part of the law enforcement inquiry file.

(4) A certification of compliance with 12 U.S.C. 3401 *et seq.* (app. C), along with the customer's consent, will be provided to the financial institution as a prerequisite to obtaining access to the financial records.

(c) *Administrative summons or subpoena*. The Army has no authority to issue an administrative summons or subpoena for access to financial records.

(d) *Search warrant*. (1) A law enforcement office may obtain financial records by using a search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure in appropriate cases.

(2) No later than 90 days after the search warrant is served, unless a delay

of notice is obtained under § 504.2(i), a copy of the search warrant and the following notice must be mailed to the customer's last known address:

Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (office/agency/unit) on (date) for the following purpose: (state purpose). You may have rights under the Right to Financial Privacy Act of 1978.

(3) Search authorization signed by installation commanders or military judges will not be used to gain access to financial records from financial institutions in any State or territory of the United States.

(4) Access to financial records maintained by military banking contractors in overseas areas or by other financial institutions located on DOD installations outside the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands is preferably obtained by customer consent.

(i) In cases where it would not be appropriate to obtain this consent or such consent is refused and the financial institution is not otherwise willing to provide access to its records, the law enforcement activity may seek access by use of a search authorization. This authorization must be prepared and issued per AR 27-10, Military Justice.

(ii) Information obtained under this paragraph should be properly identified as financial information. It should be transferred only where an official need-to-know exists. Failure to do so, however, does not render the information inadmissible in courts-martial or other proceedings.

(iii) Law enforcement activities seeking access to financial records maintained by all other financial institutions overseas will comply with local foreign statutes or procedures governing such access.

(e) *Judicial subpoena*. Judicial subpoenas—

(1) Are those subpoenas issued in connection with a pending judicial proceeding.

(2) Include subpoenas issued under Rule for Courts-Martial 703(e)(2) of the Manual for Courts-Martial and Article 46 of the Uniform Code of Military Justice. The servicing staff judge advocate will be consulted on the availability and use of judicial subpoenas.

(f) *Formal written request*. (1) A law enforcement office may formally request financial records when the records are relevant to a legitimate law enforcement

inquiry. This request may be issued only if—

(i) The customer has declined to consent to the disclosure of his or her records, or

(ii) Seeking consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry.

(2) A formal written request will be in a format set forth in appendix D of this part and will—

(i) State that the request is issued under the Right to Financial Privacy Act of 1978 and this part.

(ii) Described the specific records to be examined.

(iii) State that access is sought in connection with a legitimate law enforcement inquiry.

(iv) Describe the nature of the inquiry.

(v) Be signed by the head of the law enforcement office or a designee (persons specified in § 504.1(e)(2)).

(3) At the same time or before a formal written request is issued to a financial institution, a copy of the request will be personally served upon or mailed to the customer's last known address unless a delay of customer notice has been obtained under § 504.2(i). The notice to the customer will be—

(i) In a format similar to appendix E of this part.

(ii) Personally served at least 10 days or mailed at least 14 days before the date on which access is sought.

(4) The official who signs the customer notice is designated to receive any challenge from the customer.

(5) The customer will have 10 days to challenge a notice request when personal service is made, and 14 days when service is by mail.

(6) The head of the law enforcement office initiating the formal written request will set up procedures to ensure that no access to financial records is attempted before expiration of the above time periods—

(i) While awaiting receipt of a potential customer challenge, or

(ii) While awaiting the filing of an application for an injunction by the customer.

(7) Proper preparation of the formal written request and notice to the customer requires preparation of motion papers and a statement suitable for court filing by the customer. Accordingly, the law enforcement office intending to initiate a formal written request will coordinate preparation of the request, the notice, motion papers, and sworn statement with the supporting staff judge advocate. These documents are required by statute; their preparation cannot be waived.

(8) The supporting staff judge advocate is responsible for liaison with

the proper United States Attorney and United States District Court. The requesting official will coordinate with the supporting staff judge advocate to determine whether the customer has filed a motion to prevent disclosure of the financial records within the prescribed time limits.

(9) The head of the law enforcement office (§ 504.2(f)(2)(v)) will certify in writing (see app. C) to the financial institution that such office has complied with the requirements of 12 U.S.C. 3401 *et seq.*—

(i) When a customer fails to file a challenge to access to financial records within the above time periods, or

(ii) When a challenge is adjudicated in favor of the law enforcement office. No access to any financial records will be made before such certification is given.

(g) *Emergency access*. Section 504.2(g)(2)(3) provides for emergency access in such cases of imminent danger. (No other procedures in this part apply to such emergency access.)

(1) In some cases, the requesting law enforcement office may determine that a delay in obtaining access would create an imminent danger of—

(i) Physical injury to a person,  
(ii) Serious property damage, or  
(iii) Flight to avoid prosecution.

(2) When emergency access is made to financial records, the requesting official (§ 504.1(e)(2)) will—

(i) Certify in writing (in a format similar to that in app. C) to the financial institution that the provisions of 12 U.S.C. 3401 *et seq.* have been complied with as a prerequisite to obtaining access.

(ii) File with the proper court a signed, sworn statement setting forth the grounds for the emergency access within 5 days of obtaining access to financial records.

(3) After filing of the signed, sworn statement, the official who has obtained access to financial records under this paragraph will as soon as practicable—

(i) Personally serve or mail to the customer a copy of the request to the financial institution and the following notice, unless a delay of notice has been obtained under § 504.2(i):

Records concerning your transactions held by the financial institution named in the attached request were obtained by (office/agency/unit) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: (state with reasonable detail the nature of the law enforcement inquiry). Emergency access to such records was obtained on the grounds that (state grounds).

(ii) Ensure that mailings under this section are by certified or registered

mail to the last known address of the customer.

(h) *Release of information obtained from financial institutions—*

(1) *Records notice.* Financial records, to include derived information, obtained under 12 U.S.C. 3401 *et seq.* will be marked as follows:

This record was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, and may not be transferred to another Federal agency or department outside DOD without prior compliance with the transferring requirements of 12 U.S.C. 3412.

(2) *Records transfer.* (i) Financial records originally obtained under this part will not be transferred to another agency or department outside the DOD unless the transferring law enforcement office certifies their relevance in writing. Certification will state that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. To support this certification, the transferring office may require that the requesting agency submit adequate justification for its request. File a copy of this certification with a copy of the released records.

(ii) Unless a delay of customer notice has been obtained (§ 504.2(i)), the transferring law enforcement office will, within 14 days, personally serve or mail the following to the customer at his or her last known address—

(A) A copy of the certification made according to § 504.2(h)(2)(i) and

(B) The following notice, which will state the nature of the law enforcement inquiry with reasonable detail:

Copies of, or information contained in, your financial records lawfully in possession of the Department of the Army have been furnished to (state the receiving agency or department) pursuant to the Right to Financial Privacy Act of 1978 for (state the purpose). If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974.

(iii) If a request for release of information is from a Federal agency authorized to conduct foreign intelligence or foreign counterintelligence activities (Executive Order 12333) and is for purposes of conducting such activities by these agencies, the information will be released without notifying the customer, unless permission to provide notification is given in writing by the requesting agency.

(iv) Financial information obtained before the effective date of the Financial Privacy Act of 1978 (March 10, 1979)

may continue to be provided to other agencies according to existing procedures, to include applicable Privacy Act System Notices published in AR 340–21 series.

(3) *Precautionary measures.* Whenever financial data obtained under this part is incorporated into a report of investigation or other correspondence, precautions must be taken to ensure that—

(i) The report or correspondence is not distributed outside of DOD except in compliance with paragraph (h)(2)(ii)(B) of this section.

(ii) The report or other correspondence contains the following warning restriction on the first page or cover:

Some of the information contained herein (cite specific paragraphs) is financial record information which was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* This information may not be released to another Federal agency or department outside the DOD without compliance with the specific requirements of 12 U.S.C. 3412 and AR 190–6.

(i) *Delay of customer notice procedures—*(1) Length of delay. The customer notice required by formal written request (§ 504.2(f)(3)), emergency access (§ 504.2(g)(3)), and release of information (§ 504.2(h)(2)(iii)) may be delayed for successive periods of 90 days. The notice required for search warrant (§ 504.2(d)(2)) may be delayed for one period of 180 days and successive periods of 90 days.

(2) *Conditions for delay.* A delay of notice may only be made by an order of an appropriate court. This will be done when not granting a delay in serving the notice would result in—

(i) Endangering the life or physical safety of any person.

(ii) Flight from prosecution.

(iii) Destruction of or tampering with evidence.

(iv) Intimidation of potential witnesses.

(v) Otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same degree as the circumstances in § 504.2(i)(2)(i) through (iv).

(3) *Coordination.* When a delay of notice is appropriate, the law enforcement office involved will consult with the supporting staff judge advocate before attempting to obtain such a delay. Applications for delay of notice should contain reasonable detail.

(4) *After delay expiration.* Upon the expiration of a delay of notice under above and required by—

(i) Section 504.2(d)(2), the law enforcement office obtaining financial

records will mail to the customer a copy of the search warrant and the following notice.

Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or office) on (date). Notification was delayed beyond the statutory 180-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning (state with reasonable detail). You may have rights under the Right to Financial Privacy Act of 1978.

(ii) Section 504.2(f)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the process or request and the following notice:

Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the Government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of the court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason). The purpose of the investigation or official proceeding was (state purpose with reasonable detail).

(iii) Section 504.2(g)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the request and the notice required by § 504.2(g)(3).

(iv) Section 504.2(h)(2), the law enforcement office transferring financial records will serve personally or mail to the customer the notice required by § 504.2(f)(3). If the law enforcement office was responsible for obtaining the court order authorizing the delay, such office shall also serve personally or by mail to the customer the notice required in § 504.2(f)(3).

(j) *Foreign intelligence and foreign counterintelligence activities.* (1) Except as indicated below, nothing in this regulation applies to requests for financial information in connection with authorized foreign intelligence and foreign counterintelligence activities as defined in Executive Order 12333. Appropriate foreign intelligence and counterintelligence directives should be consulted in these instances.

(2) However, to comply with the Financial Privacy Act of 1978, the following guidance will be followed for such requests. When a request for financial records is made—

(i) A military intelligence group commander, the chief of an investigative control office, or the Commanding General (CG) (or Deputy CG), U.S. Army Intelligence and Security Command, will certify to the financial institution that the requesting activity has

complied with the provisions of 12 U.S.C. 3403(b).

(ii) The requesting official will notify the financial institution from which records are sought that 12 U.S.C. 3414(a)(3) prohibits disclosure to any person by the institution, its agents, or employees that financial records have been sought or obtained.

(k) *Certification*. A certificate of compliance with the Right to Financial Privacy Act of 1978 (app. C) will be provided to the financial institution as a prerequisite to obtaining access to financial records under the following access procedures:

- (1) Customer consent (§ 504.2(b)).
- (2) Search warrant (§ 504.2(d)).
- (3) Judicial subpoena (§ 504.2(e)).
- (4) Formal written request (§ 504.2(f)).
- (5) Emergency access (§ 504.2(g)).
- (6) Foreign intelligence and foreign counterintelligence activities (§ 504.2(j)).

**Appendix A To Part 504—Request For Basic Identifying Account Data—Sample Format**  
(Official Letterhead)

(Date) \_\_\_\_\_  
Mr./Mrs. \_\_\_\_\_  
*Chief Teller (as appropriate), First National Bank, Little Rock, AR 72203.*

Dear Mr./Mrs. \_\_\_\_\_: In connection with a legitimate law enforcement inquiry and pursuant to section 3414 of the Right to Financial Privacy Act of 1978, section 3401 *et seq.*, Title 12, United States Code, you are requested to provide the following account information: (name, address, account number, and type of account of any customer or ascertainable group of customers associated with a certain financial transaction or class of financial transactions as set forth in § 504.1(f)).

I hereby certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978, that the provisions of the Act have been complied with as to this request for account information.

(Official Signature Block) \_\_\_\_\_

Under section 3417(c) of the Act, good faith reliance upon this certification relieves your institution and its employees and agents of any possible liability to the subject in connection with the disclosure of the requested financial records.

**Appendix B To Part 504—Customer Consent and Authorization For Access—Sample Format**

Pursuant to section 3404(a) of the Right to Financial Privacy Act of 1978, I, (name of customer), having read the explanation of my rights on the reverse side, hereby authorize the (name and address of financial institution) to disclose these financial records: (list of particular financial records) to (Army law enforcement office) for the following purpose(s): (specify the purpose(s)).

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are

disclosed, and that this authorization is valid for no more than 3 months from the date of my signature.

Date: \_\_\_\_\_  
Signature: \_\_\_\_\_  
(Typed name)  
(Mailing address of customer)

Statement of Customer Rights Under the Right to Financial Privacy Act of 1978  
Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers, or other financial institutions may give financial information about you to a Federal agency, certain procedures must be followed.

*Consent to Financial Records*

You may be asked to consent to the financial institution making your financial records available to the Government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only 3 months and your financial institution must keep a record of the instances in which it discloses your financial information.

*Without Your Consent*

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose. Generally, the Federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The Federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult an attorney before making a challenge to a Federal agency's request.

*Exceptions*

In some circumstances, a Federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the Federal agency will be required to go to court for permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper. When the reason for the delay of notice no longer exists, you will usually be notified that your records were obtained.

*Transfer of Information*

Generally, a Federal agency that obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing the transfer is proper and sends a notice to you that your records have been sent to another agency.

*Penalties*

If the Federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or seek

compliance with the law. If you win, you may be repaid your attorney's fee and costs.

*Additional Information*

If you have any questions about your rights under this law, or about how to consent to release your financial records, please call the official whose name and telephone number appears below:

\_\_\_\_\_  
(Last Name, First Name, Middle Initial)

\_\_\_\_\_  
Title (Area Code) (Telephone Number)

\_\_\_\_\_  
(Component activity, address)

**Appendix C To Part 504—Certificate of Compliance With the Right To Financial Privacy Act of 1978—Sample Format**

(Official Letterhead)  
Mr./Mrs. \_\_\_\_\_  
*Manager, Army Federal Credit Union, Fort Ord, CA 93941.*

Dear Mr./Mrs. \_\_\_\_\_: I certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978, section 3401 *et seq.*, Title 12, United States Code, that the applicable provisions of that statute have been complied with as to the (customer's consent, search warrant or judicial subpoena, formal written request, emergency access, as applicable) presented on (date), for the following financial records of (customer's name):

\_\_\_\_\_  
(Describe the specific records)  
(Official Signature Block)

Pursuant to section 3417(c) of the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

**Appendix D To Part 504—Formal Written Request For Access—Sample Format**

(Official Letterhead)  
(Date) \_\_\_\_\_  
Mr./Mrs. \_\_\_\_\_  
*President (as appropriate), City National Bank and Trust Company, Altoona, PA 16602.*

Dear Mr./Mrs. \_\_\_\_\_: In connection with a legitimate law enforcement inquiry and pursuant to section 3402(5) and section 3408 of the Right to Financial Privacy Act of 1978, section 3401 *et seq.*, Title 12, United States Code, and Army Regulation 190-6, you are requested to provide the following account information pertaining to (identify customer):

\_\_\_\_\_  
(Describe the specific records to be examined)

The Army has no authority to issue an administrative summons or subpoena for access to these financial records which are required for (describe the nature or purpose of the inquiry).

A copy of this request was (personally served upon or mailed to) the subject on (date) who has (10 or 14) days in which to challenge this request by filing an application

in an appropriate United States district court if the subject desires to do so.

Upon expiration of the above mentioned time period and in the absence of any filing or challenge by the subject, you will be furnished a certification certifying in writing that the applicable provisions of the Act have been complied with prior to obtaining the requested records. Upon your receipt of a Certificate of Compliance with the Right to Financial Privacy Act of 1978, you will be relieved of any possible liability to the subject in connection with the disclosure of the requested financial records.

(Official Signature Block) \_\_\_\_\_

**Appendix E to Part 504—Customer Notice of Formal Written Request—Sample Format**

(Official Letterhead)

(Date) \_\_\_\_\_

Mr./Ms. \_\_\_\_\_

1500 N. Main Street, Washington, DC 20314.

Dear Mr./Ms. \_\_: Information or records concerning your transactions held by the financial institution named in the attached request are being sought by the (agency/ department) in accordance with the Right to Financial Privacy Act of 1978, section 3401 *et seq.*, Title 12, United States Code, and Army Regulation 190–6, for the following purpose(s):

(List the purpose(s))

If you desire that such records or information not be made available, you must do the following:

a. Fill out the accompanying motion paper and sworn statement or write one of your own—

(1) Stating that you are the customer whose records are being requested by the Government.

(2) Giving the reasons you believe that the records are not relevant or any other legal basis for objecting to the release of the records.

b. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

(List applicable courts)

c. Mail or deliver a copy of your motion and statement to the requesting authority: (give title and address).

d. Be prepared to come to court and present your position in further detail.

You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of (10 days from the date of personal service) (14 days from the date of mailing) of this notice, the records or information requested therein may be made available.

These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer if such transfer is made.

3 Enclosures (see para \_\_\_\_)

(Signature) \_\_\_\_\_

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**DEPARTMENT OF DEFENSE**

**Department of the Army**

**32 CFR Part 631**

**RIN 0702–AA50**

**Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations**

**AGENCY:** Department of the Army, DoD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Army is publishing a revision to our rule concerning armed forces disciplinary control boards and off-installation liaison and operations. The regulation prescribes uniform policies and procedures for the establishment, and operation of Armed Forces Disciplinary Control Boards, and off-installation liaison and operations.

**DATES:** Effective Date: November 18, 2005.

**ADDRESSES:** Headquarters, Department of the Army, Office of the Provost Marshal General, ATTN: DAPM–MPD–LE, 2800 Army Pentagon, Washington, DC 20310–2800.

**FOR FURTHER INFORMATION CONTACT:** James Crumley, (703) 692–6721.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This part has previously been published. The Administrative Procedure Act, as amended by the Freedom of Information Act requires that certain policies and procedures and other information concerning the Department of the Army be published in the **Federal Register**. The policies and procedures covered by this part fall into that category. The Department of the Army did not receive any responses from potential commentors.

**B. Regulatory Flexibility Act**

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the final rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

**C. Unfunded Mandates Reform Act**

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply

because the final rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of \$100 million or more.

**D. National Environmental Policy Act**

The Department of the Army has determined that the National Environmental Policy Act does not apply because the final rule does not have an adverse impact on the environment.

**E. Paperwork Reduction Act**

The Department of the Army has determined that the Paperwork Reduction Act does not apply because the final rule does not involve collection of information from the public.

**F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)**

The Department of the Army has determined that Executive Order 12630 does not apply because the final rule does not impair private property rights.

**G. Executive Order 12866 (Regulatory Planning and Review)**

The Department of the Army has determined that according to the criteria defined in Executive Order 12866 this final rule is not a significant regulatory action. As such, this rule is not subject to Office of Management and Budget review under section 6(a)(3) of the Executive Order.

**H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)**

The Department of the Army has determined that according to the criteria defined in Executive Order 13045 this final rule does not apply.

**I. Executive Order 13132 (Federalism)**

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this final rule does not apply because it will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**Jeffery B. Porter,**

*Chief, Law Enforcement Policy and Oversight Section.*

**List of Subjects in 32 CFR Part 631**

Alcohol, Business, Discrimination, Health, Investigations, Law enforcement, Military personnel,

Privacy, Safety, Uniform Code of Military Justice.

■ For reasons stated in the preamble the Department of the Army revises part 631 to Subchapter I of Title 32 to read as follows:

**PART 631—ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS**

**Subpart A—General**

- Sec.  
631.1 Purpose.  
631.2 Applicability.  
631.3 Supervision.  
631.4 Exceptions.

**Subpart B—Armed Forces Disciplinary Control Boards**

- 631.5 General.  
631.6 Responsibilities.  
631.7 Composition of boards.  
631.8 Participation by civil agencies.  
631.9 Duties and functions of boards.  
631.10 Administration.  
631.11 Off-limits establishments and areas.

**Subpart C—Off-Installation Operations (Military Patrols and Investigative Activities) and Policy**

- 631.12 Objectives.  
631.13 Applicability.  
631.14 Army policy.  
631.15 Air Force policy.  
631.16 Navy policy.  
631.17 Marine Corps policy.  
631.18 Operations.

Appendix A to Part 631—Armed Forces Disciplinary Control Board Procedures Guide

Authority: 10 U.S.C. 3012(b)(1)(g).

**Subpart A—General**

**§ 631.1 Purpose.**

This part prescribes uniform policies and procedures for the establishment, and operation of the following:

- (a) Armed Forces Disciplinary Control Boards (AFDCB).  
(b) Off-installation liaison and operations.

**§ 631.2 Applicability.**

This part applies to the following:

- (a) Active U.S. Armed Forces personnel of the Army, Air Force, Navy, and Marine Corps, and the Coast Guard wherever they are stationed.  
(b) U.S. Armed Forces Reserve personnel only when they are performing Federal duties or engaging in activities directly related to performing a Federal duty or function.  
(c) National Guard personnel only when called or ordered to active duty in a Federal status within the meaning of Title 10, United States Code.

**§ 631.3 Supervision.**

The following will develop and have staff supervision over AFDCB and off-installation enforcement policies.

- (a) The Office of the Provost Marshal General (OPMG), Headquarters, Department of the Army (HQDA). This official serves as the proponent for this part, and has primary responsibility for its content.  
(b) U.S. Air Force Director of Security Forces and Force Protection, Department of the Air Force.  
(c) Director, Naval Criminal Investigative Service.  
(d) Commandant of the Marine Corps.  
(e) Commandant of the Coast Guard.  
(f) Installation commanders are authorized to convene joint service boards within their Army Regulation (AR) 5–9 area of responsibility.

**§ 631.4 Exceptions.**

Requests for exceptions to policies contained in this part will be forwarded to HQDA (DAPM–MPD–LE), Washington, DC 20310–2800.

**Subpart B—Armed Forces Disciplinary Control Boards**

**§ 631.5 General.**

AFDCBs may be established by installation, base, or station commanders to advise and make recommendations to commanders on matters concerning eliminating conditions, which adversely affect the health, safety, welfare, morale, and discipline of the Armed Forces.

(a) For the Army, routine off-limits actions must be processed by an AFDCB following the procedures in § 631.11.

(b) Coast Guard commanders must have written authorization from the Commandant (G–WP) prior to establishing an AFDCB.

**§ 631.6 Responsibilities.**

(a) Regional Directors of the Army Installation Management Agency, Air Force commanders, Navy regional commanders, Marine Corps commanders, and Coast Guard commanders will—

- (1) Determine level and degree of participation by subordinate commanders in joint Service boards, when appropriate.  
(2) Resolve differences among subordinate commanders regarding board areas of responsibility, and the designation of sponsoring commanders.  
(3) Evaluate board recommendations, and actions from subordinate sponsoring commanders.  
(4) Forward recommendations to HQDA, OPMG (DAPM–MPD–LE), WASH DC 20310–2800, regarding

circumstances that require Service headquarters action or programs having widespread applicability.

(5) Ensure that subordinate commanders assess the availability of drug abuse paraphernalia in the vicinity of Department of Defense (DOD) installations through their AFDCBs, according to DOD Directive 1010.4. Coast Guard commanders should refer to COMDTINST M1000.6 series, chapter 20, for guidance on Coast Guard substance abuse policies.

(b) Military installation commanders for off-installation enforcement actions will—

- (1) Conduct off-installation operations as authorized by law and Service policy.  
(2) Coordinate off-installation operations with other Service commanders, as applicable, for uniformity of effort, and economy of resources.  
(3) Assist Federal, State, and local law enforcement agencies within the limits imposed by law and DOD policy.

(c) Sponsoring commanders will provide administrative support for AFDCB programs to include the following—

- (1) Promulgating implementing directives, and convening the board.  
(2) Providing a recorder for the board.  
(3) Providing copies of the minutes of board meetings to other Service commanders who are represented on the board, and to other AFDCBs as appropriate.  
(4) Approving or disapproving the minutes, and recommendations of the board, and making appropriate distribution, as required.  
(5) Publishing lists of “off-limits” establishments and areas.  
(6) Ensuring that responsible individuals are notified of any unfavorable actions being contemplated or taken regarding their establishments per Annex A of appendix A of this part.  
(7) Distributing pertinent information to the following—  
(i) All units within their jurisdictional area.  
(ii) Units stationed in other areas whose personnel frequent their area of jurisdiction.  
(8) Ensuring that procedures are established to inform all Service personnel, including those who may be visiting or are in a travel status, of off-limits restrictions in effect within the respective AFDCB’s jurisdictional area.

**§ 631.7 Composition of boards.**

(a) Boards should be structured according to the needs of the command, with consideration given to including representatives from the following functional areas—

- (1) Law enforcement.
- (2) Legal counsel.
- (3) Health.
- (4) Environmental protection.
- (5) Public affairs.
- (6) Equal opportunity.
- (7) Fire and safety.
- (8) Chaplains' service.
- (9) Alcohol and drug abuse.
- (10) Personnel and community activities.

(11) Consumer affairs.

(b) Sponsoring commanders will designate a board president, and determine by position which board members will be voting members. Such designations will be included in a written agreement establishing the board.

#### **§ 631.8 Participation by civil agencies.**

(a) Civil agencies or individuals may be invited to board meetings as observers, witnesses or to provide assistance where they possess knowledge or information pertaining to problem areas within the board's jurisdiction.

(b) Announcements and summaries of board results may be provided to appropriate civil agencies.

#### **§ 631.9 Duties and functions of boards.**

The AFDCBs will—

(a) Meet as prescribed by appendix A of this part.

(b) Receive reports, and take appropriate action on conditions in their area of responsibility relating to any of the following—

- (1) Disorders and lack of discipline.
- (2) Prostitution.
- (3) Sexually transmitted disease.
- (4) Liquor violations.
- (5) Racial and other discriminatory practices.
- (6) Alcohol and drug abuse.
- (7) Drug abuse paraphernalia.
- (8) Criminal or illegal activities involving cults or hate groups.
- (9) Illicit gambling.
- (10) Areas susceptible to terrorist activity.

(11) Unfair commercial or consumer practices.

(12) Other undesirable conditions deemed unsafe which may adversely affect the health and well being of military personnel or their families.

(c) Report to all major commanders in the board's area of responsibility—

(1) Conditions cited in paragraph (b) of this section.

(2) Recommended action as approved by the board's sponsoring commander.

(d) Coordinate with appropriate civil authorities on problems or adverse conditions existing in the board's area of jurisdiction.

(e) Make recommendations to commanders in the board's area of jurisdiction concerning off-installation procedures to prevent or control undesirable conditions.

#### **§ 631.10 Administration.**

(a) Commanders are authorized to acquire, report, process, and store information concerning persons and organizations, whether or not affiliated with DOD, according to the applicable Service parts of the sponsoring commander, which—

(1) Adversely affect the health, safety, morale, welfare, or discipline of service members regardless of status.

(2) Describes crime conducive conditions where there is a direct Service interest.

(b) Boards will function under the supervision of a president (§ 631.7(b)).

(c) Certain expenses incurred by Service members in the course of an official board investigation or inspection may be reimbursable per appropriate Service finance parts or instructions. Requests for reimbursement will be submitted through the sponsoring commander.

(d) Records of board proceedings will be maintained as prescribed by records management policies, and procedures of the sponsoring commander's Service.

#### **§ 631.11 Off-limits establishments and areas.**

(a) The establishment of off-limits areas is a function of Command. It may be used by commanders to help maintain good order and discipline, health, morale, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Where sufficient cause exists, commanders retain substantial discretion to declare establishments or areas temporarily off-limits to personnel of their respective commands in emergency situations. Temporary off-limits restrictions issued by commanders in an emergency situation will be acted upon by the AFDCB as a first priority. As a matter of policy, a change in ownership, management, or name of any off-limits establishment does not, in and of itself, revoke the off-limits restriction.

(b) Service members are prohibited from entering establishments or areas declared off-limits according to this part. Violations may subject the member to disciplinary action per applicable Service parts, and the Uniform Code of Military Justice (UCMJ). Family members of service members and others associated with the Service or

installation should be made aware of off-limits restrictions. As a general policy, these establishments will not be visited by Service law enforcement personnel unless specifically determined by the installation commander that visits or surveillance are warranted.

(c) Prior to initiating AFDCB action, installation commanders will attempt to correct adverse conditions or situations through the assistance of civic leaders or officials.

(d) Prior to recommending an off-limits restriction, the AFDCB will send a written notice (certified mail-return receipt requested) to the individual or firm responsible for the alleged condition or situation. The AFDCB will specify in the notice a reasonable time for the condition or situation to be corrected, along with the opportunity to present any relevant information to the board. If subsequent investigation reveals that the responsible person has failed to take corrective action, the board will recommend the imposition of the off-limits restriction.

(e) A specified time limit will not be established when an off-limits restriction is invoked. The adequacy of the corrective action taken by the responsible individual will be the determining factor in removing an off-limits restriction.

(f) A person whose establishment or area has been declared off-limits may at any time petition the president of the board to remove the off-limits restriction. The petition will be in writing and will include a detailed report of action taken to eliminate the condition or situation that caused imposition of the restriction. The president of the AFDCB may direct an investigation to determine the status of corrective actions noted in the petition. The board will either recommend removal or continuation of the off-limits restriction to the local sponsoring commander based on the results of the investigation.

(g) Off-limits procedures to be followed by the boards are in appendix A of this part. In the United States, off-limits signs will not be posted on civilian establishments by U.S. military authorities.

(h) In areas Outside of the Continental United States (OCONUS), off-limits and other AFDCB procedures must be consistent with existing Status of Forces Agreements (SOFAs).

### Subpart C—Off-Installation Operations (Military Patrols and Investigative Activities) and Policy

#### § 631.12 Objectives.

The primary objectives of off-installation operations are to—

- (a) Render assistance and provide information to Service members.
- (b) Preserve the safety, and security of service members.
- (c) Preserve good order and discipline among Service members and reduce off-installation incidents and offenses.
- (d) Maintain effective cooperation with civil authorities, and community leaders.

#### § 631.13 Applicability.

This subpart is not applicable to the U.S. Coast Guard.

#### § 631.14 Army policy.

(a) Soldiers, military and/or Department of the Army Civilian (DAC) police performing off-installation operations must be thoroughly familiar with applicable agreements, constraints of the Posse Comitatus Act (18 U.S.C. 1385) in the Continental United States (CONUS) and United States-host nation agreements in areas OCONUS.

(b) Military and/or DAC police assigned to off-installation operations have the sole purpose of enforcing parts, and orders pertaining to persons subject to their jurisdiction.

(c) Military and/or DAC police accompanying civilian law enforcement officers remain directly responsible to, and under the command of, U.S. Army superiors. Military and DAC police may come to the aid of civilian law enforcement officers to prevent the commission of a felony or injury to a civilian law enforcement officer.

(d) Regional Directors of the Army Installation Management Agency (IMA), Commander, Army Materiel Command (AMC), and Commander, Army Test and Evaluation Command (ATEC) may authorize subordinate commanders to establish off-installation operations within the limits imposed by higher authority, the Posse Comitatus Act (18 U.S.C. 1385) in CONUS, and United States-host nation agreements in OCONUS areas—

- (1) To assist Federal, State, and local law enforcement agencies.
- (2) In conjunction with military activities.
- (3) To safeguard the health and welfare of Soldiers.
- (4) When the type of offenses or the number of Soldiers frequenting an area is large enough to warrant such operations.
- (e) The constraints on the authority of Soldiers and/or DAC police to act off-

Installation, (Posse Comitatus Act (18 U.S.C. 1385) in CONUS and United States-host nation agreements in OCONUS areas) and the specific scope of off-installation operations will be clearly delineated in all authorizations for off-installation operations. Off-installation operations will be coordinated with the local installation commander through the Staff Judge Advocate (SJA), or higher authority, and appropriate civilian law enforcement agencies.

#### § 631.15 Air Force policy.

(a) Airmen, military and/or Department of the Air Force Civilian (DAFC) police performing off-installation operations must be thoroughly familiar with applicable agreements, constraints of the Posse Comitatus Act (18 U.S.C. 1385) in CONUS and United States-host nation agreements in areas OCONUS.

(b) Military and/or DAFC police assigned to off-installation operations have the sole purpose of enforcing parts, and orders pertaining to persons subject to their jurisdiction.

(c) Military and/or DAFC police accompanying civilian law enforcement officers remain directly responsible to, and under the command of, U.S. Air Force superiors. Military and DAFC police may come to the aid of civilian law enforcement officers to prevent the commission of a felony or injury to a civilian law enforcement officer.

(d) Air Force commanders may authorize subordinate commanders to establish off-installation operations within the limits imposed by higher authority, the Posse Comitatus Act (18 U.S.C. 1385) in CONUS, and United States-host nation agreements in OCONUS areas—

- (1) To assist Federal, State, and local law enforcement agencies.
- (2) In conjunction with military activities.
- (3) To safeguard the health and welfare of Airmen.
- (4) When the type of offenses or the number of Airmen frequenting an area is large enough to warrant such operations.

(e) The constraints on the authority of Airmen and/or DAFC police to act off-installation, (Posse Comitatus Act (18 U.S.C. 1385) in CONUS and United States-host nation agreements in OCONUS areas) and the specific scope of off-installation operations will be clearly delineated in all authorizations for off-installation operations. Off-installation operations will be coordinated with the local installation commander through the Staff Judge Advocate (SJA), or higher authority, and

appropriate civilian law enforcement agencies.

#### § 631.16 Navy policy.

The following policies apply to off-installation operations—

(a) Article 1630–020, MILPERSMAN revised August 2002, and Navy Parts, Article 0922 concerning the establishment and operation of a shore patrol.

(b) In accordance with SECNAV 1620.7A, Navy Absentee Collection Units collect, and process apprehended absentees and deserters, escort apprehended absentees, and deserters to their parent commands or to designated processing activities, escort prisoners from confinement facilities, and provide liaison with civilian law enforcement authorities.

(c) Navy personnel will be thoroughly familiar with all applicable agreements and implementing standard operating procedures, to include the constraints of the Posse Comitatus Act (18 U.S.C. 1385), in CONUS and United States-host nation agreements in OCONUS areas, as applicable.

(d) Within CONUS. (1) Installation Commanders may request authority from their Regional Commander, to establish off-installation operations—

(i) To assist Federal, State, and local law enforcement agencies within the limits imposed by higher authority and the Posse Comitatus Act (18 U.S.C. 1385).

(ii) In conjunction with military operations.

(iii) To safeguard the health, and welfare of Naval personnel.

(iv) When the type of offenses or the number of service members frequenting an area is large enough to warrant such operation.

(2) Constraints on the authority of military personnel to act off-installation (Posse Comitatus Act (18 U.S.C. 1385) and the specific scope of the authority will be clearly delineated in all authorizations for off-installation operations.

(e) Within OCONUS, off-installation operations will be kept at the minimum needed for mission accomplishment. Installation commanders may authorize off-installation operations as required by local conditions and customs, as long as they are conducted in accordance with applicable treaties and SOFAs.

(f) Off-installation operations will be coordinated with the local installation commander through the JAG or higher authority, and local law enforcement authorities.

(g) Security personnel selected for off-installation operations must—

- (1) Have mature judgment and law enforcement experience.

(2) Be thoroughly familiar with all applicable agreements and implementing standard operating procedures, to include the constraints of the Posse Comitatus Act (18 U.S.C. 1385), in CONUS and United States Host Nation agreements in OCONUS area, as applicable.

(h) Security personnel accompanying civilian police during off-installation operations do so only to enforce parts and orders pertaining to persons subject to their jurisdiction. Security personnel assigned off-installation operations remain directly responsible to, and under the command of their Navy superiors when accompanying civilian police. Security personnel performing such duties may come to the aid of civilian police in order to prevent the commission of a felony or injury to a civilian police officer.

(i) Civilian police and court liaison may be established with concurrence of the Naval Criminal Investigative Service and is encouraged particularly when the intent is to reduce mishaps.

#### **§ 631.17 Marine Corps policy.**

(a) Within CONUS. (1) Commanders may request authority from Headquarters, Marine Corps (Code POS), to establish off-installation operations—

(i) To assist Federal, State, and local law enforcement agencies within the limits imposed by higher authority and the Posse Comitatus Act (18 U.S.C. 1385).

(ii) In conjunction with military operations.

(iii) To safeguard the health, and welfare of Marines.

(iv) When the type of offenses or the number of service members frequenting an area is large enough to warrant such operations.

(2) Constraints on the authority of military personnel to act off-installation (Posse Comitatus Act (18 U.S.C. 1385)) and the specific scope of the authority will be clearly delineated in all authorizations for off-installation operations.

(b) Within OCONUS, off-installation operations will be kept at the minimum needed for mission accomplishment. Installation commanders may authorize off-installation operations as required by local conditions and customs, as long as they are conducted in accordance with applicable treaties and SOFAs.

(c) Off-installation operations will be coordinated with the local installation commander through the SJA, or higher authority, and local law enforcement authorities.

(d) Marines selected for off-installation operations must—

(1) Have mature judgment and law enforcement experience.

(2) Be thoroughly familiar with all applicable agreements and implementing standard operating procedures, to include the constraints of the Posse Comitatus Act (18 U.S.C. 1385), in CONUS and United States-host nation agreements in OCONUS areas, as applicable.

(e) Marines accompanying civilian police during off-installation operations do so only to enforce parts and orders pertaining to persons subject to their jurisdiction. Marines assigned off-installation operations remain directly responsible to, and under the command of their Marine superiors when accompanying civilian police. Marines performing such duties may come to the aid of civilian police in order to prevent the commission of a felony or injury to a civilian police officer.

(f) Procedures for absentee and deserter collection units to accept an active-duty absentee or deserter from civilian authorities may be established.

(g) Civilian police and civil court liaison may be established.

#### **§ 631.18 Operations.**

When an incident of substantial interest to the Service, involving Service property or affiliated personnel, occurs off-installation, the Service law enforcement organization exercising area responsibility will—

(a) Obtain copies of civilian law enforcement reports for processing or forwarding according to applicable Service parts.

(b) Return apprehended persons to representatives of their Service as soon as practicable.

#### **Appendix A to Part 631—Armed Forces Disciplinary Control Board Procedures Guide**

A-1. *Purpose.* This guide prescribes procedures for the establishment, operation, and coordination of AFDCBs. AFDCB proceedings are not adversarial in nature.

##### *A-2. Meetings.*

a. The board will meet quarterly. The commander establishing the AFDCB may specify whether the meetings will be open or closed. If not specified, the decision is at the discretion of the president of the board. Normally proceedings are closed, but may be opened to the public when circumstances warrant.

b. Special meetings may be called by the president of the board. Except by unanimous consent of members present, final action will be taken only on the business for which the meeting was called.

c. A majority of voting members constitutes a quorum for board proceedings.

A-3. *AFDCB composition.* Voting members will be selected per section 631.7.

A-4. *Attendance of observers or witnesses.*

a. The board may invite individual persons or organization representatives as witnesses or observers if they are necessary or appropriate for the conduct of board proceedings. The below listed authorities may assist in addressing installation or command concerns or issues.

(1) Federal, State, and local judicial, legislative, and law enforcement officials.

(2) Housing part and enforcement authorities.

(3) Health, and social service authorities.

(4) Environmental protection authorities.

(5) Alcoholic beverage control authorities.

(6) Equal employment opportunity authorities.

(7) Consumer affairs advocates.

(8) Chamber of Commerce representatives.

(9) Public works or utility authorities.

(10) Local fire marshal, and public safety authorities.

(11) State and local school board or education officials.

(12) Any other representation deemed appropriate by the sponsoring command such as, news media, union representatives, and so forth.

b. Invited witnesses and observers will be listed in the minutes of the meeting.

A-5. *Appropriate areas for board consideration.*

a. Boards will study and take appropriate action on all reports of conditions considered detrimental to the good order and discipline, health, morale, welfare, safety, and morals of Armed Forces personnel. These adverse conditions include, but are not limited to, those identified in § 631.9.

b. The board will immediately forward to the local commander reported circumstances involving discrimination based on race, color, sex, religion, age, or national origin.

##### *A-6. Off-limit procedures.*

a. Off-limits restrictions should be invoked only when there is substantive information indicating that an establishment or area frequented by Armed Forces personnel presents conditions, which adversely affect their health, safety, welfare, morale, or morals. It is essential that boards do not act arbitrarily. Actions must not be of a punitive nature. Boards should work in close cooperation with local officials and proprietors of business establishments, and seek to accomplish their mission through mutually cooperative efforts. Boards should encourage personal visits by local military, and civilian enforcement or health officials to establishments considered below standard. AFDCBs should point out unhealthy conditions or undesirable practices to establishment owners or operators to produce the desired corrective action.

b. In cases involving discrimination, the board should not rely solely on letters written by the Equal Opportunity Office, and Military Affairs Committee or investigations of alleged racial discrimination.

c. If the board decides to attempt to investigate or inspect an establishment, the president or a designee will prepare, and submit a report of findings, and recommendations at the next meeting. This procedure will ensure complete, and documented information concerning questionable adverse conditions.

d. When the board concludes that conditions adverse to Armed Forces personnel do exist, the owner or manager will be sent a letter of notification (Annex A). This letter will advise him or her to raise standards by a specified date, and, if such conditions or practices continue, off-limits proceedings will be initiated. Any correspondence with the individuals responsible for adverse conditions, which may lead to off-limits action, will be by certified mail.

e. If a proprietor takes remedial action to correct undesirable conditions previously noted the board should send a letter of appreciation (Annex B) recognizing this cooperation.

f. If undesirable conditions are not corrected, the proprietor will be invited to appear before the AFDCB to explain why the establishment should not be placed off-limits (Annex C). Any proprietor may designate in writing a representative to appear before the board in his or her behalf.

g. In cases where proprietors have been invited to appear before the board, the president of the board will perform the following—

(1) Prior to calling the proprietor—

(a) Review the findings and decision of the previous meeting.

(b) Call for inspection reports.

(c) Allow those present to ask questions, and discuss the case.

(2) When the proprietor or his or her representative is called before the board—

(a) Present the proprietor with a brief summary of the complaint concerning the establishment.

(b) Afford the proprietor an opportunity to present matters in defense.

(c) Invite those present to question the proprietor. After the questioning period, provide the proprietor an opportunity to make a final statement before being dismissed.

(3) Deliberations on recommended actions will be in closed session, attended only by board members.

h. The board should recommend an off-limits restriction only after the following:

(1) The letter of notification (Annex A) has been sent.

(2) An opportunity for the proprietor to appear before the board has been extended.

(3) Further investigation indicates that improvements have not been made.

i. The minutes will indicate the AFDCB's action in each case. When a recommendation is made to place an establishment off-limits, the minutes will show the procedural steps followed in reaching the decision.

j. Recommendations of the AFDCB will be submitted to the sponsoring commander for consideration. The recommendations will then be forwarded to other installation commanders who are represented on the board (Annex D). If no objection to the recommendations is received within 10 days, the sponsoring commander will approve or disapprove the recommendations and forward the decision to the AFDCB president.

k. Upon approval of the AFDCB's recommendations, the president will write the proprietor that the off-limits restriction has been imposed (Annex E).

l. A time limit should not be specified when an off-limits restriction is revoked. The adequacy of the corrective action taken by the proprietor of the establishment must be the determining factor in removing the off-limits restriction.

m. Military authorities may not post off-limits signs or notices on private property.

n. In emergencies, commanders may temporarily declare establishments or areas off-limits to service members subject to their jurisdiction. The circumstances for the action will be reported as soon as possible to the commander sponsoring the board. Detailed justification for this emergency action will be provided to the board for its deliberations.

o. Appropriate installation commanders will publish a list of off-limits establishments and areas using command and media channels.

#### A-7. *Removal of off-limits restrictions.*

a. Removal of an off-limits restriction requires AFDCB action. Proprietors of establishments declared off-limits should be advised that they may appeal to the appropriate AFDCB at any time. In their appeal they should submit the reason why the restriction should be removed. A letter of notification for continuance of the off-limits restriction should be sent to the proprietor if the AFDCB does not remove the off-limits restriction (Annex F). The proprietor may appeal to the next higher commander if not satisfied with continuance after exhausting all appeals at the local sponsoring commander level. Boards should make at least quarterly inspections of off-limits establishments. A statement that an inspection has been completed should be included in AFDCB minutes.

b. When the board learns that the proprietor has taken adequate corrective measures, the AFDCB will take the following actions:

(1) Discuss the matter at the next meeting and make an appropriate recommendation.

(2) Forward a recommendation for removal of the off-limits restriction to the sponsoring commander. If approved, a letter removing the restriction (Annexes G & H) will be sent to the proprietor.

(3) The minutes will reflect action taken.

#### A-8. *Duties of the AFDCB president.*

The president of the AFDCB will—

a. Schedule and preside at all AFDCB meetings.

b. Provide an agenda to each voting member at least 72 hours prior to the meeting.

c. Ensure records, minutes, and correspondence are prepared, distributed, and maintained per § 631.10(d).

#### A-9. *Commanders.*

The installation commander, and commanders within an AFDCB's area of responsibility must be thoroughly acquainted with the mission and services provided by AFDCBs. AFDCB members should keep their respective commanders informed of command responsibilities pertaining to AFDCB functions and actions.

#### A-10. *Public affairs.*

a. Due to the sensitive nature of the subject matter, there will not be a media release in connection with AFDCB meetings. However, any AFDCB proceeding, which is open to the

public, will also be open to representatives of the news media. Representatives of the news media will be considered observers, and will not participate in matters considered by the AFDCB. Members of the news media may be invited to participate in an advisory status in coordination with the public affairs office.

b. News media interviews and releases will be handled through the public affairs office according to applicable Service parts.

#### A-11. *Minutes.*

a. Minutes will be prepared in accordance with administrative formats for minutes of meetings prescribed by the Service of the sponsoring commander (Annex I). The written minutes of AFDCB meetings will constitute the official record of the AFDCB proceedings. Verbatim transcripts of board meetings are not required. The reasons for approving or removing an off-limits restriction, to include a complete address of the establishment or area involved, should be indicated in the order of business. In addition, the AFDCB's action will be shown in the order or sequence of actions taken. A change in the name of an establishment or areas in an off-limits restriction will also be included.

b. Distribution of the minutes of AFDCB meetings will be limited to the following—

(1) Each voting member, sponsoring command, and commands and installations represented by the board.

(2) Each civilian and military advisory member, if deemed appropriate.

(3) Civilian and Government agencies within the State in which member installations are located having an interest in the functions of the board, if appropriate.

c. AFDCB minutes are subject to release and disclosure in accordance with applicable Service parts and directives.

d. Minutes and recommendations of the board will be forwarded to the sponsoring commander for approval.

#### **Annex A—Letter of Notification**

(Letterhead)

(Appropriate AFDCB)

Proprietor

Dear Sir:

This letter is to inform you that it has come to the attention of the Armed Forces Disciplinary Control Board (AFDCB) that certain conditions reported at your establishment may adversely affect the (health, safety, or welfare) of members of the Armed Forces.

The AFDCB is initiating action to determine whether your establishment (area) should be placed off-limits to members of the Armed Forces if (cite conditions) are not corrected by (date).

A representative of the AFDCB will visit your establishment to determine if steps have been taken to correct the conditions outlined above.

Sincerely,

John J. Smith,

Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.

(Note: Use certified mail, return receipt requested if mailed.)

**Annex B—Letter of Appreciation**

(Letterhead)

(Appropriate AFDCB)

Proprietor

Dear Sir:

This is in reference to my letter of (date) concerning the condition(s) reported at your establishment which adversely affected the health and welfare of members of the Armed Forces.

The Board appreciates your action(s) to correct the condition(s) previously noted and does not contemplate further action with respect to this specific matter.

Your continued cooperation is solicited.

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex C—Letter of Invitation**

(Letterhead)

Proprietor

Dear Sir:

This is in reference to my letter of (date) concerning the condition reported at your establishment which adversely affects the (health, safety, or welfare) of members of the Armed Forces. Information has been received by the board which indicates you have not taken adequate corrective action to eliminate the reported condition.

Reports presented to the Armed Forces Disciplinary Control Board (AFDCB) indicate (list and describe conditions).

You are advised that the AFDCB will initiate action to determine whether your establishment should be declared off-limits to members of the Armed Forces.

You may appear in person, with or without counsel, before the AFDCB at its next scheduled meeting on (date, time, and place). At that time you will have the opportunity to refute the allegation(s), or to inform the board of any remedial action(s) you have taken or contemplate taking to correct the condition. It is requested that you inform the President, of the AFDCB if you plan to attend.

Any questions regarding this matter may be addressed to the President, Armed Forces Disciplinary Control Board, (address). Every effort will be made to clarify the matter for you.

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

(Note: Send certified mail, return receipt requested if mailed.)

**Annex D—AFDCB Off-Limits Approval Letter**

(Letterhead)

Office Symbol

MEMORANDUM FOR (Commanders of Supported Installations)

SUBJECT: Establishments or Areas Recommended for Off-Limits Designation

1. On (date), the Armed Forces Disciplinary Control Board (AFDCB)

recommended imposition of the following off-limits restrictions: (name and address of establishment)

2. Commanders furnishing AFDCB representatives are requested to provide any comments within 10 days as to whether (name of establishment or area) should be placed off-limits.

3. A copy of the AFDCB minutes and recommendation is enclosed.

FOR THE (SPONSORING) COMMANDER:

Encl

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex E—Letter of Declaration of Off-Limits**

Proprietor

Dear Sir:

This letter is to inform you that your establishment has been declared off-limits to members of the Armed Forces effective (date). Members of the Armed Forces are prohibited from entering your establishment (premises) as long as this order is in effect. This action is being taken because of (state the conditions) which are detrimental to the (health or welfare) of members of the Armed Forces.

This restriction will remain in effect indefinitely in accordance with established Armed Forces policy. Removal of the restriction will be considered by the Armed Forces Disciplinary Control Board upon presentation of information that satisfactory corrective action has been taken.

Correspondence appealing this action may be submitted to the President, Armed Forces Disciplinary Control Board, (cite address).

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex F—AFDCB Letter of Notification of Continuance of Off-Limits Restrictions After Appearance before the AFDCB (Letterhead)**

Proprietor

Dear Sir:

The Armed Forces Disciplinary Control Board (AFDCB) did not favorably consider your request for removal of the off-limits restriction now in effect at your establishment.

This decision does not preclude further appeals or appearances before the AFDCB at any of its scheduled meetings. Correspondence pertaining to this matter should be addressed to the President, Armed Forces Disciplinary Control Board, (cite address).

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex G—AFDCB Letter of Removal of Off-Limits Restriction**

(Letterhead)

Proprietor

Dear Sir:

This letter is to inform you that the off-limits restriction against (name of establishment) is removed effective (date). Members of the Armed Forces are permitted to patronize your establishment as of that date.

The corrective actions taken in response to the concerns of the Armed Forces Disciplinary Control Board are appreciated.

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex H—AFDCB Notification of Removal of Off-Limits Restriction**

(Letterhead)

Proprietor

Dear Sir:

This letter is to inform you that your request for removal of the off-limits restriction now in effect at (name of establishment) was favorably considered by the Armed Forces Disciplinary Control Board (AFDCB).

This restriction will be removed effective (date). Members of the Armed Forces will be permitted to patronize your establishment as of that date.

The corrective actions taken in response to the concerns of the AFDCB are appreciated.

Sincerely,

John J. Smith,

*Colonel, U.S. Army, President, Armed Forces Disciplinary Control Board.*

**Annex I—Format for AFDCB Meeting Minutes**

(Letterhead)

MEMORANDUM FOR

SUBJECT: Armed Forces Disciplinary Control Board

1. Pursuant to authority contained in AR 190-24/AFI 31-213/OPNAVINST 1620.2A/MCO 1620.2C/and COMDTINST 1620.1D, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations, the (area) Armed Forces Disciplinary Control Board convened at (place), (date)

2. The following voting members were present: (List names, titles, and addresses.)

3. The following military members were present: (List names, titles, and addresses.)

4. The following civilian advisory members were present: (List names, titles, and addresses.)

5. Order of business:

a. Call to order.

b. Welcome.

c. Introduction of members and guests.

d. Explanation of purpose of board.

e. Reading of minutes.

f. Unfinished or continuing business.

g. New business (subparagraph as necessary).

h. Recommendations.

(1) List of areas and establishments being placed in an off-limits restriction.

Include complete name and address (or adequate description of an area) of any establishment listed.

(2) List of areas and establishments being removed from off-limits restrictions. Include complete name and address (or adequate

description of an area) of any establishment listed.

(3) Other matters or problems of mutual concern.

i. Time, date, and place for next board meeting.

j. Adjournment of the board.

(Board Recorder's Name)

(Rank, Branch of Service), Recorder, Armed Forces Disciplinary Control Board

Approved:

(Board President's Name)

(Rank, Branch of Service) President, Armed Forces Disciplinary Control Board

(Note: The minutes of the board proceedings will be forwarded by official correspondence from the board president to the sponsoring commander for approval of the board's recommendations. By return endorsement, the sponsoring commander will either approve or disapprove the board's recommendations.)

[FR Doc. 05-20903 Filed 10-18-05; 8:45 am]

BILLING CODE 3710-08-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R05-OAR-2005-IN-0003; FRL-7981-8]

### Approval and Promulgation of Air Quality Implementation Plans; Indiana

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The EPA is approving a request from the Indiana Department of Environmental Management (IDEM) to revise the Indiana State Implementation Plan (SIP) in three areas: To amend the definition of "particulate matter," and "ambient air quality standards," add new rules consistent with these amended definitions, and amend rules pertaining to sulfur dioxide (SO<sub>2</sub>) and nitrogen dioxide (NO<sub>2</sub>) ambient standards; to update the references to the Code of Federal Regulations (CFR) from the 2000 edition to the 2002 edition; and to add "credible evidence provisions" into state rules consistent with federal requirements.

**DATES:** This rule is effective on December 19, 2005, unless EPA receives adverse written comments by November 18, 2005. If EPA receives adverse comments, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit comments, identified by Regional Material in EDocket (RME) ID No. R05-OAR-2005-IN-0003, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Agency Web site: <http://docket.epa.gov/rmepub/>. Regional RME, EPA's electronic public docket and comments system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the online instructions for submitting comments.

E-mail: [mooney.john@epa.gov](mailto:mooney.john@epa.gov).

Fax: (312) 886-5824.

Mail: You may send written comments to: John M. Mooney, Chief, Criteria Pollutant Section, (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Hand delivery: Deliver your comments to: John M. Mooney, Chief, Criteria Pollutant Section, (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604.

Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to RME ID No. R05-OAR-2005-IN-0003. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, [regulations.gov](http://www.regulations.gov), or e-mail. The EPA RME Web site and the Federal [regulations.gov](http://www.regulations.gov) Web site are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or [regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of

special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of the related proposed rule which is published in the Proposed Rules section of this **Federal Register**.

Docket: All documents in the electronic docket are listed in the RME index at <http://docket.epa.gov/rmepub/>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically in RME or in hard copy at Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. We recommend that you telephone Julie Henning, Environmental Protection Specialist, at (312) 886-4882 before visiting the Region 5 office. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** Julie Henning, Environmental Protection Specialist, State and Tribal Planning Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-4882, [henning.julie@epa.gov](mailto:henning.julie@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

- I. General Information
  - A. How Can I Get Copies of This Document and Other Related Information?
  - B. How and to Whom Do I Submit Comments?
- II. Background
- III. What Are the Revisions That the State Requests Be Incorporated Into the SIP?
- IV. What Action Is EPA Taking Today?
- V. Statutory and Executive Order Reviews

#### I. General Information

##### A. How Can I Get Copies of This Document and Other Related Information?

1. The Regional Office has established an electronic public rulemaking file available for inspection at RME under ID No. R05-OAR-2005-IN-0003, and a hard copy file which is available for inspection at the Regional Office. The official public file 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 rulemaking

file does not include CBI or other information whose disclosure is restricted by statute. The official public rulemaking file is the collection of materials that is available for public viewing at the Air Programs Branch, Air and Radiation Division, EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

2. **Electronic Access.** You may access this **Federal Register** document electronically through the regulations.gov Web site located at <http://www.regulations.gov> where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and that are open for comment.

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 at the EPA Regional Office, 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 the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

#### *B. 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 rulemaking identification number by including the text "Public comment on proposed rulemaking Region 5 Air Docket R05-OAR-2005-IN-0003" 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.

For detailed instructions on submitting public comments and on what to consider as you prepare your comments see the **ADDRESSES** section

and the section I General Information of the **SUPPLEMENTARY INFORMATION** section of the related proposed rule which is published in the Proposed Rules section of this **Federal Register**.

## **II. Background**

### *A. When Did the State Submit the Requested Rule Revisions to EPA?*

IDEM submitted the requested rule revisions related to particulate matter on February 18, 2005, followed by the update to the CFR reference on February 21, 2005, and the addition of the credible evidence provision on April 8, 2005.

### *B. Did Indiana Hold Public Hearings for Each of These Rule Revisions?*

IDEM held public hearings for each of the three rule revisions that were submitted: particulate matter, SO<sub>2</sub> and NO<sub>2</sub> ambient standards rule revision public hearings were held on May 5, 2004, and September 1, 2004; CFR rule revision public hearings were held on February 5, 2003, April 16, 2003, and June 2, 2004; credible evidence rule revision public hearings were held on September 1, 2004, and November 3, 2004.

### *C. Did IDEM Receive Any Adverse Comments to These Changes?*

IDEM did not receive any comments concerning 326 IAC 1-1-3 (regarding the CFR reference change) or 326 IAC 1-2 (regarding particulate matter, SO<sub>2</sub> and NO<sub>2</sub> ambient standards). IDEM did receive one comment concerning 326 IAC 1-1-6, relating to credible evidence. In that case, the interested party did not object to the promulgation of the rule, but stated that it would retain the right to challenge the interpretation of the rule at some time in the future.

## **III. What Are the Revisions That the State Requests Be Incorporated Into the SIP?**

The State has requested the following revisions: Changes to 326 IAC 1-2-52, "Particulate Matter" defined; the addition of 326 IAC 1-2-52.2, "PM<sub>2.5</sub>" defined; the addition of 326 IAC 1-2-52.4, "PM<sub>10</sub>" defined; the addition of 326 IAC 1-2-82.5, "Total Suspended Particulate" or "TSP" defined; changes to 326 IAC 1-3-4, Ambient air quality standards; changes to 1-1-3, References to the Code of Federal Regulations; and the addition of 326 IAC 1-1-6, "Credible evidence." The revisions are described in more detail below:

### *A. Particulate Matter Definitions and Ambient Air Quality Standards Language*

IDEM has made a number of revisions related to the federal fine particulate matter standards. These are: Amending the definition for "particulate matter" at 326 IAC 1-2-52; adding a definition for PM<sub>2.5</sub> at 326 IAC 1-2-52.2; adding a definition of PM<sub>10</sub> at 326 IAC 1-2-52.4; and adding a definition of "Total Suspended Particulate" or "TSP" at 326 IAC 1-2-82.5. Indiana also made minor administrative revisions to the Ambient Air Quality Standards section for PM<sub>10</sub>, SO<sub>2</sub> and NO<sub>2</sub> at 326 IAC 1-3-4. In the same rule, Indiana added a section stating the values of the primary and secondary standards for PM<sub>2.5</sub>. These revisions and additions are patterned after language in the revised federal standards at 40 CFR 50.6 and 50.7.

### *B. CFR Reference*

The reference to the CFR was updated in 326 IAC 1-1-3 from the 2000 edition to the 2002 edition. This is solely an administrative change that allows Indiana to reference the most current CFR.

### *C. Credible Evidence*

IDEM is requesting the approval of 326 IAC 1-1-6 which adds credible evidence provisions to state rules, consistent with the SIP call published by EPA in 1997 (62 FR 8314). The language of this new rule is patterned after the federal Credible Evidence rule at 40 CFR 51.212(c). The primary purpose of the Credible Evidence rule is to clarify that non-reference test data can be used in enforcement determinations and compliance certifications.

## **IV. What Action Is EPA Taking Today?**

We are approving revisions to the Indiana SIP in three areas: (1) To amend the definition of "particulate matter," and "ambient air quality standards," add new rules consistent with these amended definitions, and amend rules pertaining to SO<sub>2</sub> and NO<sub>2</sub> ambient standards; (2) to update the references to the Code of Federal Regulations (CFR) from the 2000 edition to the 2002 edition; and (3) to add credible evidence provisions into state rules consistent with federal requirements.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written

comments are filed. This rule will be effective December 19, 2005, without further notice unless we receive relevant adverse written comments by November 18, 2005. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective December 19, 2005.

#### V. Statutory and Executive Order Reviews

##### *Executive Order 12866; Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget.

##### *Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

Because it is not a “significant regulatory action” under Executive Order 12866 or a “significant energy action,” this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001).

##### *Regulatory Flexibility Act*

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

##### *Unfunded Mandates Reform Act*

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

##### *Executive Order 13175 Consultation and Coordination With Indian Tribal Governments*

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (59 FR 22951, November 9, 2000).

##### *Executive Order 13132 Federalism*

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

##### *Executive Order 13045 Protection of Children From Environmental Health and Safety Risks*

This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

##### *National Technology Transfer Advancement Act*

In reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

##### *Paperwork Reduction Act*

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

##### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 19, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

##### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 23, 2005.

##### **Norman Niedergang,**

*Acting Regional Administrator, Region 5.*

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

##### **PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

##### **Subpart P—Indiana**

■ 2. Section 52.770 is amended by adding paragraph (c)(170) to read as follows:

##### **§ 52.770 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(170) The Indiana Department of Environmental Management submitted revisions to Indiana's State Implementation plan on February 18, 2005, February 21, 2005, and April 8, 2005. Revisions to 326 IAC 1-2-52, 326 IAC 1-2-82.5, and 326 IAC 1-3-4 amend the definition of "particulate matter" to include the definition of PM<sub>2.5</sub> and amends the section that specifies the national ambient air quality standards. Revisions to 326 IAC 1-1-3 and 326 IAC 1-1-6 update the references to the Code of Federal Regulations (CFR) from the 2000 edition to the 2002 edition and add "credible evidence provisions" into state rules consistent with federal requirements, respectively.

(i) Incorporation by reference. The following sections of the Indiana Administrative Code are incorporated by reference.

(A) Indiana Administrative Code Title 326: Air Pollution Control Board, Article 1: General Provisions, Rule 2: Definitions, Section 52: "'Particulate matter'" defined," Section 52.2: "'PM<sub>2.5</sub>' defined," Section 52.4: "'PM<sub>10</sub>' defined," Section 82.5: "'Total suspended particulate' or 'TSP' defined." Indiana Administrative Code Title 326: Air Pollution Control Board, Article 1: General Provisions, Rule 3: Ambient Air Quality Standards, Section 4: "Ambient air quality standards." Filed with the Secretary of State on December 20, 2004 and effective on January 19, 2005. Published at Indiana Register, Volume 28, Number 5, February 1, 2005 (28 IR 1471-1473).

(B) Indiana Administrative Code Title 326: Air Pollution Control Board, Article 1: General Provisions, Rule 1: Provisions Applicable Throughout Title 326, Section 3: "References to the Code of Federal Regulations." Filed with the Secretary of State on August 26, 2004 and effective on September 25, 2004. Published at Indiana Register, Volume 28, Number 1, October 1, 2004 (28 IR 17).

(C) Indiana Administrative Code Title 326: Air Pollution Control Board, Article 1: General Provisions, Rule 1: Provisions Applicable Throughout Title 326, Section 6: "Credible evidence." Filed with the Secretary of State on February 14, 2005 and effective on March 16, 2005. Published at Indiana Register, Volume 28, Number 7, April 1, 2005 (28 IR 2045).

[FR Doc. 05-20819 Filed 10-18-05; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R03-OAR-2004-MD-0002; FRL-7984-7]

#### Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control of Visible and Particulate Emissions From Glass Melting Facilities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maryland. This revision consists of regulations for the control of particulate and visible emissions from glass melting facilities.

**DATES:** *Effective Date:* This final rule is effective on November 18, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03-OAR-2004-MD-002. All documents in the docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Once in the system, select "quick search," then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

**FOR FURTHER INFORMATION CONTACT:** Linda Miller, (215) 814-2068, or by e-mail at [miller.linda@epa.gov](mailto:miller.linda@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 6, 2005 (70 FR 38837), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. The NPR proposed approval of regulations to control particulate and visible emissions from glass melting facilities. The formal SIP revision was

submitted by the State of Maryland on November 18, 2004.

##### II. Summary of SIP Revision

The SIP revision request included COMAR 26.11.25 to be approved into the SIP. The regulation is applicable to certain types of glass melting furnaces in the Baltimore and Washington planning areas.

A detailed discussion of the rationale for EPA's approval is provided in the NPR and will not be restated here. No public comments were received on the NPR.

##### III. Final Action

EPA is approving the regulations for control of particulates and visible emissions from glass melting facilities as a revision to the Maryland SIP.

##### IV. Statutory and Executive Order Reviews

###### A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the

National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection

burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 19, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time

within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to approve regulations for the control of glass melting facilities may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

Dated: October 11, 2005.

**Donald S. Welsh,**  
*Regional Administrator, Region III.*

■ 40 CFR part 52 is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart V—[Amended]**

■ 2. In § 52.1070, the table in paragraph (c) is amended by adding the entry for COMAR 26.11.25 .01 through .04 in numerical order to read as follows:

**§ 52.1070 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA-APPROVED REGULATIONS IN THE MARYLAND SIP**

Code of Maryland administrative regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
* * * * *				
<b>COMAR 26.11.25—Control of Glass Melting Furnaces</b>				
26.11.25.01 .....	Definitions .....	10/5/98	10/19/05 [Insert page number where the document begins.]	
26.11.25.02 .....	Applicability and Exemptions .....	10/5/98	10/19/05 [Insert page number where the document begins.]	
26.11.25.03 .....	Visible Emissions from Glass Melting Facilities.	10/5/98	10/19/05 [Insert page number where the document begins.]	
26.11.25.04 .....	Particulate Matter Emissions from Glass Melting Facilities.	10/5/98	10/19/05 [Insert page number where the document begins.]	
* * * * *				

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[R03-OAR-2005-MD-0011; FRL-7984-6]

**Approval and Promulgation of Air Quality Implementation Plans; Maryland; Amendments to the Control of VOC From AIM Coatings****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maryland. This revision pertains to the amendments of controlling volatile organic compound (VOC) emissions from architectural and industrial maintenance (AIM) coatings in Maryland. EPA is approving this SIP revision in accordance with the Clean Air Act (CAA or Act).

**DATES:** This final rule is effective on November 18, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03-OAR-2005-MD-0011. All documents in the docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Once in the system, select "quick search," then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

**FOR FURTHER INFORMATION CONTACT:** Rose Quinto, (215) 814-2182, or by e-mail at [quinto.rose@epa.gov](mailto:quinto.rose@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

On August 15, 2005 (70 FR 47757), EPA published a notice of proposed rulemaking (NPR) for the State of

Maryland. The NPR proposed approval of the amendments to the control of VOC emissions from AIM coatings in Maryland. The formal SIP revision was submitted by the Maryland Department of the Environment (MDE) on March 15, 2005.

**II. Summary of SIP Revision**

This SIP revision amends a regulation to control emissions of VOC from AIM coatings in the State of Maryland. On March 15, 2005, MDE formally submitted its amendments to the AIM coatings rule as a SIP revision. These amendments are to provide consistency with similar regulations adopted by the other states in the Ozone Transport Region (OTR). These amendments are administrative changes that will not affect VOC reductions achieved through compliance with the coating standards. Other specific requirements of these amendments and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

**III. Final Action**

EPA is approving Maryland's amendments to the AIM coatings rule as a revision to the Maryland SIP.

**IV. Statutory and Executive Order Reviews****A. General Requirements**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also does not have tribal implications because it will not have a substantial direct effect

on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**B. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in

the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 19, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, pertaining to the amendments to the Maryland AIM coatings rule, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 11, 2005.

**Donald S. Welsh,**  
*Regional Administrator, Region III.*

■ 40 CFR part 52 is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart V—Maryland**

■ 2. In § 52.1070, the table in paragraph (c) is amended by revising the entry for COMAR 26.11.33 to read as follows:

**§ 52.1070 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA-APPROVED REGULATIONS IN THE MARYLAND SIP**

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/ Citation at 40 CFR 52.1100
* * * * *				
<b>26.11.33—Architectural Coatings</b>				
* * * * *				
26.11.33.06	Most Restrictive VOC Limit	2/28/05	10/19/05 [Insert page number where the document begins].	Addition of sections B(15) through B(19).
26.11.33.10	Coatings Not Listed in Regulation .05.	2/28/05	10/19/05 [Insert page number where the document begins].	
26.11.33.12	Container Labeling Requirements	2/28/05	10/19/05 [Insert page number where the document begins].	Deleted section K.
26.11.33.13	Record Keeping Requirements	2/28/05	10/19/05 [Insert page number where the document begins].	
* * * * *				

\* \* \* \* \*  
[FR Doc. 05-20817 Filed 10-18-05; 8:45 am]  
BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[R04-OAR-2003-KY-0001-200410(w); FRL-7983-3]

**Approval and Promulgation of Implementation Plans for Kentucky: Regulatory Limit on Potential To Emit; Withdrawal of Direct Final Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Withdrawal of direct final rule.

**SUMMARY:** Due to adverse comment, EPA is withdrawing the direct final rule published August 24, 2005, (70 FR 49493) approving a revision to the State Implementation Plan (SIP) of the Commonwealth of Kentucky. This revision incorporates Kentucky rule 401 KAR 52:080 into the Kentucky SIP. This rule allows sources with a potential to emit (PTE) that equals or exceeds a title V major source threshold to be classified as minor sources if they restrict their actual emissions to less than 50 percent of the title V major source thresholds and meet other conditions specified in the rule. EPA stated in the direct final rule that if EPA received adverse

comment by September 23, 2005, the rule would be withdrawn and not take effect. EPA subsequently received adverse comment. EPA will address the comment in a subsequent final action based upon the proposed action also published on August 24, 2005 (70 FR 49525). EPA will not institute a second comment period on this action.

**DATES:** The direct final rule is withdrawn as of October 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni, Air Planning Branch, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. (404) 562-9031 (phone) or [notarianni.michele@epa.gov](mailto:notarianni.michele@epa.gov) (e-mail).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 30, 2005.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

■ Accordingly, the amendments to 40 CFR 52.919 and 52.920 (which published in the **Federal Register** on August 24, 2005, at 70 FR 49493) is withdrawn as of October 19, 2005.

[FR Doc. 05-20816 Filed 10-18-05; 8:45 am]

**BILLING CODE 6560-50-P**

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 15**

[ET Docket No. 04-37; ET Docket No. 03-104; FCC 04-245]

**Broadband Power Line Systems**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; stay of effective date.

**SUMMARY:** On September 29, 2005, (70 FR 56856), the Commission announced the effective date of certain rules containing new information collection requirements that were published in the **Federal Register** on January 7, 2005. This document stays the effective date of the information collection requirements, which were approved by the Office of Management and Budget on September 15, 2005.

**DATES:** Effective October 19, 2005, the amendments to §§ 15.615 (a) through (e) published at 70 FR 1360, January 7, 2005, are stayed until November 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Brooks, Office of Engineering and Technology, Policy and Rules Division, (202) 418-2454.

**List of Subjects in 47 CFR Part 15**

Communications equipment, Computer technology, Labeling, Radio, Reporting and recordkeeping requirements, Security measures, Telephone, Wiretapping and electronic surveillance.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Agenda and Publication Analyst.*

[FR Doc. 05-20993 Filed 10-18-05; 8:45 am]

**BILLING CODE 6712-01-U**

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 05-2635; MB Docket No. 05-116; RM-11188]

**Radio Broadcasting Services; Fisher and Thief River Falls, MN**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In response to a *Notice of Proposed Rule Making*, 70 FR 17049 (April 4, 2005), this *Report and Order* reallocates Channel 262C1, Station KSNR(FM) ("KSNR") from Thief River Falls, Minnesota, to Fisher, Minnesota, and modifies Station KSNR's license accordingly. The coordinates for Channel 262C1 at Fisher, Minnesota, are 47-58-38 NL and 96-36-42 WL, with a site restriction of 24.2 kilometers (15.1 miles) northeast of Fisher.

**DATES:** Effective November 17, 2005.

**FOR FURTHER INFORMATION CONTACT:** R. Barthen Gorman, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order*, MB Docket No. 05-116, adopted September 29, 2005, and released October 3, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—RADIO BROADCAST SERVICES**

■ 1. The authority citation for Part 73 reads as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Minnesota, is amended by adding Fisher, Channel 262C1, and by removing Channel 262C1 at Thief River Falls.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 05-20608 Filed 10-18-05; 8:45 am]

**BILLING CODE 6712-01-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 041126333-5040-02; I.D. 101405B]

**Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 of the Gulf of Alaska**

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2005 total allowable catch (TAC) of pollock for Statistical Area 610 of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 14, 2005, through 2400 hrs, A.l.t., December 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 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.

The 2005 TAC of pollock in Statistical Area 610 of the GOA is 30,380 metric tons (mt) as established by the 2005 and 2006 harvest specifications for groundfish of the GOA (70 FR 8958, February 24, 2005).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2005 TAC of

pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 30,370 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

After the effective date of this closure the maximum retainable amounts at §§ 679.20(e) and (f) apply at any time during a trip.

#### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment

because the most recent, relevant data only became available as of October 13, 2005.

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

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: October 14, 2005.

**Alan D. Risenhoover,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. 05-20938 Filed 10-14-05; 2:24 pm]

**BILLING CODE 3510-22-S**

# Proposed Rules

Federal Register

Vol. 70, No. 201

Wednesday, October 19, 2005

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.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 100

[Notice 2005-25]

#### Electioneering Communications

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of public hearing.

**SUMMARY:** The Federal Election Commission is announcing a public hearing on the proposed changes to its rule defining "electioneering communications" under the Federal Election Campaign Act of 1971, as amended.

**DATES:** The hearings will be held on Thursday, October 20, 2005 and will begin at 9:30 a.m.

**ADDRESSES:** Commission hearings are held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** On August 24, 2005, the Commission published a Notice of Proposed Rulemaking ("NPRM") proposing revisions to its rule defining "electioneering communications" under the Federal Election Campaign Act of 1971, as amended. In the NPRM, the Commission stated it would hold a hearing on the proposed rules on October 19 and, if necessary, October 20, 2005. The Commission has determined that one day of public hearing will be sufficient. The hearing will be held on Thursday, October 20, 2005.

Dated: October 13, 2005.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. 05-20866 Filed 10-18-05; 8:45 am]

**BILLING CODE 6715-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2005-22715; Directorate Identifier 2005-NM-108-AD]

RIN 2120-AA64

#### Airworthiness Directives; Boeing Model 747 Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede three existing airworthiness directives (ADs) that apply to certain Boeing Model 747 airplanes. The existing ADs currently require repetitive inspections of the body station (BS) 2598 bulkhead, and corrective action if necessary. This proposed AD would add a requirement to modify the bulkhead, including a one-time inspection and corrective action if necessary, which would terminate certain repetitive inspections. This proposed AD would also require a post-modification inspection of the modified area. This proposed AD results from new reports of cracking in all three areas that require inspection in accordance with the existing ADs. We are proposing this AD to prevent fatigue cracking of the BS 2598 bulkhead structure, which could result in inability of the structure to carry horizontal stabilizer flight loads, and reduced controllability of the airplane.

**DATES:** We must receive comments on this proposed AD by December 5, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590.

- Fax: (202) 493-2251.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207, for service information identified in this proposed AD.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Kusz, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 917-6432; fax (425) 917-6590.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Include the docket number "Docket No. FAA-2005-22715; Directorate Identifier 2005-NM-108-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or may visit <http://dms.dot.gov>.

##### Examining the Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone

(800) 647-5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES**

section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

#### Discussion

We have issued the ADs listed in the following table.

#### EXISTING ADS

AD	Amendment	Federal Register reference	Requirements
2001-14-07 .....	39-12318	66 FR 36443 (July 12, 2001) .....	Repetitive high-frequency eddy current (HFEC) inspections to detect cracking of the bulkhead frame support at body station 2598 under the hinge support fittings of the horizontal stabilizer, and repair if necessary.
2001-15-03 .....	39-12337	66 FR 38365 (July 24, 2001) .....	Repetitive HFEC inspections to detect cracking of the forward and aft inner chords and the splice fitting of the forward inner chord of the body station 2598 bulkhead, and repair if necessary.
2003-19-08 .....	39-13311	68 FR 54990 (September 22, 2003) .....	Repetitive detailed inspections to detect discrepancies of certain areas of the forward and aft sides of the body station 2598 bulkhead, and repair if necessary.

The existing ADs apply to airplanes having line numbers 1 through 1307 inclusive. The existing ADs were prompted by reports of fatigue cracking on the body station 2598 bulkhead.

We issued those ADs to detect and correct discrepancies of the bulkhead structure, which could result in the inability of the structure to carry horizontal stabilizer flight loads, and reduced controllability of the airplane.

#### Actions Since Existing AD Was Issued

Since we issued those ADs, we have received additional reports of cracking in all three of the areas addressed in the existing ADs. The cracking was found on Model 747-200B, 747-200F, and 747-400 series airplanes. Also, we received a report of cracking found in all three areas on one airplane.

ADs 2001-15-03 and 2003-19-08 considered the requirements "interim action" and indicated that the manufacturer was developing a modification to address the unsafe condition. Those ADs explained that we may consider further rulemaking if a modification is developed, approved, and available. The manufacturer now has developed such a modification, and we have determined that further rulemaking is indeed necessary; this proposed AD follows from that determination.

#### Relevant Service Information

We have reviewed Boeing Service Bulletin 747-53-2473, dated March 24, 2005. The service bulletin describes procedures for modifying the bulkhead. The modification involves:

- Inspecting specified areas using surface high-frequency eddy current

(HFEC) and open-hole HFEC methods to detect cracks;

- Repairing cracks;
- Removing the bulkhead upper and lower diagonal braces by using a special tool between their attachment fittings to lift and hold the horizontal stabilizer;
- Installing the following on the aft side of the bulkhead on both sides of the airplane: Two web doublers, new upper and lower hinge backup fittings, and either a new inner chord or the original inner chord that has been inspected for cracks and repaired if necessary; and
- Installing oversize fasteners at specified locations where insurance cuts have been made to remove material that could contain an undetected crack.

AD 2003-19-08 refers to Boeing Alert Service Bulletin 747-53A2467, dated July 26, 2001, as the appropriate source of service information for the required actions. Boeing has since issued Revision 1, dated April 28, 2005. Revision 1 clarifies certain instructions, but the procedures are essentially the same as those in the original service bulletin.

AD 2001-14-07 refers to Boeing Service Bulletin 747-53A2449, Revision 1, dated May 24, 2001, as the appropriate source of service information for the required actions. Boeing has since issued Revision 2, dated March 14, 2002. Revision 2 clarifies certain instructions, but the procedures are essentially the same as those in Revision 1.

AD 2001-15-03 refers to Boeing Alert Service Bulletin 747-53A2427, dated December 17, 1998, and Revision 1, dated October 28, 1999, as the appropriate source of service information for the required actions. Boeing has since issued Revision 2,

dated October 5, 2000, and Revision 3, dated September 27, 2001. Revisions 2 and 3 clarify certain instructions, but the procedures are essentially the same as those in the applicable versions cited in AD 2001-15-03.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

#### FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of the same type design that may be registered in the U.S. at some time in the future. For this reason, we are proposing this AD, which would supersede ADs 2001-14-07, 2001-15-03, and 2003-19-08. This proposed AD would retain the requirements of the existing ADs and add the actions specified in the service bulletin described previously, except as discussed below.

#### Difference Between the Proposed AD and the Service Bulletin

The service bulletin specifies contacting the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions by either using a method that we approve or using data that meet the certification basis of the airplane and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

**Additional Changes to Existing ADs**

Boeing Commercial Airplanes has received a Delegation Option Authorization (DOA). We have revised the existing AD to delegate the authority to approve an alternative method of compliance for any repair specified in this proposed AD to an Authorized Representative for the Boeing

Commercial Airplanes DOA rather than the Designated Engineering Representative (DER).

We have changed all references to a “detailed visual inspection” in the existing ADs to “detailed inspection” in this action. Note 1 in this proposed AD defines a detailed inspection.

In the existing ADs, credit for accomplishment of a prior revision of a

service bulletin was provided in a note; in this proposed AD, that language has been added to paragraph (f).

**Costs of Compliance**

There are about 1,147 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Actions	Work hours	Average hourly labor rate	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection required by AD 2001-14-07 (per inspection cycle) .....	18	\$65	\$0	\$1,170	280	\$327,600
HFEC inspection required by AD 2001-15-03 (per inspection cycle)	2	65	0	130	280	36,400
Detailed inspection required by AD 2001-15-03 (per inspection cycle)	2	65	0	130	280	36,400
Inspection required by AD 2003-19-08 (per inspection cycle) .....	4	65	0	260	280	72,800
Proposed modification .....	126	65	33,716	41,906	280	11,733,680

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a “significant regulatory action” under Executive Order 12866;

2. Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

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

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

1. The authority citation for part 39 continues to read as follows:

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

**§ 39.13 [Amended]**

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39-12318 (66 FR 36443, July 12, 2001), amendment 39-12337 (66 FR 38365, July 24, 2001), and amendment 39-13311 (68 FR 54990, September 22, 2003), and adding the following new airworthiness directive (AD):

**Boeing:** Docket No. FAA-2005-22715; Directorate Identifier 2005-NM-108-AD.

**Comments Due Date**

(a) The FAA must receive comments on this AD action by December 5, 2005.

**Affected ADs**

(b) This AD supersedes the ADs listed in Table 1 of this AD.

TABLE 1.—SUPERSEDED ADS

AD	Amendment
AD Amendment 2001-14-07.	Amendment 39-12318.
AD Amendment 2001-15-03.	Amendment 39-12337.
AD Amendment 2003-19-08.	Amendment 39-13311.

**Applicability**

(c) This AD applies to Boeing Model 747-100, 747-100B, 747-100B SUD, 747-200B, 747-200C, 747-200F, 747-300, 747-400, 747-400D, 747-400F, 747SR, and 747SP series airplanes; certificated in any category; line numbers 1 through 1307 inclusive.

**Unsafe Condition**

(d) This AD results from reports of cracking in areas required to be inspected by the superseded ADs identified in Table 1 of this AD. We are issuing this AD to prevent fatigue cracking of the body station (BS) 2598 bulkhead structure, which could result in inability of the structure to carry horizontal stabilizer flight loads, and reduced controllability of the airplane.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within

the compliance times specified, unless the actions have already been done.

#### Restatement of AD 2001-14-07

##### *Repetitive High Frequency Eddy Current (HFEC) Inspections*

(f) Before the accumulation of 10,000 total flight cycles, or within 1,000 flight cycles after August 16, 2001 (the effective date of AD 2001-14-07), whichever occurs later: Do an open-hole HFEC inspection to find cracking of the bulkhead frame support under the hinge support fittings of the horizontal stabilizer on the left and right sides at BS 2598, in accordance with Figure 2 of the Accomplishment Instructions of Boeing Service Bulletin 747-53A2449, Revision 1, dated May 24, 2001; or Revision 2, dated March 14, 2002. Repeat the inspection after that at intervals not to exceed 3,000 flight cycles. Inspections accomplished before August 16, 2001, per Boeing Alert Service Bulletin 747-53A2449, dated June 8, 2000, are considered acceptable for compliance with the applicable inspection specified in this paragraph.

##### *Repair*

(g) If any cracking is found during any inspection required by paragraph (f) of this AD, before further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, or using a method approved in accordance with paragraph (n)(5) of this AD.

#### Restatement of Certain Requirements of AD 2001-15-03

##### *Repetitive Inspections*

(h) Do a surface HFEC inspection of the forward and aft inner chords, the frame support, and the splice fitting of the forward inner chord of the upper corner of the station 2598 bulkhead to find cracking, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747-53A2427, Revision 2, dated October 5, 2000; or Revision 3, dated September 27, 2001; at the latest of the times specified in paragraphs (h)(1) and (h)(2) of this AD, as applicable. Repeat the inspection after that at intervals not to exceed 1,500 flight cycles.

(1) For airplanes having line numbers 1 through 1241 inclusive:

(i) Before the accumulation of 6,000 total flight cycles.

(ii) Within 500 flight cycles after August 28, 2001 (the effective date of AD 2001-15-03).

(iii) For airplanes inspected before August 28, 2001, in accordance with Boeing Alert Service Bulletin 747-53A2427, dated December 17, 1998 (including inspections of the splice fitting), or Revision 1, dated October 28, 1999: Within 1,500 flight cycles after accomplishment of the last inspection done in accordance with the original service bulletin or Revision 1, as applicable.

(2) For airplanes having line numbers 1242 through 1307 inclusive:

(i) Before the accumulation of 16,000 total flight cycles.

(ii) Within 500 flight cycles after August 28, 2001.

(iii) For airplanes inspected before August 28, 2001, in accordance with Boeing Alert

Service Bulletin 747-53A2427, dated December 17, 1998 (including inspections of the splice fitting), or Revision 1, dated October 28, 1999: Within 1,500 flight cycles after accomplishment of the last inspection done in accordance with the original service bulletin or Revision 1, as applicable.

##### *Repair*

(i) If any cracking is found during the inspections required by paragraph (h) of this AD, before further flight, repair in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747-53A2427, Revision 2, dated October 5, 2000; or Revision 3, dated September 27, 2001; except where the alert service bulletin specifies that the manufacturer may be contacted for disposition of certain repair conditions, before further flight, repair in accordance with a method approved by the Manager, Seattle ACO, or using a method approved in accordance with paragraph (n)(5) of this AD.

#### Restatement of AD 2003-19-08

##### *Repetitive Inspections*

(j) Before the accumulation of 10,000 total flight cycles, or within 1,000 flight cycles after October 27, 2003 (the effective date of AD 2003-19-08), whichever is later: Do a detailed inspection of the body station 2598 bulkhead for discrepancies (cracking, elongated fastener holes) of the areas specified in paragraphs (j)(1) and (j)(2) of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747-53A2467, dated July 26, 2001; or Revision 1, dated April 28, 2005. Repeat the inspections after that at intervals not to exceed 3,000 flight cycles.

(1) The lower aft inner chords.

(2) The upper aft outer chords, and the diagonal brace attachment fittings, flanges, and rods.

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

##### *Repair*

(k) If any discrepancy is found during any inspection required by paragraph (j) of this AD: Before further flight, repair in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747-53A2467, dated July 26, 2001; or Revision 1, dated April 28, 2005. If any discrepancy is found and the service bulletin specifies to contact Boeing for appropriate action: Before further flight, repair in accordance with a method approved by the Manager, Seattle ACO, or using a method approved in accordance with paragraph (n)(5) of this AD.

#### New Requirements of This AD

##### *Modification*

(l) Before the accumulation of 20,000 total flight cycles, or within 48 months after the

effective date of this AD, whichever occurs later: Modify the bulkhead by doing all applicable actions including surface and open-hole HFEC inspections for cracking of the upper forward inner chord, aft inner chord, upper splice fitting, and frame support fitting, as specified in the Accomplishment Instructions of Boeing Service Bulletin 747-53-2473, dated March 24, 2005. Repair any cracks before further flight in accordance with the service bulletin. Where the service bulletin specifies that the manufacturer may be contacted for disposition of certain repair conditions: Before further flight, repair the cracks using a method approved in accordance with the procedures specified in paragraph (n) or (n)(5) of this AD. Accomplishment of the modification terminates the repetitive inspections required by paragraphs (f), (h), and (j)(1) of this AD.

##### *Inspection*

(m) Within 20,000 flight cycles after the modification required by paragraph (l) of this AD, inspect the body station 2598 bulkhead for cracks, and repair any cracks before further flight, in accordance with a method approved by the Manager, Seattle ACO.

##### *Alternative Methods of Compliance (AMOCs)*

(n)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) AMOCs approved previously according to AD 2000-08-21, amendment 39-11707, and AD 2001-15-03 are approved as AMOCs for the corresponding requirements of paragraphs (h) and (i) of this AD. (AD 2000-08-21 was superseded by AD 2001-15-03.)

(3) AMOCs approved previously according to AD 2001-14-07 are approved as AMOCs for the corresponding requirements of paragraphs (f) and (g) of this AD.

(4) AMOCs approved previously according to AD 2003-19-08 are approved as AMOCs for the corresponding requirements of paragraphs (j) and (k) of this AD.

(5) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on September 28, 2005.

**Ali Bahrami,**

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

[FR Doc. 05-20882 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****18 CFR Parts 2 and 33**

[Docket No. RM05-34-000]

**Transactions Subject to FPA Section 203; Correction****AGENCY:** Federal Energy Regulatory Commission (DOE).**ACTION:** Notice of proposed rulemaking; correction.

**SUMMARY:** The Federal Energy Regulatory Commission published in the **Federal Register** of October 7, 2005, a document concerning revisions to 18 CFR parts 2 and 33 to implement amended section 203 of the Federal Power Act. Footnote 4 inadvertently references February 3, 2006 instead of February 8, 2006. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** Sarah McWane (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8372.

**SUPPLEMENTARY INFORMATION:** The Federal Energy Regulatory Commission published in the **Federal Register** of October 7, 2005 (70 FR 58636), a document concerning revisions to 18 CFR parts 2 and 33 to implement amended section 203 of the Federal Power Act. Footnote 4 inadvertently references February 3, 2006 instead of February 8, 2006. This document corrects that error.

**Correction**

In proposed rule FR Doc. 05-20311, beginning on page 58636 in the issue of October 7, 2005, make the following correction. On page 58636, in the second column, paragraph 1, footnote 4 is revised to read: "As noted below, EPA's 2005's amendments to FPA section 203 will not take effect until February 8, 2006. We will generally refer to EPA's 2005's amended section 203 of the FPA as 'amended section 203.' All other references to FPA section 203 are as it currently exists."

Dated: October 14, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. 05-20895 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

**SOCIAL SECURITY ADMINISTRATION****20 CFR Part 411****Town Hall Meetings on the Notice of Proposed Rulemaking for the Ticket To Work and Self-Sufficiency Program****AGENCY:** Social Security Administration (SSA).**ACTION:** Notice of public town hall meetings.

**SUMMARY:** We intend to hold a series of town hall meetings to maximize the opportunities for individuals and organizations to give us input on our Notice of Proposed Rulemaking (NPRM) to amend our regulations for the Ticket to Work and Self-Sufficiency Program (Ticket to Work program). We invite the public, including beneficiaries and other individuals with disabilities, their advocates, service providers, employers and other interested parties to attend these public meetings and to give us input on our proposed changes to the rules for the Ticket to Work program. We are announcing the scheduling of the first of these town hall meetings and a tentative schedule of additional meetings.

**DATES:** We will hold our first public town hall meeting in Irvine, California on November 4, 2005 at 9 a.m. and ending at 12 p.m. See **SUPPLEMENTARY INFORMATION** section for tentative sites and dates for additional town hall meetings.

**ADDRESSES:** The location for the first town hall meeting is: Hyatt Regency Irvine, 17900 Jamboree Road, Irvine, CA 92614, Telephone: (949) 975-1234, Fax: (949) 852-1574, Web site: <http://irvine.hyatt.com>.

**FOR FURTHER INFORMATION CONTACT:** For information about these town hall meetings contact, Paul Kryglik by telephone (410) 965-3735 or TTY (410) 966-5609, or by e-mail to [paul.kryglik@ssa.gov](mailto:paul.kryglik@ssa.gov). You may also mail inquiries about these meetings to Paul Kryglik, Outreach Coordinator, ODISP, Office of Regulations, Social Security Administration, 107 Altmeyer, 6401 Security Boulevard, Baltimore, MD 21235-6401.

For information on eligibility or filing for benefits, call our national toll-free number 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

**SUPPLEMENTARY INFORMATION:****Background**

On September 30, 2005, we published an NPRM in the **Federal Register** (70 FR

57222) to amend our current rules for the Ticket to Work program to improve the overall effectiveness of the program in assisting beneficiaries to maximize their economic self-sufficiency through work opportunities. We provided a 90-day period for interested parties to comment. The 90-day comment period ends December 29, 2005. For information on how to give us written comments on the NPRM or read the comments we receive, see **ADDRESSES** section of the NPRM, or "How do I provide comments if I do not go to a town hall meeting?" section later in this notice. You may also give us comments orally or in writing at any of the town hall meetings, as explained in this notice. You may read the NPRM for the Ticket to Work program Online. The NPRM is available on the Internet site for the Government Printing Office at <http://www.gpoaccess.gov/fr/index.html>. The NPRM is also available on the Internet site for SSA (*i.e.*, Social Security Online) at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs>.

**What Is the Purpose of the Town Hall Meetings?**

As contemplated in the NPRM for the Ticket to Work program, we are conducting a series of town hall meetings open to the public in order to obtain additional input on our proposed changes to the current rules for the program. We are holding these town hall meetings to maximize public awareness of our proposed rules for the Ticket to Work program and to maximize the opportunity for beneficiaries and other individuals with disabilities, their advocates, service providers, employers and other interested parties to provide us input on our proposed changes to the program. We invite you and other interested persons to come to any of the town hall meetings to give us oral and/or written comments on the NPRM for the Ticket to Work program.

**What Are the Agenda and Format for the Town Hall Meetings?**

The full agenda for the meetings, as soon as available, will be posted on the Internet on the "Work Site" of SSA's Office of Employment Support Programs, at <http://www.socialsecurity.gov/work>. Seating at the town hall meetings may be limited. In general, the agenda and format for the meetings will be as follows:

There will be a brief introductory opening during which SSA officials and/or other personnel, including a facilitator, will introduce themselves and describe the purpose and format of the meeting, including the ground rules

for providing oral and/or written comments at the meeting.

We will ask for public comments on our proposed rules after a presentation of an overview of SSA's Comprehensive Work Opportunity Initiative. This discussion will be followed by a brief overview of the Ticket NPRM followed by an opportunity to offer comment on the following areas: (1) State participation and beneficiary choice; (2) employment network payment systems; (3) ticket eligibility for beneficiaries whose conditions may improve; (4) eligibility for more than one ticket per period of eligibility; (5) the definition of "using a ticket" and timely progress; (6) the evidence requirements for employment network payment; and (7) availability of phase 1 milestone payments in conjunction with vocational rehabilitation reimbursement.

The third and final phase of the meeting will start with an overview of SSA's Demonstration Projects and will be followed by an opportunity to comment on any of the Demonstration Projects or SSA Work Incentives.

For each issue and as time allows, we will give each individual the opportunity to provide oral comments within a specified amount of time (e.g., approximately two minutes). Microphones will be stationed at convenient points in the meeting room. We will ask individuals wanting to provide comments to us to form a line behind each microphone and approach the microphone in turn. We will ask that each speaker, before delivering his or her remarks, identify themselves by full name, address, and telephone number. For those individuals representing organizations, we will request that they identify themselves by full name, state the name of the organization and the capacity in which they represent the organization, and give the organization's address and telephone number. Each individual will then state his/her comments regarding the area/issue open for comment. Each individual's remarks will be recorded and later transcribed and entered into the rulemaking record as written comments.

We anticipate allotting a period of time to receive oral comments on each area/issue, with a short break between each such period. At times announced during the meeting, and at the end of each meeting, we will accept written comments from individuals wishing to give us comments in writing.

#### *What Will SSA Do With the Comments It Receives on the NPRM?*

The transcript of the oral comments on the NPRM given to us at the town hall meetings and any written comments we receive at the meetings, together with the written comments that we receive in the manner prescribed in the NPRM during the 90-day comment period, will become a part of the rulemaking record for making changes to the regulations for the Ticket to Work program. The 90-day comment period ends on December 29, 2005. We will consider all of these comments in developing the final rules for the Ticket to Work program. We will summarize the public comments we received on the NPRM and respond to the major comments in the preamble to our final regulations.

We will post the written comments we receive during the 90-day comment period, including the transcript of the oral comments presented at the town hall meetings, on our Internet site at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs>. You may also make arrangements to inspect the comments as explained in the "How do I provide comments on the NPRM if I do not go to a town hall meeting?" section of this notice.

#### *What Are the Tentative Sites and Dates for Other Town Hall Meetings?*

The tentative sites and approximate dates for additional town hall meetings are as follows:

Miami, Florida: November 16, 2005

from 9 a.m.–12 p.m.

Hartford, Connecticut: December 6, 2005 from 9 a.m.–12 p.m.

Des Moines, Iowa: December 14, 2005 from 9 a.m.–12 p.m.

When we have more information about these additional town hall meetings, we will publish that information in a notice(s) in the **Federal Register** at a time nearer to the event(s). Seating may be limited at these meetings.

#### *How Do I Provide Comments on the NPRM if I Do Not Go to a Town Hall Meeting?*

You may give us your written comments by: using our Internet site facility (i.e., Social Security Online) at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs> or the Federal eRulemaking Portal at <http://www.regulations.gov>; e-mail to [regulations@ssa.gov](mailto:regulations@ssa.gov); telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703. You may also deliver them to the Office of Regulations, Social Security

Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, between the hours of 8 a.m. and 4:30 p.m. on regular business days. To be sure your comments are considered, we must receive them by December 29, 2005.

We post the comments on our Internet site at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs>. You may also inspect the comments on regular business days by making arrangements with the following contact person: Greg Zwitch, SSA Regulations Officer, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, e-mail [regulations@ssa.gov](mailto:regulations@ssa.gov), or telephone (410) 965–1887 or TTY (410) 966–5609.

**Authority:** Sec. 1148 of the Social Security Act (42 U.S.C. 1320b–19); sec. 101(e), Pub. L. 106–170, 113 Stat. 1860, 1877 (42 U.S.C. 1320b–19 note).

Dated: October 14, 2005.

**Martin H. Gerry,**

*Deputy Commissioner for Disability and Income Security Programs.*

[FR Doc. 05–20972 Filed 10–18–05; 8:45 am]

**BILLING CODE 4191–02–U**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Food and Drug Administration**

#### **21 CFR Part 101**

[Docket No. 2005N–0413]

#### **Assessing Consumer Perceptions of Health Claims; Public Meeting; Request for Comments**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public meeting; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing a public meeting entitled "Assessing Consumer Perceptions of Health Claims." The meeting will present research assessing consumers' reactions to health claims and will address the implications of these studies for future research designed to evaluate consumer understanding of health claims and the effect of health claims on consumer perceptions and behaviors.

**DATES:** The public meeting will be held on Thursday, November 17, 2005, from 9 a.m. to 4:30 p.m. All of those attending the meeting must register by November 10, 2005. See section III of this document for details on how to register. Submit written or electronic comments, including all relevant data

and information, related to the focus of the public meeting by January 17, 2006.

**ADDRESSES:** The public meeting will be held at the Food and Drug Administration, Center for Food Safety and Applied Nutrition, Harley W. Wiley Auditorium, 5100 Paint Branch Pkwy., College Park, MD 20740.

You may submit comments, identified by Docket No. 2005N-0413, by any of the following methods:

**Electronic Submissions**

Submit electronic comments in the following ways:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web site: <http://www.fda.gov/dockets/ecomments>.

Follow the instructions for submitting comments on the agency Web site.

**Written Submissions**

Submit written submissions in the following ways:

- FAX: 301-827-6870.

- Mail/Hand delivery/Courier [For paper, disk, or CD-ROM submissions]: Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

**Instructions:** All submissions received must include the agency name and Docket No(s). and Regulatory Information Number (RIN) (if a RIN number has been assigned) for this rulemaking. All comments received may be posted without change to <http://www.fda.gov/ohrms/dockets/default.htm>, including any personal information provided. For detailed instructions on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.fda.gov/ohrms/dockets/default.htm> and insert the docket number(s), found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:**

For general questions about the meeting, to register, to request

*permission to speak at the meeting, or to request onsite parking:* Marion V. Allen, Center for Food Safety and Applied Nutrition (HFS-32), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1584, FAX: 301-436-2371, e-mail: [marion.allen@fda.hhs.gov](mailto:marion.allen@fda.hhs.gov).

*For technical questions:* Steven L. Bradbard, Center for Food Safety and Applied Nutrition (HFS-727), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1826, FAX: 301-436-1826, e-mail: [steve.bradbard@fda.hhs.gov](mailto:steve.bradbard@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Health claims are statements used on food labels or in food labeling that describe a relationship between a food or component of food and reduction in the risk of a disease or health-related condition (21 U.S.C. 343(r)(1)(B); § 101.14(a)(1) and (a)(2) (21 CFR 101.14(a)(1) and (a)(2)). The 1993 regulations for health claims (§ 101.14) adopted the congressionally mandated standard of significant scientific agreement (SSA) in the Nutrition Labeling and Education Act of 1990 (Public Law 101-538). This standard limits authorized health claims in food labeling to those dietary substance/disease relationships where, based on the totality of publicly available scientific evidence, there is significant scientific agreement among qualified experts that the claim is supported by such evidence. However, the approach of deciding whether a claim was misleading or not based on FDA's evaluation of whether the scientific evidence met the significant scientific agreement standard was overturned in court on first amendment grounds (see *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) (Pearson decision)).

The Pearson decision rejected FDA's approach in part because the agency did not meet its burden under the First Amendment of justifying a restriction on health claims that do not meet the SSA standard. The court criticized FDA's approach for not considering the possibility that disclaimers about the quality of science underlying claims that did not meet the SSA standard ("qualified health claims") could remedy any potential harm. Following the Pearson decision and subsequent related cases, including *Whitaker v. Thompson*, 248 F. Supp. 2d 1 (D.D.C. 2002) (finding a "credible evidence" standard as the appropriate standard for

FDA to apply in evaluating qualified health claims), FDA revised its process for reviewing qualified health claim petitions. FDA considers the use of qualified health claims when such claims are supported by credible scientific evidence and accurately communicate the level of scientific support for the claim. FDA instituted an interim system for communicating qualified health claims in food and dietary supplement labeling based on a four level system to classify health claim petitions in terms of the strength of science supporting the claim ("Guidance for Industry and FDA: Interim Evidence-Based Ranking System for Scientific Data" (68 FR 41387, July 11, 2003); "Guidance for Industry and FDA: Interim Procedures for Qualified Health Claims in the Labeling of Conventional Human Food and Human Dietary Supplements" (68 FR 41387)). At the same time it instituted this interim system, FDA developed a consumer studies research agenda designed to identify the most effective ways to best present scientifically based, truthful and nonmisleading information to consumers and to identify the kinds of information known to be misleading to consumers. See "Consumer Studies Research Agenda—Improving Consumer Understanding and Product Competition on the Health Consequences of Dietary Choices," Attachment D to the Report of the FDA Task Force on Consumer Health Information for Better Nutrition (July 10, 2003), available at <http://www.cfsan.fda.gov/~dms/nuttftoc.html#memo> (last accessed September 30, 2005).

FDA (Ref. 1) and others (Refs. 2 and 3) have conducted research to assess consumers' responses to health claims. Some of this research has studied consumers' reactions to qualifying language that is similar to that found in FDA's interim system for communicating the level of scientific support for health claims. This research provides important information about consumers' judgments about the level of scientific support for health claims, and reports the effects of health claims on consumers' perceptions of the substance-disease relationship, product healthfulness, product quality and safety, and purchase intent.

**II. Purpose and Scope of the Meeting**

FDA is holding this public meeting to discuss the findings from its own and other research that examines consumers' reactions to health claims, including those claims supported by SSA and those that are qualified, on conventional foods and dietary supplements. The

meeting also will allow attendees an opportunity to provide comments to FDA about the implications of the available research for further consumer studies that may be needed or that are already underway by other parties to assess consumer understanding of health claims and the effect of health claims on consumer perceptions and behaviors. FDA is also interested in hearing from commenters their views regarding schemes or signals, other than those already studied, that may, consistent with the first amendment, effectively communicate to consumers the level of scientific support for health claims, without leading consumers to make erroneous inferences about the claimed substance-disease relationship and/or other product characteristics. FDA anticipates that this meeting will also include comments from attendees about alternative research methods to empirically assess consumer understanding of health claims and the effect of health claims on consumer perceptions and behaviors. FDA intends to consider all pertinent information from this public meeting in any rulemaking related to alternatives for regulating qualified health claims in the labeling of conventional human foods and dietary supplements (see 68 FR 66040, November 25, 2003).

### III. Registration

Please submit your registration information (including name, title, firm name (if applicable), address, telephone, FAX (if available), by November 10, 2005. We encourage you to register online at <http://www.cfsan.fda.gov/~comm/register.html> or by FAX to Marion V. Allen at 301-436-2605. Space is limited and registration will be closed when maximum seating capacity is reached. Please also specify whether you need onsite parking when you register. We also will accept registrations onsite, if space is available.

If you need special accommodations due to a disability, please contact Marion V. Allen (see **FOR FURTHER INFORMATION CONTACT**) no later than November 10, 2005.

If you wish to make a presentation, indicate your request when registering and submit the following information by November 10, 2005: (1) A brief written statement about the general nature of the views you wish to present and (2) the names of any copresenters who must also register to attend. The amount of time allowed for each oral presentation at the public meeting will be limited (e.g., 5 minutes each), and will depend in part upon the number of persons who request to speak. Individuals and organizations that do not preregister to

make a presentation may be given an opportunity to speak if time permits.

Persons preregistered or wishing to register onsite should check in between 7:30 and 8:30 a.m. Because the meeting will be held in a Federal building, meeting participants must present photo identification and plan adequate time to pass through the security system.

### IV. Comments

In addition to attending or presenting oral comments at the meeting, interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments related to the focus of this public meeting. All relevant data and information should be submitted with the written comments. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### V. Meeting Transcript

A transcript will be made of the meeting's proceedings. You may request a copy in writing from FDA's Freedom of Information Office (HFI-35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A-16, Rockville, MD 20857, approximately 30 working days after the public meeting at a cost of 10 cents per page. The transcript of public meeting and all comments submitted will be available for public examination at the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, as well as on the FDA Web site at <http://www.fda.gov/ohrms/dockets/default.htm>.

### VI. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be viewed between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

1. Derby, B.M. and A.S. Levy, "Working Paper: Effects of Strength of Science Disclaimers on the Communication Impact of Health Claims," Working Paper No. 1, FDA, Center for Food Safety and Applied Nutrition (<http://www.fda.gov/OHRMS/dockets/dockets/03N0496/03N-0496-rpt0001.pdf>), September 2005.

2. France, K.R. and P.F. Bone, "Policy Maker's Paradigms and Evidence from Consumer Interpretations of Dietary

Supplement Labels," *Journal of Consumer Affairs*, Volume 39, No. 1, Copyright 2005 by the American Council on Consumer Interests, 2005.

3. Qualified Health Claims Consumer Research Project Executive Summary, International Food Information Council Foundation (<http://www.ific.org/research/qualhealthclaimsres.cfm>), March 2005.

Dated: October 14, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05-20969 Filed 10-17-05; 10:49 am]

**BILLING CODE 4160-01-S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 133

[Docket No. 2000P-0586 (formerly Docket No. 00P-0586)]

### Cheeses and Related Cheese Products; Proposal to Permit the Use of Ultrafiltered Milk

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to amend its regulations to provide for the use of fluid ultrafiltered milk (UF) in the manufacture of standardized cheeses and related cheese products. This action responds principally to two citizen petitions: One submitted by the American Dairy Products Institute (ADPI) and another submitted jointly by the National Cheese Institute (NCI), the Grocery Manufacturers of America, Inc. (GMA), and the National Food Processors Association (NFPA). FDA tentatively concludes that this action will promote honesty and fair dealing in the interest of consumers and, to the extent practicable, will achieve consistency with existing international standards of identity for cheeses and related cheese products.

**DATES:** Submit comments by January 17, 2006.

**ADDRESSES:** You may submit comments, identified by Docket No. 2000P-0586, by any of the following methods:

**Electronic Submissions**  
Submit electronic comments in the following ways:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web site: <http://www.fda.gov/dockets/ecomments>.

Follow the instructions for submitting comments on the agency Web site.

#### Written Submissions

Submit written submissions in the following ways:

- FAX: 301-827-6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD-ROM submissions]: Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name and Docket Nos. or Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to <http://www.fda.gov/ohrms/dockets/default.htm>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.fda.gov/ohrms/dockets/default.htm> and insert the docket number(s), found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Ritu Nalubola, Center for Food Safety and Applied Nutrition (HFS-820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-2371.

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#### I. Background

The standards of identity for cheeses and related cheese products are specified in part 133 (21 CFR 133). The general provisions within part 133, in part, define "milk" and "nonfat milk" that may be used in the manufacture of cheeses and related cheese products. The definitions for "milk" and "nonfat milk" in § 133.3(a) and (b), respectively, list different forms of milk and nonfat milk, including concentrated, reconstituted, and dried forms, that may be used in the making of cheeses and related cheese products. However, fluid or dried filtered forms of milk obtained through mechanical filtration of milk or nonfat milk are not included within these definitions. Therefore, while current regulations permit the use of concentrated, reconstituted, and dried forms of milk and nonfat milk as basic dairy ingredients, they do not provide for the use of fluid or dried filtered milk or fluid or dried filtered nonfat milk as basic dairy ingredients in standardized cheeses and related cheese products.

Mechanical filtration technologies available for milk processing include microfiltration, ultrafiltration, nanofiltration, and reverse osmosis (Refs. 1 and 2). In all of these filtration methods, milk is passed over a series of semipermeable membranes with varying pore sizes. The portion of milk that passes through the membranes is referred to as the "permeate," and the portion that does not pass through the membranes is referred to as the "retentate." While the application of hydraulic pressure is the driving force for these membrane separation processes, the nature of the membrane itself (as well as the orientation of the components) controls which components of milk are separated into the permeate and which components are retained in the retentate during these filtration processes (Refs. 1 and 2). In a

reverse osmosis (RO) filtration, the membrane pore size is such that all components other than water in the milk are retained. Nanofiltration uses membranes with pores that are larger than RO membranes, but smaller than those used in ultrafiltration. In milk processing, nanofiltration can be used to remove water as well as some soluble salts, yet retain all other components of milk (Refs. 1 and 2). Ultrafiltration retains macromolecules and particles larger than about 0.001-0.02 micrometers, while microfiltration is designed to retain particles between about 0.10 micrometers to 5 micrometers (Ref. 1). While there is some overlap in membrane pore sizes and operating pressures used in ultrafiltration and microfiltration (Refs. 1 and 3), in dairy processing, ultrafiltration is typically used to retain all protein components of milk, including casein and whey proteins, while some of the lactose, minerals, and water soluble vitamins present in milk are lost along with water. Microfiltration, on the other hand, is primarily used for fat separation, bacterial removal, and casein concentration, with a resulting loss of whey proteins, lactose, minerals, and water soluble vitamins along with water (Refs. 1, 2, and 3).

#### A. Petitions and Grounds

FDA received two petitions requesting amendments to existing regulations to permit the use of filtered milk in the manufacture of standardized cheeses and related cheese products.

##### 1. The 1999 ADPI Petition

The ADPI filed a citizen petition (CP) on December 2, 1999 (Docket No. 1999P-5198 (formerly Docket No. 99P-5198); hereafter referred to as the ADPI petition) requesting that the FDA amend the definition of "milk," as provided in § 133.3(a), to include fluid UF milk, thereby permitting the use of fluid UF milk in the manufacture of standardized cheeses and related cheese products specified in part 133. ADPI requested that § 133.3(a) be amended to add that "milk may be subjected to an ultrafiltration process that results in a fluid UF milk for use in the manufacture of cheese." In its petition, ADPI stated that the requested amendment would improve efficiencies in cheese manufacturing and result in benefits to consumers without alteration of cheese composition, characteristics, or flavor. FDA reviewed the ADPI petition and determined that it did not present reasonable grounds in accordance with 21 CFR 10.30 to support the requested amendment and, therefore, FDA closed

this petition. However, because the issues raised in the ADPI petition are clearly covered under a second citizen petition (Docket No. 2000P-0586 (formerly Docket No. 00P-0586)/CP2, discussed in section I.A.2 of this document), FDA converted the ADPI petition into a comment to this second petition. ADPI was informed of FDA's action in a letter dated February 26, 2003.

## 2. The 2000 NCI/GMA/NFPA Joint Petition

On June 13, 2000, FDA received a joint petition (Docket No. 2000P-0586 (formerly Docket No. 00P-0586)/CP2; hereafter referred to as the NCI petition) from the NCI, the GMA, and the NFPA requesting an amendment of § 133.3 to include "filtered milk" in the definition of "milk" and "filtered skim milk" in the definition of "nonfat milk" for use in standardized cheeses and related cheese products. The NCI petition also requested that a new subsection be added within § 133.3 to define "filtered milk" as:

\* \* \* the liquid milk product produced by a physical separation technique in which raw or pasteurized milk is passed over one or more semipermeable membranes to partially remove the water phase and its constituents, including water, lactose, whey proteins, and minerals. Either before or after filtration, fat may be separated to produce filtered skim milk. After filtration, water may be partially removed by means of evaporation to produce more concentrated forms of filtered milk."

Based on this definition, FDA believes that the petitioners requested the agency to permit not only ultrafiltration (which typically does not result in a loss of whey proteins), but also other filtration techniques such as microfiltration and subsequent treatment to further concentrate the filtered product, in the manufacture of standardized cheeses and related cheese products. The petitioners withdrew a previous joint petition (Docket No. 2000P-0586 (formerly Docket No. 00P-0586)/CP1) that requested amendments to permit both fluid and dried forms of filtered milk in the manufacture of standardized cheeses and related cheese products.

In support of their requested amendments, the NCI, GMA, and NFPA (hereafter referred to as the petitioners) argued that the amendments requested in the NCI petition are consistent with established FDA policy. Some cheese standards, in addition to specifying a specific procedure for preparing the food, currently provide for the use of "any other procedure which produces a finished cheese having the same physical and chemical properties" (see e.g., standard of identity for cheddar

cheese in § 133.113). The petitioners maintained that these "alternate make procedure" provisions historically have provided the legal basis for the use of milk filtration and the resulting filtered milk in cheese making, regardless of whether the filtration occurs in the same plant as other cheese-making procedures or in a centralized filtration facility. The petitioners believe that FDA has previously acknowledged that the use of filtered milk to manufacture cheddar cheese is covered by the alternate make procedure provision of the standard of identity for cheddar cheese. Furthermore, the petitioners maintained that the requested amendments are fully consistent with the basis and rationale for amendments that FDA previously made to expand the scope of the forms of milk recognized as "milk" for cheese making. The petitioners stated that FDA authorized the use of certain forms of milk because these forms of milk may be used in place of fluid milk to produce a finished cheese that is equivalent physically and chemically to the traditional cheese made using fluid milk.

In addition, the petitioners stated that mechanical filtration has been used in cheese manufacturing in the United States for the past 20 years, and contended that the extensive use of filtration technologies, under the existing "alternate make procedure" provisions within some standards of identity for cheeses, has produced significant benefits by improving product consistency and yields and manufacturing efficiency; lowering milk refrigeration, hauling and whey disposal costs; expanding milk sourcing options; and enabling cheese makers to respond more effectively to regional disruptions in the fluid milk supply. The petitioners also stated that because mechanical filtration removes only those constituents that are removed by loss of whey in traditional cheese making, it functions simply to rearrange the steps in the cheese making process to permit the constituents to be removed earlier. The petitioners further contended that the long history and widespread use of filtration technology under the alternate make procedure provisions have clearly established the equivalence of cheese made from filtered milk and cheese made from other forms of milk explicitly permitted under § 133.3.

The petitioners also argued that cheese made with filtered milk is nutritionally equivalent to traditional cheese because mechanical filtration of milk using membranes with pore sizes between 0.0001 and 0.20 microns removes the water phase constituents (water, soluble protein, lactose,

minerals, and some water soluble vitamins) that otherwise would be removed in the traditional cheese-making process as whey. In fact, the petitioners argued, with respect to filtered milk in cheese, the retentate may actually contain slightly greater concentrations of valuable constituents (e.g., whey proteins) than the cheese curd that remains after loss of whey in traditional cheese making. The petitioners provided analytical data related to cheddar cheese to support their assertion that cheese made with filtered milk is not "nutritionally inferior," as that term is defined in 21 CFR 101.3(e)(4), to cheese made using traditional procedures.

Finally, the petitioners argued that their proposed amendments are consistent with the Codex Alimentarius Commission (Codex) standard for cheese. The Codex standard for cheese (Standard A-6-1978, revised in January 1999) provides for the use of "milk and/or products obtained from milk." The petitioners stated that the Codex standard encompasses mechanical filtration technology, provided the finished cheese meets applicable requirements for physical and chemical properties, which would include nutritional and organoleptic properties.

## B. The Government Accountability Office (GAO)<sup>1</sup> Report

The fiscal year (FY) 2000 FDA appropriations bill from the U.S. Senate requested the Comptroller General to conduct a study to determine the quantity and end use of UF milk imported into the United States and to submit a report describing the results of the study to Congress. In March 2001, GAO reported (hereafter referred to as "the GAO report" (Ref. 4)), in part, that: There are no specific data on UF milk imports because UF milk is classified under the broad category of "milk protein concentrates" (MPC) by the U.S. Customs Service. GAO reported that imports in the broad category of MPC rose dramatically between 1990 and 1999 from about 800 to 45,000 metric tons, the primary reasons being the difference between U.S. and international prices of milk protein, especially nonfat dry milk (NFDM), and the market growth of nutritional supplements and other novel foods using MPC. GAO also reported that dry MPC imports are used in several foods other than cheeses, such as frozen desserts, bakery products, and sports and other nutritional supplement products. Some in the industry note that

<sup>1</sup> The GAO changed its name from the "General Accounting Office" in 2004.

economic disincentives have prevented domestic production of dry MPC. GAO noted that there are limited data on domestic production and use of fluid UF milk in cheese making but found that 22 dairy plants produce fluid UF milk used to make cheese within the plant, while 4 dairy farms in New Mexico and Texas produce fluid UF milk for transport to cheese plants in the Midwest. GAO also found that FDA and State contract inspectors reported no violations related to the use of imported UF milk or MPC in standardized cheese in FY 1999, whereas in FY 2000, two plants in Vermont were issued warning letters for using imported MPC in standardized cheese, and the plants subsequently discontinued this use.

### C. Comments to Petitions

FDA received a total of 58 letters and e-mails, each containing one or more comments, to the ADPI (subsequently converted to a comment to the NCI petition) and the NCI petitions. A large portion of the letters and e-mails received were from individual dairy farmers, organizations representing dairy farmers, and consumers. Nearly half of the comments opposed both the ADPI and NCI petitions, while the other half opposed the NCI petition alone without commenting on the ADPI petition. A few comments expressed support for the ADPI petition, but none of the comments supported the NCI petition. The primary concern expressed by the comments opposing either of the petitions appeared to be the potential economic impact of the use of imported milk ingredients, particularly dried forms of filtered milk or MPC, on U.S. dairy farmers. Some comments also expressed concern about the use of imported milk ingredients on the quality and safety of cheese.

The organizations representing dairy farmers expressed strong opposition to both petitions and stated that the use of filtered milk would undoubtedly lower the quality of cheese products and greatly increase the flood of imports of subsidized MPC and filtered milk with the potential to jeopardize the safety of cheese products. They stated that the filtration process removes calcium and reduces the lactose content of milk and results in cheese that does not have the fullness of flavor of traditional cheese. They further maintained that changing the definition of milk to allow the use of liquid filtered milk would ultimately result in the use of dry filtered MPC and, therefore, they reiterated that even if only liquid filtered milk were allowed, while disallowing dry MPC, they would still be concerned about product quality degradation. In

addition, they stated that changing the definition of milk could result in increased imports of filtered milk from Canada, displacing U.S. milk and causing a surplus. However, these comments did not provide any factual data or information that would lead FDA to believe that the use of fluid UF milk would impact the safety or quality of the product.

Another comment, from an organization representing milk producers, unconditionally endorsed the ADPI petition, but strongly opposed the NCI petition, stating that the commenter does not support any change to § 133.3(a) that alters which products are currently defined as "milk." This comment stated that the language in the NCI petition is sufficiently vague that it may be subject to interpretation such that it subsequently would allow dried forms of UF milk. The comment also stated that permitting only liquid forms of UF milk has general widespread support among different stakeholders, and argued that it is essential to establish a definition of "liquid" UF milk to mitigate potential misinterpretations regarding the use of dried MPC and provide clarity for enforcement. In this regard, the comment suggested that a limitation of 45 percent total solids be included in the definition of "liquid ultrafiltered milk," because a requirement of a maximum of 45 percent total solids would allow for the use of UF technology while preserving the liquid state of the ultrafiltered product and preventing subsequent treatment for concentration beyond ultrafiltration.

### D. Forms of Milk Permitted as Basic Dairy Ingredients

The definitions of "milk" and "nonfat milk" in § 133.3 do not provide for the use of filtered milk or filtered nonfat milk as basic dairy ingredients in standardized cheeses and related cheese products. In 1983, with respect to the use of the forms of milk that are permitted as basic ingredients in cheesemaking, FDA amended § 133.3 to define the class designations "milk," "nonfat milk," and "cream" and provide for alternate forms of milk, nonfat milk, and cream, i.e., concentrated, dried, and reconstituted forms to be used in standardized cheeses and related cheese products (48 FR 2736, January 21, 1983). In the proposed rule, FDA advised of its opinion that these alternate forms can be used to produce the same cheese as produced from fluid cow's milk (43 FR 42127 at 42128, September 19, 1978), which was the only form of milk permitted as the basic ingredient for

cheese manufacture at that time. Filtered forms, however, are not included within "milk" or "nonfat milk" permitted in standardized cheeses and related cheese products.

In the NCI petition, the petitioners argued that the alternate make procedure that is provided for in some cheese standards historically has provided the legal basis for the use of milk filtration and the resulting filtered milk as an ingredient in cheese making. FDA does not agree with the petitioners. The alternate make procedure provision provides for the use of "any other procedure which produces a finished cheese having the same physical and chemical properties" as the procedure specified in the standard. For example, the procedure for making blue cheese described in § 133.106(a)(2) requires *Penicillium roquefortii* spores to be added to the curd. In a final rulemaking in 1983, in response to a comment that this requirement should be changed to permit the addition of spores to dairy ingredients rather than only to the curd, FDA noted that a change is not necessary because the procedure described in § 133.106(a)(2) may be modified as provided for in § 133.106(a)(1), which states that any other procedure may be used which produces a finished cheese having the same physical and chemical properties (48 FR 2736 at 2739). Rather than restricting the manufacturing procedure to the one specifically described in the standard, this provision allows manufacturers to use alternate manufacturing procedures, but not alternate ingredients, provided the alternate manufacturing procedure does not adversely affect the physical and chemical properties of the cheese. However, the alternate make procedure provision does not permit the use of dairy or other ingredients that are not specifically provided for in the cheese standard. Therefore, the alternate make provision of current cheese standards allows manufacturers to appropriately process the basic ingredient milk during the cheese-making process. For example, the ingredient milk may undergo an additional step of ultrafiltration prior to being introduced into the cheese vat in a single within-batch and within-plant production line for cheese making. In such a process, the ingredient that is introduced into the cheese-making process is milk. However, fluid UF milk purchased or brought in from another plant, even within the same company, that is then introduced into cheese making is considered an alternate ingredient because the ultrafiltration process is

used solely for the production of an ingredient that is subsequently used in cheese making. Therefore, in this case, the ingredient is fluid UF milk, not milk.

In the NCI petition, the petitioners also stated that FDA has previously acknowledged that the use of filtered milk to manufacture cheddar cheese is covered by the alternate make procedure provision of the cheddar cheese standard, including when filtration occurs in a separate centralized facility. FDA clarifies that it has previously not objected to the use of fluid UF milk in cheddar cheese under specific circumstances. In 1996, FDA granted temporary permission to Bongards Creamery in Minnesota to manufacture cheddar cheese using fluid UF milk that is produced on a farm in New Mexico. That permission was granted on a limited basis in response to a request from the T.C. Jacoby & Company, Inc., to run a testing program at Bongards Creamery during a pilot period to demonstrate that the finished cheddar cheese made with fluid UF milk as an ingredient has the same physical and chemical characteristics as traditional cheddar cheese (Ref. 5). In its response to T.C. Jacoby & Company, Inc., FDA stated that based on its understanding that “cheddar cheese produced with the retentate that results when milk is subjected to processing in a ultrafiltration system is nutritionally equivalent to and is physically and chemically identical” to cheddar cheese prepared by the standardized procedure, it would not object to the use of fluid UF milk in the manufacture of cheddar cheese at Bongards Creamery on the limited basis described by T.C. Jacoby & Company, Inc. (Ref. 6).

Subsequently, FDA stated its interpretation of the cheese standards that, as written, they do not allow for the use of UF milk as an ingredient (Ref. 7). FDA reaffirms that the use of filtered milk, dried or fluid, including fluid UF milk, as an ingredient is not covered under the alternate make procedures provided for in certain standardized cheeses. However, while FDA has considered the use of UF milk in standardized cheeses, it has stated that it would not object to the experimental use of fluid UF milk as an ingredient in cheddar and mozzarella cheeses (Ref. 7) and that enforcement regarding the use of UF milk as an ingredient in Swiss cheese is not a priority (Ref. 8).

Substances commonly referred to as MPC are also not permitted as ingredients in standardized cheeses. While there is no current FDA regulation that defines “MPC” and this term does not appear to have a standard

definition within the industry, the term “MPC” is generally used to refer to dried forms of filtered milk and dried blends and coprecipitates of milk proteins (Ref. 9). The existing standards of identity in part 133 do not list MPC as a permitted optional ingredient in the manufacture of standardized cheeses or related cheese products. Ingredients that are not specifically provided for by the standard cannot be used in the manufacture of a food named with the standardized term. FDA reiterated this statement in 1983 when FDA amended the standards for nine natural cheeses to bring them into closer conformance with the recommended Codex standards for those cheeses (48 FR 2736). FDA advised that dairy ingredients that may be used in manufacture of standardized cheeses are specifically listed in the individual standards, and that milk-derived ingredients other than those specifically provided for may not be used in these cheeses (48 FR 2736 at 2737). In addition, specific to the use of caseinates in standardized cheeses, FDA previously addressed comments on the use of caseinates in previous rulemakings (48 FR 2736 at 2737 and 58 FR 2431 at 2439, January 6, 1993), and advised that caseinates are not among the dairy ingredients provided for use in the manufacture of standardized cheeses in part 133 and, therefore, cannot be used. FDA reaffirms that ingredients other than those specifically provided for by the individual standards cannot be used in the making of standardized cheeses and related cheese products.

Therefore, under the current regulations, use of filtered milk, including fluid UF milk, as an ingredient in a cheese whose applicable standard(s) does not provide for its use would constitute a deviation from the standard, and such cheese cannot be named by the standardized term. However, under the provisions of 21 CFR 130.17, food manufacturers may request from FDA a temporary marketing permit (TMP) to market a food that is named by the standardized term but that deviates from its standard of identity.

#### *E. Temporary Marketing Permit (TMP)*

On August 1, 2002, FDA received an application from Wells' Dairy, Inc. (Wells' Dairy), for a TMP for the use of UF milk in the manufacture of cottage cheese. In the **Federal Register** of December 9, 2004 (69 FR 71418), FDA announced the issuance of a TMP to Wells' Dairy to market test cottage cheese that deviates from the standard of identity for cottage cheese in that the product is formulated using fluid UF skim milk. For the purpose of this TMP,

fluid UF skim milk was described as “the product obtained by subjecting skim milk to a physical separation process called ultrafiltration using a membrane with a pore size of 10,000 Daltons (Da) molecular weight cut-off (MWCO), resulting in the partial loss of lactose, minerals, water-soluble vitamins, and water present in skim milk.” The TMP also specified that the casein-to-whey protein ratio of skim milk is not altered during the ultrafiltration process and that the moisture content of fluid UF skim milk is about 80 percent. The TMP permitted the addition of such fluid UF skim milk to skim milk at a level needed to increase the total solids of the cheese milk (or final milk used to make cheese) by 5 to 25 percent, and required fluid UF skim milk to be declared in the ingredient statement of the finished cottage cheese as “ultrafiltered skim milk.” The purpose of the permit was to allow Wells' Dairy to measure consumer acceptance of the product, identify mass production problems, and assess commercial feasibility. The permit provided for the temporary market testing of 15 million pounds (lb) (6.8 million kilograms) of the test product for a period of 15 months.

## **II. The Proposal**

### *A. Legal Authority/Statutory Directive*

Section 401 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 341) directs the Secretary of Health and Human Services (the Secretary), to issue regulations fixing and establishing reasonable definitions and standards of identity, quality, or fill of container whenever such action will promote honesty and fair dealing in the interest of consumers. Section 701(e) of the act (21 U.S.C. 371(e)) directs the Secretary to publish a proposal for the amendment or repeal of any definition and standard of identity under section 401 of the act for any dairy product (e.g., cheese) that is based on a petition of any interested persons showing reasonable grounds.

### *B. Options Considered*

FDA considered several options in response to the two petitions, including the following: (1) Denying the two petitions, (2) proposing to permit the use of all fluid forms of filtered milk, (3) proposing to permit the use of all fluid and dried forms of filtered milk, and (4) proposing to permit the use of fluid UF milk. FDA concluded that the first option would not be appropriate given that the NCI petition includes within its scope allowing the use of UF milk in standardized cheeses, which FDA

tentatively concludes, for reasons discussed under option 4, should be permitted.

The second option, to provide for the use of all fluid forms of filtered milk in standardized cheeses, was also determined to be inappropriate. Standards of identity regulations establish the name of the food, which identifies and describes the food's basic nature (43 FR 42118 at 42120, September 19, 1978). As FDA discussed in 1950 during the establishment of the cheese standards of identity, the starting point for all varieties of cheese is milk. In preparing milk for use in cheese making, adjustments may be made by adding or removing milk fat in the form of cream, fresh skim milk, NFDM solids, or concentrated skim milk so that the ratio of milk fat to the nonfat milk solids is at a desired level (15 FR 5656 at 5657, August 24, 1950). FDA reiterates its longstanding interpretation that a basic nature of cheese is that it is a food made using milk as the starting ingredient. Proposing to allow the use of all fluid forms of filtered milk in standardized cheeses was rejected because some forms of filtration concentrates are specific individual components of milk resulting in a retentate that is no longer milk. For example, microfiltration can be used to separate whey proteins along with lactose, minerals, and water-soluble vitamins from milk resulting in the concentration of casein fractions. FDA tentatively believes that such products that are merely concentrates of certain individual milk components are not milk. The use of individual components of milk, such as specific milk proteins, as the basic or starting ingredient in cheese is not consistent with the basic nature of cheese in that cheese is a food prepared using milk, not specific individual components of milk. Moreover, as FDA previously noted, when providing flexibility for use of advances in food technology, food standards should ensure that the basic nature of the food remains essentially the same (60 FR 67492 at 67499, December 29, 1995). FDA tentatively concludes that allowing for the use of technologies that could potentially result in the use of a specific component of milk as the starting ingredient of cheese would seem to violate the intent of the cheese standards of identity to preserve the basic nature of cheese.

In the NCI petition, the petitioners also stated that because mechanical filtration removes only those constituents that are removed by loss of whey in traditional cheese making, it functions simply to rearrange the steps in the cheese-making process to permit the constituents to be removed earlier.

FDA believes that food standards should provide for flexibility in manufacturing procedures and ingredients, provided that the basic nature and essential characteristics of the food are preserved. In determining which filtered products are appropriate for use as ingredients in cheeses, FDA considered how the use of a type of filtered milk affects the basic nature and essential characteristics of cheese. While filtration selectively and variably removes different constituents of milk that are lost, to varying degrees, during the whey removal process in the traditional cheese-making process, we do not agree that this fact can form a sufficient basis to support the use of all forms of fluid filtered milk as ingredients. Some forms of filtration result in retentates that are specific individual components of milk and are no longer milk. In addition, research suggests that milk that is concentrated to higher levels of protein is not suited for use in all types of cheeses, with adverse effects on quality being reported particularly in the case of hard and semi-hard cheeses (Refs. 1, 10, and 11). Moreover, FDA believes that in determining the appropriateness of different forms of filtered milk as ingredients in cheese a primary criterion, based on a fundamental principle of food standards, is whether the use of the filtered milk ensures the integrity of the standardized cheese—its basic nature and essential characteristics. As explained in the previous paragraph, FDA tentatively concludes that the use of a product of microfiltration as the starting ingredient of cheese is not consistent with the basic nature of cheese. Therefore, we do not agree that it is appropriate to provide for the use of all types of fluid filtered milk nor do we agree that the argument about the “rearrangement” of the steps of cheese making (as described by the petitioners) sufficiently supports the appropriateness of the use of all forms of fluid filtered milk as an ingredient.

A third option that was also considered inappropriate was to provide for all filtered milk, including both fluid and dried forms. Under this option, substances such as MPC, dry microfiltered (MF) milk, and caseins would be permissible in standardized cheeses or related cheese products. FDA's concerns regarding the use of all fluid filtered milk, which are stated in the two previous paragraphs, also apply to the use of dried filtered milks. Allowing for the use of technologies that could potentially result in the use of specific components of milk, such as caseins, rather than milk, as the starting

ingredient of cheese would be inconsistent with the basic nature of cheese.

### C. Proposed Amendments

Based on all the information available, including the information presented by the two petitions and the comments received thus far, FDA is proposing to amend the definitions of “milk” and “nonfat milk” in § 133.3 to do the following: (1) Provide for ultrafiltration of milk and nonfat milk and (2) define UF milk and nonfat milk as raw or pasteurized milk or nonfat milk that is passed over one or more semipermeable membranes to partially remove water, lactose, minerals, and water-soluble vitamins without altering the casein-to-whey protein ratio of the milk and resulting in a liquid product. FDA is also proposing that the name of such treated milk is “ultrafiltered milk” or “ultrafiltered nonfat milk,” as appropriate. Consequently, when this type of milk is used, it would be declared in the ingredient statement of the finished food as “ultrafiltered milk” or “ultrafiltered nonfat milk.”

First, providing for the use of fluid UF milk is consistent with the basic nature of cheese in that the starting ingredient is milk. During the process of ultrafiltration, some of the lactose, soluble salts, and water-soluble vitamins of milk pass through the membranes and are removed, while protein, fat, fat-soluble vitamins, and some of the insoluble salts are retained. Therefore, unlike microfiltration, ultrafiltration does not result in the separation of specific fractions of milk proteins.

Second, FDA tentatively concludes that fluid UF milk can be used in standardized cheeses while maintaining the essential characteristics of these cheeses specified in the individual standards of identity in part 133. Scientific literature suggests that fluid UF milk, especially at low concentration factors, can be used in different cheeses (including soft, semi-hard, hard, and direct-acidified cheeses and process cheese) without adversely affecting the physical, chemical, or organoleptic properties of the cheese (Refs. 1, 2, and 11 through 20; Appendix F of the NCI petition). This appears to be especially true with soft cheeses such as cottage cheese (Refs. 1, 14, and 15) and some direct-acidified cheeses (Ref. 12). Specifically with respect to cottage cheese, as noted in section I.E of this document, FDA reviewed relevant scientific information related to the use of fluid UF milk as an ingredient and determined that fluid UF milk may be used in cottage cheese without

adversely affecting the essential physical or chemical characteristics, including nutritional composition and organoleptic properties of cottage cheese. FDA issued a TMP to Wells' Dairy to market test cottage cheese that deviates from the standard of identity for cottage cheese in that the product is formulated using fluid UF skim milk (69 FR 71418).

FDA notes, however, that the scientific literature also includes some reports of adverse effects from the use of fluid UF milk on the texture and development of flavor and aroma of certain cheeses, particularly in semi-hard and hard cheeses and with the use of fluid UF milk at higher concentration factors (Refs. 1, 11, 17, and 21 through 24). FDA points out that the use of fluid UF milk must not adversely affect the physical or chemical characteristics of the cheese. The cheese standards of identity ensure the integrity of the cheese by setting limits on its fat, milk solids-not-fat, and moisture content. In addition, FDA considers nutritional equivalency and organoleptic properties of the cheese among other factors to determine whether the essential characteristics of the cheese are maintained. Providing for the use of fluid UF milk does not preclude a standardized cheese from meeting the existing requirements within the applicable individual standard(s) of identity in part 133. Rather, the use of fluid UF milk would be optional and any cheese made using fluid UF milk would have to meet all the requirements, including the physical and chemical characteristics, specified in the applicable individual standard(s) of identity.

Third, FDA anticipates that providing for the use of fluid UF milk would enable cheese manufacturers to benefit from advances in milk filtration technology and provide them with greater flexibility in cheese making, while preserving the basic nature and essential characteristics of standardized cheese. Further, using ultrafiltration technology may result in better retention of milk proteins and greater cheese yields as well as more uniform product quality (Ref. 1). In addition, the petitioners claimed that using fluid filtered milk (including fluid UF milk) helps manage seasonal imbalances in milk supplies and demand for cheese, and reduces the costs associated with bulk milk distribution, resulting in cost savings that ultimately could be passed on to consumers. Furthermore, declaring fluid UF milk in the ingredient statement of the cheese as "ultrafiltered milk" or "ultrafiltered skim milk," as appropriate, would

enable consumers to identify cheeses made with milk that has undergone ultrafiltration.

Finally, providing for the use of fluid UF milk would bring the standards of identity for cheeses in closer conformity with the international standards adopted by Codex and facilitate increased harmonization. In response to the ADPI and NCI petitions, FDA considered the relevant Codex standards for cheeses and related cheese products. Specifically, FDA reviewed the Codex standards for cheese (Codex Stan A-6), cheeses in brine (group standard) (Codex Stan 208), cottage cheese including creamed cottage cheese (Codex Stan C-16), cream cheese (Codex Stan C-31), extra hard grating cheese (Codex Stan C-35), unripened cheese including fresh cheese (group standard) (Codex Stan 221), named variety process(ed) cheese and spreadable process(ed) cheese (Codex Stan A-8(a)), process(ed) cheese and spreadable process(ed) cheese (Codex Stan A-8(b)), process(ed) cheese preparations (Codex Stan A-8(c)), and whey cheeses (Codex Stan A-7) (Refs. 25-34). FDA notes that several Codex standards such as the standard for cheese, group standard for cheeses in brine, and group standard for unripened cheese including fresh cheese all permit the use of "milk and/or products obtained from milk," which encompasses fluid UF milk, as the raw material in the manufacture of these cheeses, provided the finished cheese meets the relevant physical and chemical properties. Additionally, the Codex standard for whey cheeses provides for the addition of "raw materials of milk origin," including fluid UF milk. Providing for the optional use of fluid UF milk as a basic dairy ingredient in cheeses would be consistent with, although not as expansive as, the provisions of some Codex standards.

In a recent proposed rule (70 FR 29214, May 20, 2005) (the food standards proposal), FDA and FSIS proposed a set of general principles that define how modern food standards should be structured. The agencies also proposed that, if finalized, the agencies will require that a CP for establishing, revising, or eliminating a food standard be submitted in accordance with these general principles. Conversely, the agencies proposed that they may find deficient a petition to establish, revise, or eliminate a food standard that does not follow these general principles. FDA believes that the action proposed here to provide for the use of fluid UF milk as an ingredient in standardized cheeses and related cheese products is consistent with the general principles

proposed in the food standards proposal.

For the reasons explained previously in this section, FDA tentatively concludes that providing for the use of fluid UF milk only, rather than for the use of all fluid filtered milk (as requested by the NCI petition), would promote honesty and fair dealing in the interest of consumers by providing greater flexibility in cheesemaking while preserving the basic nature and essential characteristics of the food. Therefore, FDA proposes to amend the definitions of "milk" and "nonfat milk" within § 133.3 to do the following: (1) Provide for ultrafiltration of milk and nonfat milk and (2) define UF milk and nonfat milk as raw or pasteurized milk or nonfat milk that is passed over one or more semipermeable membranes to partially remove water, lactose, minerals, and water-soluble vitamins without altering the casein-to-whey protein ratio of the milk and resulting in a liquid product. FDA also proposes that the name of such treated milk is "ultrafiltered milk" or "ultrafiltered nonfat milk," as appropriate. Consequently, when this type of milk is used, it would be declared in the ingredient statement of the finished food as "ultrafiltered milk" or "ultrafiltered nonfat milk."

FDA seeks comment on the appropriateness of the proposed amendments, including the provision to permit the use of fluid UF milk and fluid UF nonfat milk. The proposed amendments would allow for optional ultrafiltration of the starting ingredient, milk or nonfat milk, used in cheese manufacturing. Under these proposed amendments, whether a manufacturer uses fluid UF milk is optional and entirely up to the manufacturer.

FDA also seeks comment on the appropriateness of the proposed definition of ultrafiltration. With respect to the requirement for an unaltered casein-to-whey protein ratio during ultrafiltration, FDA acknowledges that some loss of small molecular weight whey proteins may occur during ultrafiltration of milk with the extent of loss partially dependent on the nature of the membrane and the orientation of the molecules in milk (which may be influenced by the treatment of milk prior to or during ultrafiltration). While casein and most whey proteins are retained in the retentate, proteoseptones with low molecular weights may be lost in the permeate. Proteoseptones have a molecular weight between 4,100 and 20,000 Da (Ref. 35). Because there is expected to be free cross-flow of these proteins across the membranes, the loss of the very low

molecular weight proteose-peptones may be small and, therefore, as noted in published reviews, the casein-to-whey protein ratio of milk would not be significantly altered during ultrafiltration (Refs. 36 and 37). Studies also have demonstrated complete retention of whey proteins and a relatively constant casein-to-whey protein ratio in milk that has been ultrafiltered to increasing volume concentration (Refs. 13, 38, and 39). The information presented by Wells' Dairy, Inc., as part of its TMP submission also demonstrates that there is minimal, insignificant loss of true protein in the ultrafiltration permeate resulting in an ultrafiltered retentate with its casein-to-whey protein ratio intact (Docket No. 2004P-0519; 69 FR 71418).

FDA notes that a comment received in response to the two petitions suggested that any definition of ultrafiltration also include a requirement that the fluid UF milk must contain a maximum of 45 percent total solids (or a minimum moisture content of 55 percent). The comment stated that this requirement is necessary to define "liquid" UF milk and preclude any treatment following ultrafiltration to further concentrate UF milk. However, the comment did not provide any supporting information or data on the appropriateness of this minimum level of moisture. In the proposed definition of UF milk, FDA is not proposing a requirement related to minimum moisture content of UF milk; however, the proposed definition states that UF milk is a liquid product. FDA seeks comment on whether there is a need for an added measure to ensure the liquid nature of this ingredient and/or to preclude any subsequent treatment following ultrafiltration to further concentrate the fluid UF milk. If so, does a minimum moisture content requirement sufficiently address this concern and what is an appropriate minimum level of moisture?

FDA also seeks comment on the need for, and appropriateness of, the following: (1) Not permitting other forms of mechanical filtration, such as microfiltration; and (2) the requirement that the casein-to-whey protein ratio remain unaltered during ultrafiltration and the feasibility of such a requirement for compliance and enforcement purposes. If the requirement that the casein-to-whey protein ratio remain unaltered is not appropriate, FDA seeks information on what constitutes an acceptable variation of this ratio during ultrafiltration of milk so that FDA may determine appropriate criteria for purposes of enforcement.

In response to the petitions, FDA received some comments that opposed

the use of any filtered milk, citing product safety and quality concerns; however, these comments did not provide any scientifically sound and valid data to support their objections specifically with regard to fluid UF milk. At this time, FDA does not have any information that raises food safety concerns with the use of fluid UF milk in standardized cheeses. FDA specifically requests that any comments that address the technical aspects of these proposed provisions include sound scientific and factual data or information that support the positions presented in the comments. For example, are there analytical data or other information that would support a determination that standardized cheeses made using fluid UF milk, as defined in this proposed rule, are potentially unsafe or are nutritionally inferior? Are there scientific data or information that demonstrate that the use of fluid UF milk, as defined in this proposed rule, adversely affects the physical, chemical, or sensory characteristics of a particular standardized cheese or cheese product or that would support the determination that the use of fluid UF milk is not appropriate in a particular standardized cheese or cheese product?

### III. Executive Order 12866: Cost Benefit Analysis

FDA has examined the economic implications of this proposed amendment for part 133 as required by Executive Order 12866. 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). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of \$100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues. FDA has determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866.

#### A. Need for Regulation

Under current standards of identity for cheese and cheese products, the definitions of "milk" and "nonfat milk" do not encompass "filtered milk". As a result, while these definitions list milk,

nonfat milk, and the different forms (including concentrated, reconstituted, and dried) that can be used in making standardized cheeses, they do not explicitly permit the use of filtered milk as an ingredient in standardized cheeses. The use of filtered milk in cheese making provides greater flexibility and potential cost savings to cheese producers while still preserving the basic nature and essential characteristics of the food. FDA tentatively concludes that revision of the standard is needed to promote honesty and competition in the interest of consumers and to allow dairy producers to utilize a safe and effective technology.

#### B. Background and Current Industry Practices

The sources for this analysis were compiled from food research and chemistry journals, milk and cheese industry publications, U.S. Department of Agriculture (USDA) data and reports, other government agency reports, and expert opinions. Sources cited in this text refer to the specific passage or data reported, but all sources found at the end of the document were used to formulate the basis of the analysis.

The standardization of casein and fat content in milk is a common practice in cheese production that improves the consistency of the final products, reduces the volatility of total milk ingredient costs, and increases the amount of cheese produced per vat (Ref. 9). Not all cheese producers standardize their milk, but the amount of protein, specifically in the form of casein, present in milk for cheese production is the single largest factor affecting cheese yield. Condensed skim milk and NFDM are widely used to increase the amount of casein in cheese milk (Refs. 9 and 40). In 2001, the dairy industry purchased 621 million lb of NFDM, 67.5 percent of all domestic sales of NFDM. The use of NFDM in hard cheeses made up 43.3 percent of the total amount purchased by the dairy industry, and cottage and cream cheeses accounted for an additional 6.2 percent (Ref. 41).

By adding condensed milk or NFDM the cheese producer is adding lactose and minerals that must later be removed from the curd at a greater rate than the casein that provides the benefits (Ref. 40). Ideally, cheese producers would standardize their cheese milk with a higher concentration of protein without adding components that later have to be removed. The key components of milk products used in cheese making are listed in table 1 of this document.

TABLE 1.—COMPOSITION OF MILK PRODUCTS

Component <sup>1</sup>	Milk (%)	Nonfat Dry Milk (%)	Fluid UF Milk (%)	Dry UF Milk (%)	Fluid MF Milk (%) <sup>2</sup>	Isolated Casein (%)
Protein	3.3	36	4.48–11.94	42–80	7.9	89–94
Fat	3.65	0.8	5.51–14.68	1–2.5	10.5	1.5 <sup>3</sup>
Lactose	4.75	52	4.59–3.68	46–4.1	4.7	0–0.2 <sup>3</sup>

<sup>1</sup> Percentages compiled from the Wisconsin Center for Dairy Research and the Wisconsin Milk Marketing Board White Paper (2001), Fassbender (2001), Innovations in Dairy (2001), and GAO (2001).

<sup>2</sup> As in the case of fluid UF milk, the composition of fluid MF milk can vary but we were unable to find a range of values of protein, fat, and lactose content of fluid MF milk in the literature.

<sup>3</sup> Maximum values.

Table 1 of this document, reflects the fact that UF milk can be concentrated to a greater or lesser extent to meet the needs of different manufacturing processes. For some cheeses, the UF milk can be highly concentrated then mixed with cream to produce a liquid “precheese” with the same gross composition as the final cheese. It has been shown that this precheese can be used in continuous process cheese making without the use of vats (Refs. 10 and 42). Some soft cheeses, processed cheese, and direct acidified cheese, particularly those made from goat’s and sheep’s milk, have been reported to be successfully produced using highly concentrated UF milk (Refs. 12, 13, and 43). However, the high concentration of the retentate may affect some properties of the milk and require specially designed equipment (Ref. 2).

More widely accepted for the common styles of cheese consumed in the United States appears to be the use of lower concentrations of UF milk to standardize the protein concentration in cheese milk to produce higher final cheese yields (Refs. 4, 10, and 44). Low concentration UF milk replaces a percentage of milk, usually between 10 and 20 percent, to provide a higher level of casein in the cheese milk without the addition of lactose and minerals (Ref. 40). Most of the benefits of using UF milk are from standardizing the protein concentrations while still allowing conventional cheese-making equipment to be used, or easily adapted for use (Ref. 10). Other uses include UF milk replacement to eliminate the natural seasonal variation in milk quality, improving the consistency of cheese (Ref. 9).

For the purpose of the economics analysis, and without making any declarations about what FDA believes is technically sufficient, we use a low concentration of UF milk with approximately 10 percent replacement as the appropriate reference for 80 percent of all cheese made in the United States. This is based on research that

suggests that low concentration replacement has been successfully used in Cheddar and Mozzarella cheeses (Refs. 1 and 9), whereas continuous process cheese-making from high concentration UF milk was not (Ref. 9). These two cheeses alone made up two-thirds of domestic cheese production in 2002 with Swiss and other American cheeses, making up an additional 13 percent (Ref. 45). If this proposed rule is finalized, all standardized cheese made in the United States, regardless of the variety and including those that implement UF technology, must continue to meet the physical and chemical properties specified in the standard.

Amending the standard of identity of cheese has the potential to affect two related sectors of the dairy industry: Dairy processors and cheese producers. Milk is produced on dairy farms daily, with the volume and composition varying both seasonally and daily. The milk is picked up from dairy farms and transported by milk haulers to cooperatives or proprietary operations for distribution or further processing. Large dairy farms may encompass production, processing, and even hard-product manufacturing facilities all at one site, whereas other dairy farms may belong to a cooperative or sell their milk to a proprietary operation that processes or further distributes the milk at its own discretion. Except in the cases of large operations, dairy farms do not usually process their own milk. Therefore, while there are almost 92,000 dairy operations (an operation is a place with one or more milk cows; a farm may include more than one operation) in the United States (Ref. 46), the unit of measurement for purchasing UF technology is the dairy processor who collects milk from one or more dairy operations. In addition to making the capital investment in UF technology, dairy processors would benefit from the decreased costs for transporting and storing UF milk during shipment to cheese producers.

Cheese producers, while not the direct purchasers of UF technology, would still be affected by the changes in the definition of milk in standardized cheese if they choose to replace some of their ingredient milk with UF milk. Many of the benefits of using UF milk in cheese accrue to the cheese producers directly, including, e.g., higher cheese yields and increased production efficiency as well as a greater ability to eliminate the natural variation in their milk supplies, and reduced storage costs.

Dairy processors and cheese producers are not mutually exclusive categories. A dairy processor is a manufacturer of dairy products made using milk as the main dairy ingredient. Therefore, cheese producers are all dairy processors, but not all dairy processors produce cheese. In 2002 there were 403 cheese plants and 1,153 dairy processors in the United States (Ref. 45). Some dairy processors either manufacture cheese directly or manufacture dairy products that are sold to cheese producers. However, some dairy processors produce no cheese products or ingredients whatsoever, and instead, produce a variety of other dairy products including fluid milk, butter, ice cream, and whey products. It is also worth noting that dairy processors include cooperatives. In 1997 there were 226 dairy cooperatives that ranged in primary function from bargaining-only to hard-product manufacturing and fluid processing (Ref. 47).

We measure benefits as the net decrease in the cost of producing cheese. These benefits accrue from all types of protein-standardization; however, the extent of the benefits will vary depending on the milk product used. These benefits lead to cost savings that could be passed along to consumers if the market is opened to a larger number of dairy producers within the industry and competition among cheese producers is enhanced. When only those milk processors that are large

enough to incorporate UF technology in legitimate alternate-make procedures (i.e., within plant and within batch) are allowed to use the cost-saving technology in standardized cheeses, they will be able to sell their goods at the market price, which is based on competition among firms with higher production costs. If, however, the market is broadened so that all firms, large and small, are able to use the cost-saving technology, competition among these firms should bid down the market price of cheese, passing the savings on to consumers.

We measure the costs of using filtered milk to make standardized cheese as losses to consumers who prefer cheese made under the existing milk definitions, domestic and international market adjustments, and government purchases required under USDA's Commodity Credit Corp., program. Increases in government purchases of dairy products will not incur unless the market prices of specific products fall below the government floor prices.

### C. Regulatory Options

We analyze several options for amending the standards of identity for cheeses and cheese products. Option 1 would amend the definition of milk in the standards of identity for cheeses to allow fluid UF milk to be used. Option 2 would allow fluid UF milk and dry UF milk. Option 3 would amend the definition of milk in the standards of identity for cheese to allow all filtration methods that resulted in a fluid milk product to be used in cheese production. Option 4 would allow all filtration methods that resulted in fluid or dry milk products to be used. Option 5 would allow all milk or products obtained from milk to be used in cheese production, in concert with the Codex general standard for cheese.

We estimate the benefits and costs of the regulatory option compared with the benefits and costs of a baseline. The baseline reflects the state of the industry before any new regulation is put in place. Therefore, in this analysis the baseline is leaving the standard of identity for cheese unmodified, i.e., milk, nonfat milk, and the concentrated, reconstituted, and dried forms of milk and nonfat milk are the only basic ingredients allowed in the production of standardized cheese. Due to the "extensive use of nonfat dry milk (NFDM) as an ingredient for cheese manufacture in the United States" (Ref. 9), the baseline assumes NFDM is used as the source of supplemental solids in cheese manufacture. For purposes of this analysis, we assume that the

benefits and costs of the baseline are zero.

#### *Option 1: Allow fluid UF milk to be used in the making of standardized cheeses*

This option would allow fluid UF milk to be used in the making of standardized cheese. For most U.S. cheese production, this option would result in replacing a percentage of the milk used in the production of cheese with fluid UF milk. This option differs from the baseline by substituting fluid UF milk for NFDM as the protein-dense replacement milk ingredient.

*Benefits of Option 1:* Fluid UF milk retains more moisture from milk than NFDM does, so as a percentage of total composition, UF milk has less protein than NFDM. However, it also contains less lactose than either NFDM or milk. In fact, the more highly concentrated the milk is, (the concentrations listed in table 1 of this document, vary from 1.5 to 4 times the solids concentration of milk), the more protein is retained and the less lactose is unnecessarily added. Replacement of milk with fluid UF milk during the manufacturing process produces yield increases per vat, thus spreading out fixed costs (labor, equipment, physical facility) over more total weight of cheese (Ref. 9). According to the Technical Director of North American Milk Products, a cheese plant that replaces 10 percent of its daily milk inputs with fluid UF skim milk would see an increase in cheese yield of 12 percent. This increase in yield lowers costs by up to two cents per pound of cheese (Ref. 48). In 2002, 8.6 billion pounds of cheese were produced (Ref. 45). Therefore, the yield increase due to partial replacement of milk with fluid UF milk in all U.S. cheese production could save about \$172 million per year (\$0.02 per pound x 8.6 billion pounds).

This estimate may understate the potential cost savings; Fassbender (Ref. 49) states that a 10 percent replacement produces a yield increase of 25 percent, and an article from Dairy Management, Inc., states that a 10–15 percent replacement produces a yield increase as high as 18 percent (Ref. 50). In addition, the amount of rennet and starter cultures which are added to cheese milk can be reduced due to the higher solids content in the cheese milk. In one fluid UF milk research study at the Wisconsin Center for Dairy Research, a plant was able to reduce the rennet usage by 4 ounces per vat, for a total annual savings of over \$28,000 (Ref. 49). If we assume this plant is representative of all cheese manufacturing plants, then multiplying \$28,000 by the 403 cheese plants in 2002 (Ref. 45) gives a rough figure of

\$11 million savings in coagulant usage annually. FDA notes that these estimates are uncertain and seeks comment on the cost savings from rennet and starter cultures.

Estimating the net social benefits from implementing UF technology requires subtracting out the private costs to firms of making the necessary capital investments. Milk is increasingly being ultrafiltered during the processing stage, usually at manufacturing plants or dairy cooperatives, so we assume that no capital investment in equipment by the cheese maker is needed to take advantage of UF technology for low level fluid UF milk concentration replacement (Ref. 48). Cheese producers can simply replace a portion of milk with fluid UF milk purchased from a dairy processor without purchasing new equipment.

An early cost-benefit analysis of fluid UF milk production by Slack, et al. (Ref. 51), found that the benefits of UF milk production outweighed the costs for dairy farms with over 100 cows. However, this threshold has likely changed as the latest Pasteurized Milk Ordinance (April 2003 edition) loosened the restriction that allowed only single pass UF systems to now allowing for less expensive recirculating UF systems. Informal conversations with industry representatives revealed that the smallest single pass UF systems being marketed can process 300,000 lb of milk per day, the equivalent of production from almost 5,000 cows (300,000 lb is roughly 34,800 gallons, which at 7 to 8 gallons per cow per day, is 4,350 to 4,971 cows). Recirculating systems, on the other hand, are available for flow rates of 800 gallons per day, or production from approximately 100 cows (Ref. 52).

The costs of implementing fluid UF technology differ for four categories of dairy processors.

- If a processor already produces fluid UF milk, there is no additional cost to allowing the extended definition of milk in standardized cheese.
- If a processor collects milk from fewer than 100 cows, UF technology may not be economically feasible. If cheese producers switch their input purchases away from milk to fluid UF milk, there might be a redistribution of income away from these very small dairy processors. FDA believes that few, if any, milk processors will fall into this category. Even though there are many small dairy farms (72,070 in 2002) milk is not necessarily ultrafiltered on-farm. Instead, small dairy farms have the option of combining milk with other dairy farms in member-owned cooperatives or selling milk to

proprietary operations that combine milk from several farms for processing. The USDA defines a "small" dairy cooperative as handling less than 50 million lb of milk each year (Ref. 53), which is roughly the equivalent of milk from 2,000 cows per day and well above the 100 cow minimum.

- If a processor collects milk from more than 100 cows but less than 4,000 and is not currently producing fluid UF milk, then the cost of purchasing recirculating UF equipment ranges from \$175,000 to \$350,000 (Ref. 52).

- If a processor collects milk from 4,000 or more cows and is not currently producing fluid UF milk, then the cost of purchasing UF equipment ranges from \$350,000 for a recirculating system to \$1,372,500 for a single-pass system (Ref. 52).

Of the 1,153 dairy processors (which includes dairy cooperatives that process milk for members), an unknown portion would purchase UF technology in response to this proposed rule if finalized. In 2002, cheese production used 64,504 million lb of milk, which is approximately 61 percent of the 105,961 million lb used in all manufactured dairy products (Ref. 45). Therefore, we estimate that 61 percent of the dairy manufacturing plants process milk for cheese, for a total of 703 dairy plants. Given that at least 22 dairy manufacturing plants and 4 large dairy farms already produce fluid UF milk (Ref. 4), a total of 677 dairy processors may choose to purchase UF technology as a result of changing the definition of milk in § 133.3. Assuming that new

purchases of UF equipment would more likely be recirculating systems, the total one time capital expenditure would range from \$118 to \$237 million. Given that the UF equipment depreciates over 7 to 14 years (Ref. 1), we estimated the annualized cost over a 10 year period. With a 3 percent interest rate, the annualized cost ranges from \$14 to \$28 million. With a 7 percent interest rate, the annualized cost ranges from \$17 to \$34 million. The annualized cost ranges indicate the capital expenditure ranges based on the equipment capacity needs described previously in this document.

Milk is produced daily, with the volume and composition varying both seasonally and daily. Demand for dairy products also varies both seasonally and daily, but demand variations are not correlated with supply variations (e.g., milk production peaks in the spring, but demand for milk and butter peaks in the fall months) (Ref. 53). Cheese producers, however, need to provide a consistent quality cheese, regardless of the day or season in which the inputs were produced. Replacing a given portion of milk with UF milk can eliminate the daily variation that occurs in milk composition by standardizing the ratio of casein to fat. However, fluid UF milk does not offer any price stability from seasonal fluctuations that occur in the supply and demand for both milk and cheese, since it cannot be stored past the short term in a liquid form. Nonfat dry milk has a shelf-life of 12 to 18 months (Ref. 50) and may offer more price stability from seasonal fluctuations.

The transportation and storage costs associated with fluid UF milk are lower than milk due to the removal of approximately two-thirds of the water, lactose, and ash during the filtration process (Ref. 48). The 2001 GAO Report cites a shipment of fluid UF milk by Select Milk Producers, Inc., in which the cost of transporting fluid UF milk was 73 percent lower than the cost of transporting milk. In this same year, milk hauling charges in the Upper Midwest Marketing Area (which includes California and Wisconsin, the top two milk producing states) averaged 17.1 cents per hundredweight (cwt) of milk (Ref. 54). A 73 percent price reduction in this average hauling cost lowers the cost of hauling fluid UF milk to an average of 4.62 cents per cwt. As stated in the section I of this document, we assume that for approximately 80 percent of the cheese produced in the United States, fluid UF milk is used as a substitute in cheese production, not for milk, but for the baseline standardizing ingredient, NFDM. To calculate the transportation savings for these cheeses, we take the 64,504 million pounds of milk used in cheese production in 2002 (Ref. 45) and multiply by 80 percent to capture the amount shipped for American style natural cheeses. We then calculate 10 percent of this total to be replaced by fluid UF milk and convert it to cwt. This is the amount of milk that is subject to a 73 percent reduction in shipping costs, giving a total annual cost savings of about \$7 million as follows:

#### CALCULATION OF TRANSPORTATION COST SAVINGS FOR FLUID UF MILK USED IN AMERICAN STYLE NATURAL CHEESE

80% X 64,504 million lb	=	51,603 million lb of milk shipped for American cheese production
10% X 51,603 million lb	=	5,160 million lb of milk filtered before shipment to cheese factory
5,160 million lbs/100 lb	=	51.6 million cwt of milk filtered before shipment
73% of 17.1 cents/cwt	=	\$0.13 savings per cwt of fluid UF milk shipped
\$0.13 X 51.6 million cwt	=	\$6.7 million

There would be an additional transportation and storage cost savings for the varieties of cheese that are well-suited to high concentrations of UF milk where replacement values are closer to 100 percent of the original milk. To get

a potential range for what this cost savings would be, we calculated the transportation savings assuming that the remaining 20 percent of cheese production would use only UF milk for an upper bound and assuming only 2

percent of cheese production would replace 100 percent of milk in cheese production as a lower bound. The annual transportation savings here range from \$2 to \$17 million (See below).

#### CALCULATION OF UPPER BOUND OF TRANSPORTATION COST SAVINGS FOR 100% FLUID UF MILK REPLACEMENT

20% X 64,504 million lb	=	12,901 million lb of milk shipped for all other cheese production
100% X 12,901 million lb	=	12,901 million lb of milk filtered before shipment to cheese factory
12,901 million lb/100 lb	=	129 million cwt of milk filtered before shipment
73% of 17.1 cents/cwt	=	\$0.13 savings per cwt of UF milk shipped
\$0.13 X 129 million cwt	=	\$16.8 million

#### CALCULATION OF LOWER BOUND OF TRANSPORTATION COST SAVINGS FOR 100% FLUID UF MILK REPLACEMENT

2% X 64,504 million lb	=	1,290 million lb of milk shipped for other cheese production
100% X 1,290 million lb	=	1,290 million lb of milk filtered before shipment to cheese factory
1,290 million lbs/100 lb	=	12.9 million cwt of milk filtered before shipment
73% of 17.1 cents/cwt	=	\$0.13 savings per cwt of UF milk shipped
\$0.13 X 12.9 million cwt	=	\$1.7 million

In terms of total transportation cost savings for all cheese production, this calculation gives an annual savings between \$9 and \$24 million for replacing milk with fluid UF milk in cheese production. While this is a cost savings over using milk in cheese production, it is not a savings over using NFDM. Reducing the moisture content of milk by two-thirds reduced the shipping costs by 73 percent, so it is reasonable to assume that NFDM with only 3.2 percent moisture (Ref. 40) and an increased shelf-life of 12 to 18 months (Ref. 50) would be significantly less expensive to ship and store than UF milk. Compared with the baseline then, these savings would be reduced by an amount in excess of \$7 million due to the actual increase in costs from replacing NFDM with fluid UF milk.

The total annual benefits from using fluid UF milk to make standardized cheeses are uncertain, partly because the number of additional plants that would use the UF technology is uncertain. The cost savings also depend on the size of the plants that decide to invest, the amount of milk which cheese producers replace with fluid UF milk, and whether fluid UF milk replaces milk or NFDM in the production process. If all dairy plants switch to UF technology, the yield and coagulant savings would be high, but investment costs would also rise. If most plants already use this technology, or decide against investing, the yield, coagulant, and transportation savings would be low. If NFDM is not extensively used in current cheese production, the transportation savings will be greater. Finally, if larger plants already have UF technology the total capital investment costs will decrease but yield increases will not be as dramatic as only smaller systems will potentially invest as a result of changing the definition.

In addition to the technical benefits in cheese production from allowing fluid UF milk to be used in standardized cheese production, amending the standards offers another economic benefit. Specifically, allowing fluid UF milk to be used as an ingredient in cheese would open the benefits of UF technology to a wider range of cheese manufacturers. Currently, fluid UF milk can be used in standardized cheese production only under "alternate make" procedures. Under the alternate make procedure provisions, manufacturers of cheese who purchase or produce milk in sufficient quantity to use UF technology may substitute the ultrafiltration of milk as a step in the cheese-making process as long as the final finished cheese has the same physical and chemical properties as the cheese produced under

the procedure specified by the standard of identity. This provision only allows for the use of alternate procedures and not for alternate ingredients. Therefore, the use of UF technology must be within plant and within batch; fluid UF milk purchased from another plant, even within the same company, is considered an alternate ingredient. Allowing fluid UF milk as an ingredient effectively removes the barriers to shipment of fluid UF milk to cheese producers throughout the country and allows for greater competition in the market for cheese ingredients.

As stated previously in this document, approximately 22 dairy manufacturing plants and four large dairy farms produce UF milk. It is difficult to ascertain how much of the UF milk is being used within plants under alternate make procedure provisions, and how much is being shipped to outside plants. Few records are kept either by the USDA or trade associations regarding intermediate products like fluid UF milk (See GAO report). In 1996, the FDA permitted a single New Mexico plant to produce cold UF milk for shipment to a cheese-making plant in Minnesota for trial purposes only. Subsequently, the New Mexico plant is said to have increased shipments of UF milk to 15 plants throughout the country (Ref. 49).

Allowing fluid UF milk to be used in standardized cheese production could significantly increase the number of plants using this cost-saving technology, particularly among smaller operations that cannot currently afford to purchase UF technology. These smaller cheese producers that cannot afford to filter milk as a step in the production process could purchase UF milk from a dairy processor. In 2002, there were 403 cheese plants and 1,153 dairy manufacturing plants spread across all fifty states (Ref. 45) but only 26 dairy plants and farms were producing UF milk. The supply of UF milk is restricted by the current definition, potentially increasing its cost as an input to cheese production.

*Costs of Option 1:* There are no health costs associated with the lower production costs of cheese made with fluid UF milk.

If consumers prefer cheese made under the existing milk definition and if they purchase cheese made from fluid UF milk believing it to be made from milk under the existing definition, there will be a small cost incurred by the consumer. However, even though the total dollar amount spent on cheese is large (in 2000, the retail price of 1 lb of natural cheddar cheese was \$3.83 (Ref. 55) and 8.2 billion lb of all cheeses

(excluding cottage cheeses) were produced (Ref. 45), for total consumer expenditure of \$31.4 billion) the costs incurred from fluid UF milk are likely to be low because standardized cheeses do not tend to have credence attributes. Credence attributes are characteristics that consumers are willing to pay more for, even though they are not detectable after consumption (e.g., "dolphin-safe" tuna). The growth in the dairy products over the past 20 years has been largely attributed to increased demand for pizza and fast food products that contain cheese, particularly Mozzarella and American cheese (Ref. 56). These are not the varieties of cheese that tend to be associated with cheese connoisseurs who demand purity in cheese ingredients. There is no evidence that consumers place a premium on cheeses made under the existing definition, in particular because cheese made with UF technology must have the same physical and chemical properties as cheese made under the existing milk definition and because an unknown quantity of cheeses produced in the United States are already made using UF technology under the alternate make procedure provisions.

The U.S. dairy market is regulated under both Federal and State regulations. The U.S. Government provides price supports for domestic milk production under the USDA's Commodity Credit Corp. A potential drop in the demand for milk as cheese producers switch to fluid UF milk could result in the market price dropping below the support price, thus forcing the government to purchase a larger amount of milk. However, fluid UF milk is produced by separating the components of milk. Therefore, any decrease in the domestic demand for milk resulting from the production and sale of fluid UF milk will be off-set by a decrease in the supply of milk, as dairies ultrafilter some of their milk instead of selling it directly. As a result, the quantity of milk purchased by the government is left unchanged. Stated another way, if cheese producers purchase fluid UF milk instead of other milk, the demand for milk from cheese producers will fall, while the demand for fluid UF milk from cheese producers will rise. As a result, the dairy processors who find it profitable to do so will decrease their supply of milk and instead ultrafilter the milk before they sell it to the cheese producer. If no dairy processors find it profitable to ultrafilter their milk before selling it, then cheese producers will have no choice but to purchase milk, again

leaving the amount purchased by the government unchanged.

In addition, the U.S. Government provides export subsidies under the Dairy Export Incentive Program. Fluid UF milk is less expensive to transport than milk under the standard definition of milk in cheese, leading to fears that expanding the use of fluid UF milk may increase imports and further decrease the demand for domestic milk. As of the first 9 months of 2002, all UF milk imported into the United States was in a dry powder form categorized as MPC (Ref. 57). Therefore, allowing the use of fluid UF milk as an ingredient in the standard of identity of cheese should not cause foreign-produced UF milk to replace domestic milk in cheese production or cause U.S. Government purchases under the Commodity Credit Corp. to rise.

*Option 2: Allow fluid and dry UF milk in standardized cheese production*

This option would allow UF milk either in fluid or spray-dried form. Dry UF milk is often referred to as MPC, though the definition of MPC is not consistently used and sometimes includes other dried filtered or concentrated milk products. This option differs from the baseline and Option 1 by substituting dry UF milk for NFDm or fluid UF milk as an ingredient in standardized cheeses.

*Benefits of Option 2:* The protein composition of dry UF milk ranges from 42 percent to 80 percent (Ref. 40), depending on the degree of concentration. In addition, as the protein concentration increases, the lactose content decreases from 46 percent to just 4.1 percent at the highest concentrations. Therefore, the supplementation of cheese milk with dry UF milk during the manufacturing process produces even larger yield increases per vat than fluid UF milk or NFDm, thus further spreading out fixed costs (labor, equipment, physical facility) over more total weight of cheese. Given these larger cheese yield increases over fluid UF milk, it is safe to assume that the total yearly savings from using dry UF milk would exceed \$172 million. In addition, the amount of rennet and starter cultures which are added to cheese milk can be reduced due to the higher solids content in the cheese milk. The rough figure of \$11 million savings in coagulant usage annually calculated in Option 1 is applicable here as well.

Calculating the net social benefits to implementing UF technology requires subtracting out the private costs to firms of making the necessary capital investments. Similar to fluid UF milk, dry UF milk production occurs at the

processing stage, usually at manufacturing plants or dairy cooperatives, so we assume no capital investment in equipment by the cheese producer is needed to take advantage of dry UF technology for low concentration UF milk replacement. Cheese producers can simply replace a portion of milk with dry UF milk purchased from a dairy processor without purchasing new equipment.

The costs of implementing dry UF technology varies among different types of dairy processors and will depend on their current production technology. If a dairy processor already produces UF milk and NFDm, there is no additional cost to allowing the extended definition of milk in standardized cheese. If a processor collects milk from fewer than 100 cows, it may not be economically feasible to implement the UF process, making dry UF milk production impossible even if the dairy processor has appropriate drying technology. If a dairy processor collects milk from 100 to 4,000 cows and is not currently producing UF milk, then the cost of implementing a UF system ranges from \$175,000 to \$350,000, depending on the size of the plant. If a processor collects milk from 4,000 or more cows and is not currently producing UF milk, then the cost of purchasing UF equipment ranges from \$350,000 for a recirculating system to \$1,372,500 for a single-pass system. Using the same method as Option 1, the total one time capital expenditure for dairy processors who sell their products to cheese producers would be \$118 to \$237 million. If the dairy processor does not own a spray dryer, additional capital costs would be necessary, on the order of \$750,000 (Ref. 58). If half of all 703 dairy plants had to purchase this equipment, the one-time capital expenditure would grow by \$264 million for a total of \$382 to \$501 million. Given that the UF equipment depreciates over 7 to 14 years (Ref. 1), we estimated the annualized cost over a 10-year period. With a 3-percent interest rate, the annualized cost ranges from \$45 to \$59 million. With a 7-percent interest rate, the annualized cost ranges from \$54 to \$71 million. The annualized cost ranges indicate the capital expenditure ranges based on the equipment capacity needs described previously in this document.

Similar to NFDm, spray-drying UF milk significantly increases the shelf-life of the milk. Using such milk powders can eliminate the natural daily and seasonal variation that occurs in milk composition (by standardizing the ratio of casein to fat). In addition, the ability to store dry UF milk allows the cheese producer to offset the volatility of fresh

milk prices (Ref. 9) and be better able to balance seasonal imbalances than milk or fluid UF milk.

The transportation and storage costs associated with dry UF milk are lower than either milk or fluid UF milk due to the removal of approximately 95 percent of the water, lactose, and ash (Ref. 40) during the ultrafiltration and subsequent drying processes. The moisture content of dry UF milk is similar to that of NFDm; therefore, it is reasonable to assume that shipping and storage costs would also be similar for replacing NFDm with dry UF milk in protein standardization. If NFDm is not being used for protein standardization, then dry UF milk could offer substantial benefits compared to the transportation and storage of milk, possibly reducing these costs up to 95 percent.

A review of the literature found no manufacturers of dry UF milk in the United States; however, informal conversations with industry representatives revealed one joint venture in New Mexico that currently produces dry UF milk and possibly another firm in New York (Ref. 59). Little is known about the cost of producing dry UF milk, and why there is little to no U.S. production is a matter of some debate. The price floor set by the U.S. Dairy Price Support Program for NFDm is often cited as the cause. At the current levels of government purchase prices for milk protein, U.S. manufacturers of dry UF milk products would obtain the same or lower return per pound of protein than they would for producing NFDm. Given the higher manufacturing costs associated with UF technology, dairy producers in the United States are often better off producing NFDm and selling it to the government than producing dry UF milk products for cheese and other food uses (Ref. 60). Foreign firms who currently export dry UF milk to the United States have greater incentive to open their own plants in the United States, as it would reduce their transportation and tariff costs.

*Costs of Option 2:* There are no health costs associated with the lower production costs of cheese made with fluid or dry UF milk.

If consumers prefer cheese made under the existing milk definition and if they purchase cheese made from dry UF milk believing it to be made from milk under the existing definition, there will be a small cost incurred by the consumer. However, even though the total dollar amount spent on cheese is large (about \$31.4 billion in 2000) the costs incurred from dry UF milk are likely to be low because standardized cheeses do not tend to have credence

attributes and there is no evidence that consumers place a premium on cheeses made under the existing definition. Cheese made with UF technology must have the same physical and chemical properties as cheese made under the existing definition of milk within the cheese standards.

There is some concern over whether allowing dry UF milk (presumably imported from other countries) in the definition of milk in cheese would displace purchases of other dairy substitutes that are domestically produced. A drop in the demand for milk or NFDN as cheese producers switch to purchasing dry UF milk could result in the market price dropping below the support price, thus forcing the government to purchase a larger amount of milk. In addition, since dry UF milk is much less expensive to transport than milk and even fluid UF milk, expanding the use of dry UF milk may increase imports and further decrease the demand for domestic milk.

As in the case with fluid UF milk, if domestic production of dry UF milk increases as a result of the change in definition, any decrease in the domestic demand for milk resulting from the production and sale of dry UF milk would be offset by an decrease in the supply of milk, as dairies ultrafilter and dry some of their milk instead of selling it directly. As a result, the quantity of milk purchased by the government would be left unchanged. However, unlike fluid UF milk, dry UF milk is imported from other countries with no restrictions on the quantity and under a very low tariff rate (Ref. 60). The U.S. Government does not directly support the price of dry UF milk under the Credit Commodity Corp., purchases; however, if foreign-produced dry UF milk is substituted in production for NFDN and other milk products, increases in dry UF milk imports would cause government purchases of dairy products to increase. If, on the other hand, allowing dry UF milk to be used in the production of standardized cheese causes domestic manufacturers of NFDN to produce dry UF milk instead, the amount of government purchases of NFDN may actually decrease as resources shift to the new product.

The inconsistency with which the term MPC is used makes it difficult to discern how much foreign-produced dry UF milk is being imported into FDA's Operational and Administrative System for Import Support (OASIS) database includes MPC as a separately identifiable product; however, many dried dairy substances other than dry UF milk are also included in this

category, including milk protein isolate, whey protein concentrate, whey protein isolate, casein, milk protein stabilizer, emulsifier or binder, peptones, and total milk proteinate. Without a standard definition for MPC it is not clear that even imports labeled specifically as MPC are 100 percent dry UF milk.

In his analysis of MPC imports and the commercial disappearance of NFDN, Jesse (Ref. 60) separated the concentrated milk protein imports into the following four categories: MPC, Casein-MPC, Casein, and Caseinates/Other Casein Derivatives. Then, looking only at the category of MPCs, imports increased steadily between 1989 and 1997, at a rate of about 4,200 metric tons per year. From 1998 through 2000, imports started growing even more rapidly, with an average rate of growth at 18,000 metric tons per year (Ref. 60). However, 2001 and 2002 saw a reversal of this trend, with imports falling from 52,900 metric tons in 2000 to 28,500 metric tons in 2001 (Ref. 57). Estimates of 2002 imports were expected to total about 35,000 tons, about a 23 percent increase (Ref. 60). A news release published after the second quarter of 2003 by the National Milk Producers Federation states that MPC imports were up 39 percent from the first half of 2002 and approaching year 2000 levels (Ref. 61).

The impact of these imports increases in significance as USDA purchases more NFDN under the Commodity Credit Corp. The USDA had 1.2 billion lb of NFDN in warehouses, and program cost overruns were almost \$3 billion more than its original \$1.3 billion estimate in mid-2003 (Ref. 62). The negative impact on dairy production in the United States attributable to the MPC imports is uncertain, according to Jesse (Ref. 60) somewhere between "an amount much smaller than government purchases" of NFDN to an amount that "exceeds government purchases, and that excess cheese supplies augmented by MPC and other milk proteins have depressed the cheese market." He estimated displacement of NFDN into government purchases at almost 430 million lb in 2002, though he added that his estimates "very likely err on the high side." Bailey (Ref. 56), who separated "dry whey" and "casein" from MPCs, looked at this question from a cost angle. He estimated that MPC imports between 1996 and 2000 increased the cost the dairy price support program by about \$572 million (Ref. 56).

*Option 3: Allow all filtration methods that result in a fluid milk product to be used in standardized cheese production*

This option would allow fluid UF milk as well as milk processed with

other filtration technologies, most notably microfiltration, as long as no nonmilk derived ingredients are added in the preparation of the liquid concentrates. This option differs from the baseline by permitting the substitution of fluid UF and MF milk for NFDN. This technology and the resulting product, sometimes referred to as Native Milk Casein Concentrates, is not currently available. However, the availability of the ingredient may be driven by outside food manufacturers who fractionate milk proteins to harvest milk serum proteins leaving the native milk casein concentrate for sale to cheese manufacturers in the near future (Ref. 9).

*Benefits of Option 3:* The benefits from allowing fluid MF milk as an ingredient in cheese manufacture are similar to the benefits from allowing fluid UF milk due to similar levels of protein, lactose, and moisture (Ref. 63) (see table 1 of this document). There are other potential benefits from fluid MF milk that fluid UF milk does not offer. First, microfilters have larger pore structures than ultrafilters, allowing more whey proteins to pass through the membrane. If the cheese producers are purchasing MF milk, they will have less whey to remove in later steps of the cheese-making process. Second, some industry experts believe that MF is the new direction of cheese fortification process because it has the potential for continuous cheese making without vats for more varieties of cheese (Refs. 9 and 64).

*Costs of Option 3:* Because fluid MF milk is not yet available to cheese makers, it is difficult to determine how the costs would differ from NFDN. Because of the similar process to producing fluid UF milk, the costs are assumed to also be similar to Option 2. *Option 4: Allow all filtration methods that result in a fluid or dried milk product to be used in standardized cheese production*

This option would allow milk used in the production of cheese to be supplemented with UF milk as well as milk forms derived from other filtration technologies, most notably microfiltration, as long as no nonmilk derived ingredients had been added in the preparation of these liquid or dried concentrates. This option differs from the baseline by substituting both fluid and dry UF and MF milk for NFDN as the protein standardization ingredient. As with fluid MF milk, this technology and the resulting product, sometimes referred to as Native Milk Casein Concentrates, is not currently available. However, the availability of the ingredient may be driven by outside

food manufacturers who fractionate milk proteins to harvest milk serum proteins, leaving the native milk casein concentrate for sale to cheese manufacturers in the near future (Ref. 9).

*Benefits of Option 4:* The benefits of allowing fluid or dry MF milk as an ingredient in cheese build on the benefits of Option 3, which allows for fluid MF milk. In addition to those benefits, allowing dry MF milk has decreased transportation and storage costs similar to NFDM and dry UF milk.

*Costs of Option 4:* Because neither fluid nor dry MF milk is available to cheese producers, we are unable to estimate how costs would differ from NFDM. Dry MF milk, being similar in manufacture to dry UF milk, would be subject to similar costs, including foreign trade and domestic purchase adjustments.

*Option 5: Allow all milk and products obtained from milk to be used in cheese production, in agreement with the Codex general standard for cheese*

This option would allow milk to be manufactured with “milk and/or products obtained from milk” and

would mirror the Codex general standard for cheese (Ref. 25). This option differs from the baseline by allowing any milk derived ingredient to be used as either the sole ingredient or the protein-standardizing replacement ingredient in cheese production. This option would include isolates of casein that contain up to 94 percent protein and little to no lactose. These isolates are not currently manufactured in the United States, but have been used in other countries as a fortification ingredient (Ref. 9). This option would also allow for dry blends of different milk derived ingredients, including NFDM, dry UF milk, isolated casein, and whey protein concentrate.

*Benefits of Option 5:* The benefits to opening the standard to all “milk and/or products obtained from milk” are not certain, but would allow cheese producers full freedom in choosing inputs to maximize their own production yields and profits.

*Costs of Option 5:* The costs to opening the standard to all “milk and/or products obtained from milk” are not certain. There may be domestic and international market adjustments

leading to U.S. Government purchases of domestic dairy products.

#### D. Summary of Costs and Benefits

The total annual costs and benefits from amending the definition of milk used to produce standardized cheeses are uncertain, though FDA does not have concerns from a food safety standpoint. The uncertainty stems from several diverse factors:

- The number of plants that would implement UF or other filtration technology,
- The number of plants that already use UF technology,
- The number of plants that already use spray-drying technology,
- The size of the plants that would decide to invest in new technology,
- The percent of milk that cheese producers would replace with UF milk in cheese making, and
- Whether UF milk replaces milk or NFDM in the production process

Table 2 of this document highlights the quantified annual costs and benefits of Options 1 through 5 using the assumptions and calculations described in the text.

TABLE 2.—COSTS AND BENEFITS SUMMARY

	Option 1	Option 2	Option 3	Option 4	Option 5
Annualized Investment	\$14–\$28 million <sup>1</sup> \$17–\$34 million <sup>2</sup>	\$45–\$59 million <sup>1</sup> \$54–\$71 million <sup>2</sup>	Unknown	Unknown	Unknown
Yield Increase	\$172 million	\$172 million	Unknown	Unknown	Unknown
Transportation Savings	< \$9 to \$24 million	> \$9 to \$24 million Similar to Option 1	Similar to Option 2	Unknown	
Rennet & Starter Savings	\$11 million	\$11 million	Unknown	Unknown	Unknown
Benefits (net savings in production costs)	\$164–\$193 million <sup>1</sup> \$158–\$190 million <sup>2</sup>	\$133–\$162 million <sup>1</sup> \$121–\$153 million <sup>2</sup>	Unknown	Unknown	Unknown
Government Programs	No increase in government purchases or trade impacts	Potential for increase in government purchases of NFDM	Unknown	Unknown	Unknown
Costs (change in government program costs)	None	Uncertain	Unknown	Unknown	Unknown

<sup>1</sup> At 3 % interest.

<sup>2</sup> At 7 % interest.

FDA does not currently have a best estimate on the cost savings of this proposed rule and seeks comment on all areas of uncertainty listed previously in this document. FDA believes Options 1 and 2, if implemented, would lead to social benefits potentially as high as \$190 million at a 7 percent annualized investment rate (\$193 million at 3

percent) and \$153 million (\$162 million at 3 percent), respectively. Options 3 through 5 are difficult to quantify based on the smaller amount of research into new filtration and separation technologies in the dairy industry. These options lead to increasingly greater flexibility for cheese producers to maximize their own production

yields and profits and have the potential to provide benefits to the cheese industry in the future.

#### IV. Small Entity Analysis

FDA has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a

significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effects of the rule on small entities. FDA finds that this proposed rule would have a significant economic impact on a substantial number of small entities.

The Small Business Administration (SBA) considers a dairy manufacturer, which includes cheese manufacturers, to be small if it employs fewer than 500 workers. Table 3 of this document lists the dairy manufacturing statistics by employment size from the U.S. Census Bureau's 1997 Economics Census for the three industries most likely to be

impacted by this proposed rule. The total number of firms listed in table 3 of this document is different from earlier parts of the analysis because the earlier estimates were derived from 2002 USDA data but the most recent Economic Census data available is for 1997.

TABLE 3.—DAIRY MANUFACTURING STATISTICS BY EMPLOYMENT SIZE

	Total Number Of Firms	Number of Firms with Less than 500 Employees	Percent of Industry that is "Small"
Cheese Manufacturing	524	518	98.9
Fluid Milk Manufacturing	612	605	98.9
Dry, Condensed, and Evaporated Dairy Manufacturing	213	208	97.7

Source: U.S. Census Bureau, 1997 Economic Census June 24, 1999 Manufacturing—Industry Series.

Based on the SBA definition of small business for the dairy manufacturing industries, almost all dairy and cheese manufacturers qualify. However, Blayney and Manchester found that large dairy manufacturing companies and cooperatives, those percent with food and nonfood sales in 1998 of \$800 million or more, accounted for almost 70 percent of the industry (Ref. 65). Of this 70 percent, large proprietary companies accounted for 42 percent and large cooperatives for 27 percent. The remainder of the industry was divided between smaller companies, including cooperatives (Ref. 65).

The dairy industry in the United States exhibits substantial economies of scale and, historically, small dairy farms have found ways of combining their resources to be able to compete in the industry. The 1960s saw a wave of mergers and consolidations, leading to almost a complete conversion to "bulk handling and processing" of milk at plants in the 1970s. This trend has continued with ever-decreasing numbers of processors handling ever-increasing volumes of milk (Ref. 47).

FDA believes that if cheese manufacturers demand UF milk, dairy cooperatives will adjust in order to keep themselves and their individual members viable in the market. In 1997, the last year the USDA did a comprehensive survey of dairy cooperatives, dairy cooperatives handled 83 percent of all milk delivered to plants and dealers in the United States, and 98 percent of the milk received by cooperatives came directly from member producers (Ref. 53). These cooperatives are diverse in size, but the average handles 564 million lb annually, well above the 2.2 million lb

requirement of production from 100 cows. According to the National Milk Producers Federation (NMPF) Web site, the average U.S. dairy cow produces about 7 gallons of milk per day (Ref. 66). To calculate the minimum weight to make UF technology financially feasible, we multiplied 100 cows by 7 gallons per day by 365 days per year to get 255,500 gallons per year. We then multiplied the product by 8.62 lb per gallon (NMPF Web site) to get 2,202,410 lb per year. FDA seeks comment on the financial burden investing in UF technology imposes on dairy processors and cheese manufacturers, particularly small entities.

In addition, small milk operations combined in cooperatives may be able to gain additional benefits from UF technology if they are able to market their products in a larger geographic region as a result of the lower shipping costs. This issue may be important if dairies develop in remote locations around the country as Mermelstein (Ref. 48) has suggested, or if there is a geographical shift in the production of either cheese or its components. Milk production in the West, as a percentage of total U.S. production, has increased, and there is some concern that Midwestern cheese producers will become "milk-starved" (Ref. 49). National Agricultural Statistics Services data over the past 9 years has shown a significant increase in milk production in the West, up to 38 percent of the U.S. total in 2001 and 2002. However, these data also show a significant increase in cheese production in the Western States over this same time period, up to 37 percent in 2001 and 38 percent in 2002 (Ref. 67). The significantly lower hauling costs for filtered milk may

enable small milk processors and cheese producers to ship ingredients over longer distances to meet manufacturing needs.

#### V. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires cost-benefit and other analyses before any rule making if the rule would include a "Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (annually adjusted for inflation) in any 1 year." The current inflation-adjusted statutory threshold is \$113 million. FDA has determined that this proposed rule does not constitute a significant rule under the Unfunded Mandates Reform Act.

#### VI. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) Major Rule

The SBREFA (Public Law 104–121) defines a major rule for the purpose of congressional review as having caused or being likely to cause one or more of the following: an annual effect on the economy of \$100 million; a major increase in cost or prices; significant adverse effects on competition, employment, productivity, or innovation; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. In accordance with the SBREFA, the Office of Management and Budget (OMB) has determined that this proposed rule is a major rule for the purpose of congressional review.

## VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule would have a preemptive effect on state law. Section 4 (a) of the Executive Order requires agencies to “construe \* \* \* a Federal Statute to preempt State law only where the statute contains an express preemption provision, or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.” Section 403A of the act (21 U.S.C. 343–1) is an express preemption provision. Section 403A(a)(1) provides that:

\* \* \* no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—(1) any requirement for a food which is the subject of a standard of identity established under section 401 that is not identical to such standard of identity or that is not identical to the requirement of section 403(g). \* \* \*

This proposed rule makes changes to the general provisions related to the standards of identity for cheeses and related cheese products. Although this rule would have a preemptive effect in that it would preclude States from promulgating requirements for standardized cheese and cheese products that are not identical to the standards as amended by this proposal, this preemptive effect is consistent with what Congress set forth in section 403A of the act.

Section 4(c) of the Executive Order further requires that “any regulatory preemption of State law shall be restricted to the minimum level necessary” to achieve the regulatory objective. Under section 401 of the act (21 U.S.C. 341), “[w]henver in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food \* \* \* a reasonable definition and standard of identity. \* \* \*” Further, section 4(e) provides that “when an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.” FDA is providing an opportunity for State and local officials to comment on this rulemaking. For the reasons set forth above, the agency believes that it has complied with all of the applicable requirements under the Executive order.

In conclusion, FDA has determined that the preemptive effect of the proposed rule would be consistent with Executive Order 13132.

## VIII. Environmental Impact

We have determined under 21 CFR 25.32(p) that this action is of the 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.

## IX. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by OMB under Paperwork Reduction Act of 1995 is not required.

## X. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

## XI. References

The following references have been placed on public display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

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4. GAO report, “Dairy Products: Imports, Domestic Production, and Regulation of Ultra-filtered Milk,” March, GAO–01–326, 2001.
5. Letter to FDA from Mr. Ted Jacoby, Jr., T.C. Jacoby & Company, Inc., May 1, 1996
6. Letter to Mr. Ted Jacoby, Jr., T.C. Jacoby & Company, Inc., from FDA, October 21, 1996.
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### List of Subjects in 21 CFR Part 133

Cheese, Food grades and standards, Food labeling.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and re-delegated to the Director of the Center for Food Safety and Applied Nutrition, it is proposed that 21 CFR part 133 be amended as follows:

### PART 133—CHEESES AND RELATED CHEESE PRODUCTS

1. The authority citation for 21 CFR part 133 continues to read as follows:

**Authority:** 21 U.S.C. 321, 341, 343, 348, 371, 379e.

2. Section 133.3 is amended by revising paragraphs (a) and (b) and by adding new paragraphs (f) and (g) to read as follow:

#### § 133.3 Definitions.

(a) *Milk* means the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, which may be clarified and may be adjusted by separating part of the fat therefrom; concentrated milk, reconstituted milk, and dry whole milk. Water, in a sufficient quantity to reconstitute concentrated and dry forms, may be added. For the purposes of this part, wherever the term "milk" appears in the individual standards for cheeses and related cheese products, ultrafiltered milk as described in paragraph (f) of this section, may be used.

(b) *Nonfat milk* means skim milk, concentrated skim milk, reconstituted skim milk, and nonfat dry milk. Water, in a sufficient quantity to reconstitute concentrated and dry forms, may be added. For the purposes of this part, wherever the term "nonfat milk" appears in the individual standards for cheeses and related cheese products, ultrafiltered nonfat milk as described in paragraph (g) of this section, may be used.

\* \* \* \* \*

(f) *Ultrafiltered milk* means raw or pasteurized milk that is passed over one or more semipermeable membranes to partially remove water, lactose, minerals, and water-soluble vitamins without altering the casein:whey protein ratio of the milk and resulting in a liquid product.

(g) *Ultrafiltered nonfat milk* means raw or pasteurized nonfat milk that is passed over one or more semipermeable membranes to partially remove water, lactose, minerals, and water-soluble vitamins without altering the casein:whey protein ratio of the nonfat milk and resulting in a liquid product.

Dated: October 7, 2005.

**Leslye M. Fraser,**

*Director, Office of Regulations and Policy,  
Center for Food Safety and Applied Nutrition.*

[FR Doc. 05-20874 Filed 10-18-05; 8:45 am]

BILLING CODE 4160-01-S

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R05-OAR-2005-IN-0003; FRL-7981-9]

### Approval and Promulgation of Air Quality Implementation Plans; Indiana

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a request from the Indiana Department of Environmental Management (IDEM) to revise the Indiana State Implementation Plan (SIP) in three areas: To amend the definition of "particulate matter," and "ambient air quality standards," add new rules consistent with these amended definitions, and amend rules pertaining to sulfur dioxide (SO<sub>2</sub>) and nitrogen dioxide (NO<sub>2</sub>) ambient standards; to update the references to the Code of Federal Regulations (CFR) from the 2000 edition to the 2002 edition; and to add "credible evidence provisions" into state rules consistent with federal requirements.

In the final rules section of this **Federal Register**, EPA is approving the SIP revision as a direct final rule without prior proposal, because EPA views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If we do not receive any adverse comments in response to these direct final and proposed rules, we do not contemplate taking any further action in relation to this proposed rule. If EPA

receives adverse comments, we will withdraw the direct final rule and will respond to all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

**DATES:** Written comments must be received on or before November 18, 2005.

**ADDRESSES:** Submit comments, identified by Regional Material in EDocket (RME) ID No. R05-OAR-2005-IN-0003 by one of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

*Agency Web site:* <http://docket.epa.gov/rmepub/>. RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the online instructions for submitting comments.

*E-mail:* [mooney.john@epa.gov](mailto:mooney.john@epa.gov).

*Fax:* (312) 886-5824.

*Mail:* You may send written comments to:

John M. Mooney, Chief, Criteria Pollutant Section, (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

*Hand delivery:* Deliver your comments to: John M. Mooney, Chief, Criteria Pollutant Section (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604.

Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding federal holidays.

*Instructions:* Direct your comments to RME ID No. R05-OAR-2005-IN-0003. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, [regulations.gov](http://regulations.gov), or e-mail. The EPA RME Web site and the Federal [regulations.gov](http://regulations.gov) Web site are "anonymous access" systems, which means EPA will not know your identity or contact information unless you

provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or [regulations.gov](http://regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I(B) of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* All documents in the electronic docket are listed in the RME index at <http://www.epa.gov/rmepub/>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically in RME or in hard copy at Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone Julie Henning at (312) 886-4882 before visiting the Region 5 Office.)

**FOR FURTHER INFORMATION CONTACT:** Julie Henning, Environmental Protection Specialist, State and Tribal Planning Section, Air Programs Branch (AR-18J), USEPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-4882. [Henning.julie@epa.gov](mailto:Henning.julie@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

II. What Action Is EPA Taking Today?

III. Where Can I Find More Information About This Proposal and the Corresponding Direct Final Rule?

#### **I. General Information**

*A. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit CBI to EPA through RME, [regulations.gov](http://regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific

information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

## II. What Action Is EPA Taking Today?

EPA is proposing to approve revisions to the Indiana SIP in three areas: (1) To amend the definition of “particulate matter,” and “ambient air quality standards,” add new rules consistent with these amended definitions, and amend rules pertaining to SO<sub>2</sub> and NO<sub>2</sub> ambient standards; (2) to update the references to the Code of Federal Regulations (CFR) from the 2000 edition to the 2002 edition; and (3) to add credible evidence provisions into state rules consistent with federal requirements.

## III. Where Can I Find More Information About This Proposal and the Corresponding Direct Final Rule?

For additional information, see the Direct Final Rule which is located in the Rules section of this **Federal Register**. Copies of the request and the EPA’s analysis are available electronically at RME or in hard copy at the above address. (Please telephone Julie

Henning at (312) 886–4882 before visiting the Region 5 Office.)

Dated: September 23, 2005.

**Norman Niedergang,**

*Acting Regional Administrator, Region 5.*

[FR Doc. 05–20820 Filed 10–18–05; 8:45 am]

**BILLING CODE 6560–50–P**

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

#### 46 CFR Part 389

[Docket No. MARAD–2005–22050]

RIN 2133–AB67

#### Determination of Availability of Coastwise-Qualified Launch Barges

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice of reopening and extension of comment period.

**SUMMARY:** The Maritime Administration is hereby giving notice that the closing date for filing comments on the Determination of Availability of Coastwise-Qualified Launch Barges Notice of Proposed Rulemaking (NPRM) (Docket No. MARAD 2005–22050) has been extended to the close of business (5 p.m. EST) on December 13, 2005.

**DATES:** The comment date of the NPRM published in the **Federal Register** on August 15, 2005 (70 FR 47771) is extended from October 14, 2005, to December 13, 2005.

(Authority: 49 CFR 1.66)

Dated: October 12, 2005.

By order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

[FR Doc. 05–20700 Filed 10–18–05; 8:45 am]

**BILLING CODE 4910–81–P**

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## FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Parts 22, 24, and 27

[WT Docket Nos. 03–264; FCC 05–144]

#### Amendment of Various Rules Affecting Wireless Radio Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) requests comment on whether to implement a spectral density model to its radiated power rules for

wireless radio services (WRS); further increase its radiated power limits; specify radiated power as an average rather than peak; and apply the radiated power rule changes to other services. In a related document, the Commission has streamlined and harmonized licensing provisions in the WRS that were identified in part during the Commission’s 2000 and 2002 biennial regulatory reviews.

**DATES:** Submit comments on or before December 19, 2005, and submit reply comments on or before January 17, 2006. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:**

Wilbert E. Nixon, Jr. and/or B.C. “Jay” Jackson, Jr. of the Mobility Division, Wireless Telecommunications Bureau, at 202–418–0620 or via e-mail at [Wilbert.Nixon@fcc.gov](mailto:Wilbert.Nixon@fcc.gov) and/or [Jay.Jackson@fcc.gov](mailto:Jay.Jackson@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Further Notice of Proposed Rulemaking (FNPRM)* portion of the Commission’s *Report and Order and Further Notice of Proposed Rulemaking*, FCC 05–144, in WT Docket Nos. 03–264, adopted July 22, 2005, and released August 9, 2005. The Commission is also concurrently publishing a summary of the *Report and Order* in the **Federal Register**. The full text of the document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission’s duplicating contractor: Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 800–378–3160, facsimile 202–488–5563, or via e-mail at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com). The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at [Brian.Millin@fcc.gov](mailto:Brian.Millin@fcc.gov).

#### Synopsis of the Further Notice of Proposed Rulemaking

##### I. Introduction and Background

1. In the Report and Order portion of the *Report and Order and Further Notice of Proposed Rulemaking*, we revise the broadband PCS transmitting power rule by eliminating the transmitter output power limit portion of that rule. We note, however, that various proposals before us concerning

the radiated power portion of the rule (EIRP limits), particularly those introduced into the record by CTIA's recent *ex parte* filing, give rise to practical and technical issues that we believe should be further evaluated and addressed before we act on these proposals. Although it appears that some of these radiated power proposals have considerable merit, especially as applied across various bands or services in a harmonized fashion, we find that a more complete record would assist us in properly analyzing the technical details and specifics needed to craft a clear and workable radiated power rule that is not unduly burdensome. We also see no need to delay implementation of the other streamlining actions taken in the Report and Order while we consider this issue. Therefore, we are splitting off the radiated power issues from the *Report and Order* and consider them in the *FNPRM*. This will allow us to seek a more comprehensive record, and will provide an opportunity to comment for any parties that might wish to address any of the proposals in the CTIA filing and the issues discussed below.

2. Accordingly, in the *FNPRM*, we ask a number of questions on the details of the CTIA proposals, explained further below, for changes to the broadband PCS radiated power limits. In addition, we consider whether these proposals should be applicable to those part 22 and part 27 services that operate under a flexible regulatory framework similar to part 24 broadband PCS. We also seek comment on possible changes to other technical rules that may be appropriate if we adopt changes to the radiated power rules.

## II. Discussion

### A. The CTIA Proposal

3. CTIA's *ex parte* filing proposes that the Commission revise its PCS radiated power rules to limit average EIRP for broadband PCS stations having an antenna height of up to 300 meters above average terrain to the larger of: (1) 1640 Watts per carrier (3280 Watts in rural areas) which is the current rule, and (2) 3280 Watts per MHz of emission bandwidth (6560 Watts per MHz of emission bandwidth in rural areas). For stations using an antenna height greater than 300 meters above average terrain, CTIA proposes that the "per MHz" limit be set to 1640 rather than 3280 Watts. We note that the CTIA plan for revision of the radiated power rule comprises three related but independent proposals that we believe can and should be addressed and evaluated individually. First, CTIA proposes to add a power spectral density feature to the current

rule. This would allow more radiated power, the specific amount being proportional to emission bandwidth, for stations transmitting emissions with a bandwidth wider than 500 kHz, relative to stations transmitting emissions with a bandwidth less than 500 kHz. Under CTIA's proposal, the narrow emission bandwidth stations would remain subject to the current set radiated power limits, preventing the unintended result of narrowband systems actually having to decrease power. Second, CTIA generally proposes increasing the maximum radiated power for emissions with a bandwidth wider than 500 kHz, notwithstanding the implementation of a spectral density model. Third, CTIA proposes that the radiated power rule be specified in terms of average power rather than peak power. CTIA states that the issue of peak vs. average power is "logically separate" from the power spectral density issue, but believes that it is appropriate to address it because it arises in the "very same sentence in the rules." Finally, CTIA proposes that the Commission ensure regulatory parity for technically like services by mirroring the requested broadband PCS changes in our part 27 Advanced Wireless Service (AWS) rules.

4. We welcome comment on all aspects of the CTIA proposal. We recognize the effort CTIA has made to reconcile the differing positions filed earlier in the record and to craft a consensus among the parties. CTIA states that its proposal will facilitate deployment of wideband technologies and eliminate disadvantages for certain narrowband technologies, resulting in lower costs for consumers. Because many of the commenting parties support the proposal, we believe that it makes a good starting point for consideration of these issues. Nevertheless, as discussed in detail below, we have some concerns with CTIA's proposal, especially in circumstances where subsequent entrants operating within our rules and their licensed parameters seek to introduce technologies and services that are incompatible with existing systems. For instance, we question whether the proposal would serve the purpose of balancing the interference potential of various known and future technologies, as well as the relative coverage or performance of wideband versus narrowband systems. We also believe that the CTIA proposal, as outlined, may be unnecessarily complex in some respects, leading to practical difficulties in compliance. We question whether the proposed radiated power limits are comparable to power levels actually

used by licensees in their current systems.

5. We seek forward-looking comment to inform us on possible unintended consequences that might flow from the technical aspects of the CTIA proposal, such as the "peak vs. average power" issue. Our radiated power rules are intended to limit the interference potential of wireless systems while still providing technical flexibility to licensees. As a result, substantial changes to our radiated power rules may require consideration of how these changes may affect other related technical interference-limiting rules. Based on these considerations, we raise a number of questions in the following paragraphs about the three aspects of the CTIA proposal. We also suggest some simpler alternatives that might accomplish the same objectives as the CTIA proposal, and we seek comment on those as well.

6. We also seek comment on whether we should extend the relief CTIA's requests to other services. As noted, CTIA specifically requests that the proposed changes be mirrored in the part 27 rules governing AWS systems. If we adopt any or all of the proposed changes, should we implement them in other services, for example, part 27 (700 MHz and/or Wireless Communications Services (WCS)), or part 22 (Cellular)? We recognize that there may be concerns with applying the proposed changes to other services that may be less flexible than broadband PCS, or where there may be possible interference concerns to adjacent spectrum users (*i.e.*, Public Safety) or existing incumbent systems (*i.e.*, Broadcasters), and therefore we seek comment on whether CTIA's proposed changes should be extended beyond part 24 broadband PCS. In this regard, we note that Crown Castle International Corp. (Crown Castle) recently filed an *ex parte* in this proceeding. Crown Castle is the sole licensee of a nationwide authorization in the 1670–1675 MHz band with plans to deploy, through its subsidiary Crown Castle Mobile Media, a wide-band terrestrial wireless network to "transmit multiple channels of high-quality, digital video and audio programming to mobile phones and other hand-held devices." Crown Castle supports the CTIA proposal in principle, but also seeks application of the proposal, if implemented, on a proportional basis. We seek comment on application of CTIA's proposal in general to the 1670–1675 MHz band. Moreover, Crown Castle points out that CTIA seeks application of its proposal to part 24 PCS and part 27 AWS, *i.e.*, bands that were previously afforded

relief in the *Rural Report and Order*. In supporting CTIA's proposal, Crown Castle requests that the Commission increase power levels in rural areas for certain bands not afforded relief in the *Rural Report and Order*, published at 70 FR 21652, April 27, 2005, specifically the 1670–1675 MHz band, as the “reasoning provided by the Commission for increasing the base station power limits applicable to rural PCS and AWS operations also applies to 1670–75 MHz operations” (*i.e.*, allowing expanded rural coverage while using fewer base stations). We seek comment on this issue as well.

#### *B. Power Limits for Wide Bandwidth Emissions*

7. *Power spectral density limits.* In the Notice of Proposed Rule Making, the Commission requested that commenters consider a power spectral density (*i.e.*, power per unit of bandwidth) limit in the context of achieving a more “technology neutral” transmitter power output rule. The Commission was concerned that a “per carrier” (or “per emission”) wording, instead of the existing “per transmitter” language, would shift the burden of compliance with the transmitter output power rule from equipment manufacturers to individual licensees, who might find it impracticable to individually monitor each “carrier” (or emission). Because we decided to eliminate the transmitter output power rule, the compliance burden associated with it will no longer exist. Nevertheless, our question opened the door to consideration of power spectral density limits generally.

8. The Commission seeks to promulgate rules that are “technology neutral” because we believe that ideally it is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits and other market factors, and not primarily because of government regulation. It should also be understood that “technology neutral” means that our rule should neither penalize *nor give advantage* to any particular technology unnecessarily. Sometimes, however, an FCC rule adopted under earlier unknown or different technological circumstances will inadvertently affect new and evolving technologies unequally and, in fact, this may be unavoidable in some cases, if the purpose of the rule (*e.g.*, avoiding harmful interference) is to be accomplished.

9. According to Motorola, adoption of a rule providing a power spectral density limit for broadband PCS can be considered in terms of leveling the competitive playing field between

narrow emission and wide emission technologies. Qualcomm and Motorola both argue that the current radiated power rule, by failing to taking emission bandwidth into consideration, authorizes narrow emission systems to transmit more aggregate radiated power than wide emission systems, within a given spectrum block. CTIA claims that the current EIRP limit is interpreted to place a limit on the power of a single carrier but to permit multiple carriers to be transmitted from a single base station. CTIA further claims that systems operating in smaller bandwidths are permitted to operate at higher power spectral density than those operating in larger bandwidths. CTIA argues that technologies, such as CDMA, W-CDMA, or OFDM, that combine many voice signals onto a single combined signal and that use advanced techniques to counter multipath fading therefore are disadvantaged by the per-carrier power constraint in the current rules. CTIA contends that removing an artificial handicap on the use of some technologies—such as W-CDMA—would facilitate the adoption and deployment of these technologies by wireless service providers. Moreover, CTIA contends that researchers and inventors would no longer be constrained to give up power in order to use wider bandwidths.

10. Existing narrow emission PCS technologies (*i.e.*, TDMA, GSM) carry 3 to 8 voice conversations per emission, while existing wide emission technologies (*i.e.*, CDMA) carry as many as 20 to 40 voice conversations per emission. Because the current rule makes no distinction between wide and narrow emissions, it applies the same maximum radiated power limit to both. Consequently, a wide emission system is allowed to provide only about one fifth of the radiated power for each voice conversation that a narrow emission system is allowed to provide, assuming that each system is fully loaded and operating at the maximum power permitted by rule. Thus the average voice conversation on the wide emission system would have a lower signal to noise ratio, which, despite the partially compensating processing gain provided by signal spreading, would reduce the coverage range. Motorola expressed a view that the Commission's current policy is biased against wider bandwidth technologies as it allows technologies that utilize a narrower bandwidth to radiate a higher power per unit bandwidth, thus placing wider bandwidth systems at a competitive disadvantage because wider bandwidth technologies will need to deploy

additional infrastructure to maintain the same coverage area as narrower bandwidth technologies.

11. Several of the comments reflect a concern that, if the Commission were to adopt a rule allowing more radiated power for wide emissions than for narrow emissions, the power allowed by such a rule for narrow emissions (such as GSM and TDMA) would be lower than is permitted by the current rule. These commenters argue that there should be no reduction in the radiated power limit currently applicable to existing PCS systems. We note that we did not propose in the NPRM to reduce the transmitting power limits for broadband PCS systems, nor do we do so here. Thus, even if we were to adopt the CTIA proposal, we assume that the current radiated power limits (1640 Watts EIRP non-rural, 3280 Watts EIRP rural) would be unchanged for all narrow emission types. The parties' comments have raised a good question however, and we seek comment on whether a power spectral density radiated power limit should be applied for narrow emissions as well as wide emissions. For example, should the radiated power limit for 30 kHz bandwidth emissions be lower than that for 200 kHz bandwidth emissions? Likewise, should the radiated power limit for 12.5 kHz bandwidth emissions be lower than that for 30 kHz bandwidth emissions?

12. One of our concerns is that a larger aggregate power presents a greater interference potential to other systems. In other words, the current rule may well allow systems employing narrow emission technologies to pose a greater interference potential than those employing wide emission technologies. We note that CTIA does not propose any upper limit or cap on radiated power under this approach, and consequently the power levels permitted under its proposal could easily reach some very large numbers (*i.e.*, 32,800 Watts in a rural area) for wider emission types such as Wideband Code Division Multiple Access (W-CDMA) using 5 MHz bandwidths. Moreover, existing licensees and new entrants may not have adequate information about the types of technology being deployed in adjacent bands or areas, including system architecture, nor the locations of base stations that could cause interference. This additional interference risk with limited information could lead to difficult negotiating positions among adjacent systems using different technologies, which could hinder coordination procedures that have been at the heart of the success of interference avoidance

in the broadband PCS service, and which will be applied to other flexible use bands (e.g., part 27 AWS). In considering the issue of whether to adopt a radiated power limit rule that would allow more power for wider bandwidth emissions, we must consider the primary objective of the rule, which is to limit interference potential between licensees. How should the Commission balance the interference potential of various technologies and facilitate information sharing in order to facilitate inter-system coordination negotiations between licensees?

13. If we ultimately decide to adopt a rule that allows a higher radiated power limit for wide emissions than for narrow emissions, we must define which emissions types are wide and which are narrow, and the basis for that classification. We note that typical systems using emissions that have a bandwidth wider than 1 MHz re-use the same channels in every cell, whereas systems using emissions with a bandwidth less than 1 MHz use a cellular frequency re-use pattern where different channel sets are used in adjacent cells. Another way of describing this is that systems using emissions that have a bandwidth wider than 1 MHz use their entire spectrum contiguously in each cell, whereas systems using emissions with a bandwidth less than 1 MHz use at each cell a number of narrower channels separated by several channels not used in that cell. We note that Motorola proposes in its earlier filings to utilize a bandwidth of 1 MHz as the dividing

line. The CTIA proposal, however, results in the division between narrow and wide emission bandwidths occurring at 500 kHz rather than 1 MHz. We believe however, that if a technology is developed using a 500 kHz–1MHz bandwidth, the technology is more likely to use different channels at different cells like other narrowband systems, rather than use a spread spectrum approach as is typically used in wideband systems. Accordingly, if we were to adopt a spectral density model similar to what CTIA proposes, we seek comment on whether to use 500 kHz, 1 MHz, or some other emission bandwidth as the dividing point between narrow and wide emissions, noting that we seek to logically divide wireless technologies into two groups that use differing system architectures.

14. Adoption of a radiated power rule that allows more power for wide emissions than for narrow emissions also raises a number of questions in regard to implementation. A “Watts per MHz” power spectral density limit, such as the CTIA proposal includes for wider bandwidth emissions, would define power limits based on a sliding scale with a potentially infinite number of linear scaled limit values. Initially, we question whether this is the best way to structure a radiated power limit rule for PCS and other flexible services. An alternative would be to use a “step” approach, with specific power limits for particular bandwidth ranges, which could perhaps be set forth in a table to make clear what limit is applicable in any given instance. For an analogy, if it

were desired in the interest of highway safety to require heavier vehicles to travel slower than lighter vehicles, it may make more sense to simply have two posted speed limits, one for automobiles and another for heavier vehicles such as trucks, rather than to adopt a “mph per ton of vehicle” ratio that would likely result in a different individual speed limit being applicable to each model of car or truck in accordance with how much that particular model weighs. While the latter might be more accurate in terms of equalizing the momentum of vehicles, the gained accuracy is greatly outweighed by the resultant complexity and difficulty in determining compliance. CTIA apparently differs with this assessment, stating that a “stepped limit” would be less appropriate than a power spectral density applied to “every contiguous 1 MHz region in the relevant band,” but offers no reasons, however, for that particular position. We therefore seek comment on whether, if we decide to allow higher radiated power for wide emission types, this power should be expressed in terms of a specific limit or series of limits for various emission bandwidths. We note that this could be easily codified in table form, as illustrated below. The simplest proposal would involve having only four power radiated limits: rural and non-rural power limits for wide emissions (for example, emissions with bandwidth exceeding 1 MHz), and rural and non-rural power limits for narrow bandwidth emissions.

TABLE 1.—PCS MAXIMUM EIRP LIMITS

Emission bandwidth	Non-rural	Rural
<1 MHz (narrow)	1640 Watts (no change)	3280 Watts (no change).
≥1 MHz (wide)	3280 Watts (for example)	6560 Watts (for example).

15. Another possible variation is the use of a series of radiated power limits corresponding to six common existing emission bandwidths as illustrated in Table 2: 6.25 kHz, 12.5 kHz, 16/20/25/30 kHz, 200 kHz, 1.25 MHz, 4.3/5 MHz. The value of each radiated power limit would be chosen as appropriate to the technologies commonly deployed in that emission bandwidth, and thus the

power levels would not necessarily be linearly scaled by bandwidth or otherwise related to each other, as would be the case with a pure power spectral density limit. Would the benefit of having custom tailored power levels for each common bandwidth justify the added complexity of an increased number of limits? What would be appropriate power levels for these

emission bandwidths? We seek comment on these methods for providing higher radiated power limits for systems employing emissions with wider bandwidths and any other alternatives, including CTIA’s preferred sliding scale approach in terms of “Watts per MHz.”

TABLE 2.—PCS MAXIMUM EIRP LIMITS

Emission bandwidth	Example technologies	Non-rural	Rural
1 to 10 kHz (very narrow)	FSK (digital voice)	410 Watts (for example)	820 Watts (for example).
10 kHz to 15 kHz (narrow)	NBFM, FSK	820 Watts (for example)	1640 Watts (for example).
15 kHz to 150 kHz (medium)	FM, AMPS, iDEN	1640 Watts (no change)	3280 Watts (no change).
150 kHz to 1 MHz (medium wide)	GSM, EDGE	1640 Watts (no change)	3280 Watts (no change).

TABLE 2.—PCS MAXIMUM EIRP LIMITS—Continued

Emission bandwidth	Example technologies	Non-rural	Rural
1 MHz to 3 MHz (wide) .....	CDMA, 1X-EVDO, OFDM .....	3280 Watts (for example) .....	6560 Watts (for example).
> 3 MHz (very wide) .....	CDMA2000-3X, WCDMA .....	6560 Watts (for example) .....	13,120 Watts (for example).

### C. Radiated Power Limit Increases

16. Some of the commenters propose not only to allow more radiated power for wide emission systems relative to narrow emission systems, but also to increase the overall radiated power limit substantially over that permitted by the current rule. For example, Ericsson originally proposed to increase the maximum radiated power limit for non-rural broadband PCS from 1640 to 6560 Watts EIRP, and QUALCOMM proposed that the limit be increased similarly for wide emissions. We reiterate that, using an open-ended power spectral density limit such as that in the CTIA proposal, permissible radiated power could reach very high power levels for very wide emission systems (e.g., 16,400 Watts for a 5 MHz emission bandwidth in non-rural areas and 32,800 Watts for a 5 MHz emission bandwidth in rural areas).

17. We seek comment on whether these maximum power levels now being proposed by the parties for our rules may be far above power levels that licensees actually use in their systems. Do existing licensees use as much radiated power in their systems as is permitted by the current PCS radiated power rule? In this light, we ask what marginal benefit would be realized by further overall increases in our radiated power limits for broadband PCS or other flexible wireless services? We believe that our radiated power rule should be as flexible as possible, but it should also reflect realistic limits that are comparable to necessary power levels. We seek comment on how such levels should also accommodate implementation of future technologies and current situations that may prove unusual or exceptional, without imposing undue regulatory burdens or unnecessary risks of harmful interference. One reason to avoid unrealistically high limits in our rules would be, as CTIA has suggested, if we also were to specify radiated power limits in terms of average power instead of peak power (see discussion below). To build an adequate record on whether there is any routine or extraordinary need for very high power operation, we request that commenters supporting higher overall limits provide examples of actual situations in which licensees could beneficially use radiated power

levels on the order of what is being proposed by the parties. Are there particular coverage or service quality problems that could be solved by such an increase? What effect would increased radiated power have on the potential for harmful interference to adjacent spectrum users?

18. If we were to increase radiated power levels as CTIA proposes, it may be necessary to enhance coordination efforts between licensees, which will assist these licensees in minimizing instances of interference. We note that current rules do not require broadband PCS licensees to notify the Commission of the location of existing transmitter sites. We therefore seek comment on possible methods to improve information sharing among licensees, including comment on the types of circumstances that would trigger information disclosure or sharing requirements. For example, we note that an industry association made up of representatives of many current licensees has established a detailed protocol for exchanging technical information. We seek comment on whether this existing sharing protocol will be sufficient if we were to raise radiated power levels as CTIA proposes. As an alternative, should we require such licensees to notify adjacent licensees about the technical specifications of such base station prior to commencing operation, or should we require licensees (or lessees, in the case of secondary markets) to register such stations in ULS?

19. Finally, we seek comment regarding whether radiated power limit increases will impact licensee's administrative burden in making filings required for proper evaluation of transmission sites in regard to environmental compliance. We note that wireless systems, including broadband PCS systems, are subject to environmental evaluation with respect to human exposure of RF radiation for non-building mounted antennas when the antenna height above ground level is less than 10 meters and the total power of all channels is greater than 2000 watts ERP and for building mounted antennas when the total power from all channels is greater than 2000 watts ERP. Otherwise, these systems are categorically excluded from such environmental evaluation. We note that

we are not proposing any change to RF exposure standards, and that CTIA "sees no connection between its proposal and RF exposure limits." However, we seek comment as to whether adoption of higher radiated power limits would increase the number of facilities requiring full environmental evaluation rather than being categorically excluded, and whether adoption of higher radiated power limits would outweigh any possible increased administrative burden. We also note that engineers considering the RF environment at a site location which includes a PCS cell may not in fact know the exact operating power of all the transmitters at that location, since that information is not collected by Commission and is not typically made available by licensees. Nonetheless, we find it reasonable that an engineer assume that the power is no greater than our rules permit. How would an increase in the radiated power limits affect the ability of consultants to analyze a site? Would high power use "lock out" other users from co-locating at a site, because to do so would exceed the RF exposure limits?

### D. Peak vs. Average Radiated Power Limits

20. For most of the last 50 years, wireless telecommunications services such as land mobile and public mobile telephone services, including analog cellular, used frequency or phase modulation (FM or PM) to transmit analog voice and/or tone modulation. The emissions from these older technologies have a "constant envelope," which is to say, there are no peaks or valleys in the envelope of the modulated waveform. As a result, the peak power of such emissions is equal to the average power. In our power limit rules for private and public land mobile services, we did not need to specify either "peak" or "average" because the two were equal.

21. In recent years, we have allowed greater technical flexibility in many of our wireless services so that licensees could utilize newer technologies without having to obtain prior FCC approval. As a result, licensees in these services have employed a variety of newer and more efficient digital technologies, many of which produce an emission where the modulation

envelope is not of constant amplitude. With these emissions, the peak power is larger than the average power, and the ratio between the two is referred to as the peak-to-average ratio (PAR). Because the PAR can vary from 0 dB to as much as 13 dB, depending on the technology used and the modulation conditions, stations having equal average radiated powers could have substantially different peak radiated powers. Because receivers often begin to exhibit interference effects when the power of an undesired signal exceeds a certain value, even if only for a short duration, the peak radiated power of the emission can be an important factor in evaluating the interference potential of a transmitting station. Consequently, the Commission has in recent years adopted rules in our flexible services that limit peak radiated power rather than average radiated power.

22. The CTIA filing states that the Commission's use of peak radiated power is subject to interpretation and could lead to confusion and proposes that the Commission's radiated power limits for PCS and AWS be specified in terms of average power, either instead of, or as an alternative to, peak power. CTIA points out that when several signals are present in an amplifier, that they can combine to produce high peaks even though individually they would not have high peaks. Given this concern, we seek comment as to whether we should depart from the Commission's practice of specifying peak radiated power and specify average radiated power as CTIA proposes. We note that the peak power of a radiated emission is always equal to or higher than the average power. Under the CTIA proposal, peak power could reach levels much higher than the increased limits CTIA recommends for the rule. If we specify average radiated power, should we also include a limit on the PAR, in order to guard against interference, and what should that limit be? We request that commenters consider the pros and cons of peak and average radiated power limits in terms of controlling the interference potential of stations, conforming to current industry measurement procedures using available measuring instruments, minimizing the burden of compliance with the rules, and having applicability to the wide range of technologies in use today and in the future.

### III. Procedural Matters

#### A. Comment Filing Procedures

23. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file

comments on the Further Notice of Proposed Rulemaking, WT Docket No. 03-264, on or before December 19, 2005, and submit reply comments on or before January 17, 2006. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, published at 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail

and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

*People with Disabilities:* Contact the FCC to request materials in accessible formats (braille, large print, electronic files, audio format, etc.) by e-mail at [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

24. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, facsimile (202) 488-5563, or e-mail at <http://www.fcc@bcpiweb.com>; and (2) Wilbert E. Nixon, Jr., Mobility Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554, or e-mail at [Wilbert.Nixon@fcc.gov](mailto:Wilbert.Nixon@fcc.gov).

#### B. Ex Parte Rules Regarding the Permit-But-Disclose Comment Proceeding

25. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206.

#### C. Initial Regulatory Flexibility Analysis

26. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) (See 5 U.S.C. 601-612), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *FNPRM*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before December 19, 2005. Reply comments must be filed on or before January 17, 2006. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

27. In the Report and Order, we revise the Broadband PCS transmitting power

rule by eliminating the transmitter output power limit portion of that rule. We note, however, that various proposals before us concerning the radiated power portion of the rule (EIRP limits), particularly those introduced into the record by CTIA's recent *ex parte* filing, give rise to practical and technical concerns that we believe should be further evaluated and addressed before we act on these proposals. Although it appears that some of these radiated power proposals have considerable merit, especially as applied across various bands or services in a harmonized fashion, we find that a more complete record would assist us in properly analyzing the technical details and specifics needed to craft a clear and workable radiated power rule that is not unduly burdensome. Accordingly, in the *FNPRM*, we ask a number of questions on the details of the CTIA proposals for changes to the broadband PCS radiated power limits. In addition, we consider whether these proposals should be applicable to those part 22 and part 27 services that operate under a flexible regulatory framework similar to part 24 Broadband PCS. Finally, we also seek comment on possible changes to other technical rules that may be appropriate if we adopt changes to the radiated power rules, as explained further below.

## 2. Legal Basis

28. The potential actions on which comment is sought in the *FNPRM* would be authorized under sections 4(i), 7, 11, 303(c), 303(f), 303(g), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(c), 303(f), 303(g), 303(r), and 332.

## 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

29. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the Agency certifies that "the rule will not, if promulgated, have a significant impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A

small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This IRFA describes and estimates the number of small entity licensees that may be affected if the proposals in the *FNPRM* are adopted.

30. *Small Businesses*. Nationwide, there are a total of 22.4 million small businesses, according to SBA data.

31. *Small Organizations*. Nationwide, there are approximately 1.6 million small organizations.

32. *Small Governmental Jurisdictions*. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

33. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

34. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control

application where unjust enrichment issues are implicated. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we request commenters to estimate the number of small entities that may be affected by any rule changes resulting from the *FNPRM*.

35. The potential rules on which comment is sought in the *FNPRM*, if adopted, would possibly affect small entity licensees of the services identified below.

## Wireless Radio Services

36. *Cellular Licensees*. The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent Trends in Telephone Service data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

37. *220 MHz Radio Service—Phase I Licensees*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If

this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

38. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licensees. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, published at 62 FR 16004, April 3, 1997, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

39. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service

Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

40. *Upper 700 MHz Band Licenses.* The Commission released a Report and Order, published at 15 FCC Rcd 476 (2000), authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

41. *Paging.* In the *Paging Second Report and Order*, published at 62 FR 11616, March 12, 1997, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093

licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the *Trends in Telephone Service* report, published in May 2002, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

42. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

43. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report*

and Order, published at 65 FR 35843, June 6, 2000. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

44. *Specialized Mobile Radio (SMR)*. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

45. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service

were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

46. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

47. *Private Land Mobile Radio (PLMR)*. PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We also note that PLMR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all carriers are small businesses under the SBA's definition.

48. *Public Safety Radio Services*. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance,

and emergency medical services. There are a total of approximately 127,540 licensees in these services.

Governmental entities as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

49. *Fixed Microwave Services*. Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

50. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–

1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

51. *39 GHz Service.* The Commission defines "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

52. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

53. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, published at 64 FR 59656, November 3, 1999, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross

revenues not exceeding \$15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this IRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

54. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

55. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

56. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the

Commission estimates that almost all of them qualify as small entities under the SBA definition.

57. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this IRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

58. *Multiple Address Systems (MAS).* Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than \$15 million in the three previous calendar years. "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

59. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public

safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

60. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

61. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million. "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

62. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, published at 65 FR 17594, April 4, 2000, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this

service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

63. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.

64. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million,

and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the *FNPRM*.

65. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

66. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and Other Program Distribution, consisting of all such companies having annual receipts of no more than \$12.5 million. According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year. Of this total, 1,180 firms had annual receipts of \$10 million or less, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the *FNPRM*.

67. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. No auction has yet been held in this service, although an action has been scheduled for January 14, 2004. Accordingly, there are no licensees in this service.

#### 4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

68. The policy proposals in the *FNPRM* could apply to a significant number of Commission licensees of wireless services. Specifically, the *FNPRM* seeks comment on possible changes to the broadband PCS radiated power limits including the introduction of power spectral density limits and specifying average radiated power in addition to peak radiated power in measuring emissions. We recognize that if we were to increase radiated power levels, it may be necessary to enhance coordination efforts between licensees, which will assist licensees in minimizing instances of interference.

Also, we seek comment on possible methods to improve information sharing among licensees and the level of burden increase such information sharing might entail. We also note that we have discussed possible changes to the likelihood of needing environmental evaluations as a result of our proposed actions in Section E of this IRFA, *infra*.

#### 5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

69. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”

70. In addition to our discussion of compliance burdens, *supra*, we have noted in this *FNPRM* that radiated power limit increases may impact licensee’s administrative burden in making filings required for proper evaluation of transmission sites in regard to environmental compliance. We have sought comment on this issue. We note that wireless systems, including broadband PCS systems, are subject to environmental evaluation with respect to human exposure of RF radiation for non-building mounted antennas when the antenna height above ground level is less than 10 meters and the total power of all channels is greater than 2000 watts ERP and for building mounted antennas when the total power from all channels is greater than 2000 watts ERP. Otherwise, these systems are categorically excluded from such environmental evaluation. Although we are not proposing any change to RF exposure standards, we seek comment as to whether adoption of higher radiated power limits would increase the number of facilities requiring full environmental evaluation rather than being categorically excluded, and whether adoption of higher radiated power limits would outweigh any possible increased administrative burden.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

71. None.

#### D. Initial Paperwork Reduction Act of 1995 Analysis

72. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

73. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission’s rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before December 19, 2005, and reply comments on or before January 17, 2006. Comments and reply comments should be filed in both WT Docket Nos. 03–103 and 05–42. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

74. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, facsimile (202) 488–5563, or e-mail at [http://www.fcc@bcpiweb.com](mailto:http://www.fcc@bcpiweb.com); and (2) Wilbert E. Nixon, Jr., Mobility Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554, or e-mail at [Wilbert.Nixon@fcc.gov](mailto:Wilbert.Nixon@fcc.gov).

#### IV. Ordering Clauses

75. *It is further ordered* that the commission’s Consumer Information Bureau, Reference Information Center, shall send a copy of this *FNPRM*, including the Final Regulatory Flexibility Certification and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects

47 CFR Part 22

Communications common carriers, Radio.

47 CFR Part 24

Personal communications services, Radio.

47 CFR Part 27

Wireless communications services.

Federal Communications Commission.

Marlene H. Dortch,  
Secretary.

[FR Doc. 05–20928 Filed 10–18–05; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 05–2517; MB Docket No. 05–273, RM–11273]

### Radio Broadcasting Services; Charleston, TN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission’s rules, 47 CFR 73.202(b). The Audio Division requests comment on a petition filed by Claire Giannasi, proposing the allotment of Channel 250A at Charleston, Tennessee as that community’s first local service. The proposed coordinates for Channel 250A at Charleston, Tennessee, are 35–19–11 NL and 84–37–00 WL. The allotment will require a site restriction of 13.4 km (8.3 miles) east of Charleston.

**DATES:** Comments must be filed on or before November 18, 2005, and reply comments on or before December 5, 2005.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: Kris R. Kendrick, Esq., Post Office Box 82032, Athens, Georgia 30608–2032.

**FOR FURTHER INFORMATION CONTACT:** Deborah A. Dupont, Media Bureau (202) 418–7072.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission’s Notice of Proposed Rule Making, MB Docket No. 05–273, adopted September 23, 2005, and released September 27, 2005. The full text of this Commission document is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission’s copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company’s Web site, <http://www.bcpiweb.com>. This document does not contain proposed information

collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

#### PART 73—RADIO BROADCAST SERVICES

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

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by adding Charleston, Channel 250A.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 05–20844 Filed 10–18–05; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, and 52

[FAR Case 2005–007]

RIN 9000–AK33

#### Federal Acquisition Regulation; Central Contractor Registration – Taxpayer Identification Number (TIN) Validation

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to include the process of validating a Central Contractor Registration (CCR) registrant’s taxpayer identification number (TIN) with the Internal Revenue Service (IRS) to improve data accuracy in the Federal procurement system. Additionally, the proposed amendment removes outdated language requiring modifications of contracts prior to December 31, 2003, regarding CCR.

**DATES:** Interested parties should submit written comments to the FAR Secretariat on or before December 19, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR case 2005–007 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-007@gsa.gov](mailto:farcase.2005-007@gsa.gov). Include FAR case 2005–007 in the subject line of the message.

- Fax: 202–501–4067.

- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAR case 2005–007 in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/>

*proposed.htm*, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208–4949. Please cite FAR case 2005–007.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Vendor registration in the CCR as a pre-requisite for being awarded a contract has been required in the Department of Defense since 1998, for Civilian Agencies since 2003. Since CCR’s inception, validation of registrants’ TINs with the IRS has been contemplated in order to improve data accuracy throughout the Federal procurement system. This capability, although actively pursued, was never implemented as the Internal Revenue Code (I.R.C.) restricts disclosure of TINs without the taxpayer’s consent, which due to technology at the time, would have been costly and inefficient to pursue. However, in its Fall 2004 “Report to Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations,” the Federal Contractor Tax Compliance Task Force (which included the Office of Management and Budget, the Department of Treasury, the Department of Defense, the General Services Administration, the Department of Justice, and the IRS) recommended that “. . . a consent-based TIN validation under I.R.C. § 6103 should be instituted.” The capability for a near real-time/real-time, web-based solution integrating the CCR with an IRS validation is now able to be pursued due to advancements in technology. The FAR was recommended to be updated to specifically identify the validation of the TINs as a part of CCR registration.

Additionally, Subpart 4.11, Central Contractor Registration, contains language that was included when this subpart was implemented in the FAR in 2003. This outdated language required modifications of contracts by December 31, 2003, to include CCR registration requirements. As this date is past, the case removes the associated language.

The rule is proposing to amend the FAR by—

1. Modifying FAR 2.101 to indicate that the validation requirement for “registered in CCR” includes TIN matching.

2. Removing FAR 4.1103(a)(3)(i) thru 4.1103(a)(3)(ii) and a part of 4.1104 to

remove the language requiring action by December 31, 2003.

3. Adding detail to the FAR clause at 52.204-7, Central Contractor Registration, to specifically identify validation of the TIN as a part of the definition "Registered in the CCR Database," and to indicate that consent is part of that process.

4. Removing Alternate I to FAR clause 52.204-7, Central Contractor Registration.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, as no new requirements are being placed on the vendor community. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 4, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2005-007), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes

to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 2, 4, and 52**

Government procurement.

Dated: October 12, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 4, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 4, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 2—DEFINITIONS OF WORDS AND TERMS**

2. Amend section 2.101 by revising paragraph (2) of the definition "Registered in the CCR database" to read as follows:

**2.101 Definitions.**

\* \* \* \* \*  
*Registered in the CCR database* \* \* \*  
 \* \* \* \* \*

(2) The Government has validated all mandatory data fields, to include validation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service (IRS), and has marked the record "Active". The contractor will be required to provide consent for TIN validation to the Government as a part of the CCR registration process.

\* \* \* \* \*

**PART 4—ADMINISTRATIVE MATTERS**

**4.1103 [Amended]**

3. Amend section 4.1103 by removing paragraph (a)(3) and redesignating paragraphs (b), (c), (d), and (e) as (a)(3), (b), (c) and (d), respectively.

**4.1104 [Amended]**

4. Amend section 4.1104 by removing the last sentence.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Amend section 52.204-7 by revising the date of the clause; in paragraph (a) by revising paragraph (2) of the definition "Registered in the CCR database"; and by removing Alternate I. The revised text reads as follows:

**52.204-7 Central Contractor Registration.**  
 \* \* \* \* \*

**Central Contractor Registration (DATE)**

(a) \* \* \*  
 \* \* \* \* \*  
*Registered in the CCR database* \* \* \*  
 \* \* \* \* \*

(2) The Government has validated all mandatory data fields, to include validation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service (IRS), and has marked the record "Active". The Contractor will be required to provide consent for TIN validation to the Government as a part of the CCR registration process.

[FR Doc. 05-20869 Filed 10-18-05; 8:45 am]

**BILLING CODE 6820-EP-S**

# Notices

Federal Register

Vol. 70, No. 201

Wednesday, October 19, 2005

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

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

October 13, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), [OIRA\\_Submission@OMB.EOP.GOV](mailto:OIRA_Submission@OMB.EOP.GOV) or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720-8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to

the collection of information unless it displays a currently valid OMB control number.

### Forest Service

*Title:* Perceived and Realized Health Benefits on Public Lands.

*OMB Control Number:* 0596-NEW.

*Summary of Collection:* In June 2002, President Bush issued Executive Order 13266 for the purpose of improving the health of all Americans. Physical activity was one of the four health-protection pillars and part of this E.O. encouraged Federal agencies to promote physical activity on public lands. Little is known about the use of outdoor recreation lands for health activities. Data will be collected from users of urban proximate public lands, who come from a variety of ethnic/racial, income, age, educational, and other socio-demographic backgrounds. The activities pursued, health benefits realized, information sources utilized, and site attributes preferred are just some of the items affected by these differences. The statute authorizing the collection of information is the Forest and Rangeland Renewable Resources Research Act of 1978 (Pub. L. 95-307, 92 Stat. 353).

*Need and Use of the Information:* Data will be collected using on-site surveys from visitors to urban parks and more distant watershed sites in or within an hour's drive of Los Angeles, California; Minneapolis-St. Paul, Minnesota; and Chicago, Illinois. Participants will answer questions on the following topics: Area visitation history and patterns; activity patterns; site amenities/characteristics; constraints to more frequent visitation, physical health; and demographics. The collected information will enable Forest Service personnel to more effectively manage recreation areas for the encouragement and promotion of potential physical health benefits. If this information is not collected resource managers will have to make visitor based decisions on limited information.

*Description of Respondents:* Individuals or households.

*Number of Respondents:* 3,600.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 576.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 05-20907 Filed 10-18-05; 8:45 am]

**BILLING CODE 3410-11-P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

[Docket No. 05-014N]

### New Technology Web Site Contents; Response to Comments

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is announcing the availability on its Web site of information regarding new technologies for use in the production of meat, poultry, and egg products that the Agency has received and for which FSIS has written a "No Objection" letter. The Web site will include brief descriptions of the new technologies. The availability of this information should increase public and industry awareness of new technologies and foster their use by small and very small plants.

**DATES:** This notice is effective November 18, 2005.

### FOR FURTHER INFORMATION CONTACT:

Shaukat H. Syed, D.V.M., Director, New Technology Staff, Office of Policy, Program, and Employee Development, FSIS, U.S. Department of Agriculture, Room 2932, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250-3700; telephone (202) 205-0675, facsimile (202) 205-0080.

**SUPPLEMENTARY INFORMATION:** FSIS has a longstanding interest in technologies used in livestock and poultry slaughter and in meat and poultry and egg product processing establishments. The development and proper use of technology can contribute significantly to improvements in the safety of the food supply, especially with regard to reducing threats posed by pathogenic microorganisms.

FSIS defines the term "new technology" as new, or new applications of, equipment, substances, methods, processes, or procedures

affecting the slaughter of livestock and poultry or processing of meat, poultry, or egg products. New technologies have resulted in significant improvements in the food safety of meat and poultry products in recent years.

On February 11, 2003, FSIS published a notice in the **Federal Register** titled "FSIS Procedures for Notification of New Technology" (68 FR 6873). This notice established new, flexible procedures to encourage the development and use of new technologies in livestock and poultry slaughter establishments and in meat, poultry, and egg product processing establishments.

On August 12, 2003, the Under Secretary for Food Safety announced the formation of the New Technology Staff (NTS). Located within FSIS, the NTS is charged with reviewing new technologies that companies intend to use in the slaughter of livestock and poultry and in the processing of meat, poultry, and egg products. Review by the NTS is intended to ensure that the use of new technologies is consistent with Agency regulations, and that the technologies will not adversely affect product safety, inspection procedures, or the safety of FSIS inspection program personnel.

On February 19, 2004, FSIS posted on its Web site at [http://www.fsis.usda.gov/regulations\\_&\\_policies/New\\_TechnologyNotification&ProtocolSubmission//index.asp](http://www.fsis.usda.gov/regulations_&_policies/New_TechnologyNotification&ProtocolSubmission//index.asp) a document titled "Guidance Procedures for Notification and Protocol Submission of New Technology." This guidance document was intended to assist establishments in determining whether they need to notify FSIS of new technologies that they propose to use in livestock and poultry slaughter and in meat, poultry, and egg product processing establishments. This document also was intended to provide guidance on when establishments need to submit protocols for in-plant testing of new technologies. This guidance document replaced the procedures outlined in FSIS' **Federal Register** notice of February 11, 2003 (68 FR 6873).

On April 14, 2005, FSIS posted on its Web site at [http://www.fsis.usda.gov/regulations\\_&\\_policies/New\\_Technologies/index.asp](http://www.fsis.usda.gov/regulations_&_policies/New_Technologies/index.asp) a document titled "Guidance on Requesting a Waiver of Food Safety and Inspection Service Regulatory Requirements for the Use of New Technology." This guidance on requesting a waiver informs meat and poultry slaughter and processing, egg product establishments, and other interested persons of the procedure for obtaining a regulatory waiver for a

limited period of time to test their new technology.

On April 14, 2005, FSIS also posted on its Web site at [http://www.fsis.usda.gov/regulations\\_&\\_policies/New\\_Technologies/index.asp](http://www.fsis.usda.gov/regulations_&_policies/New_Technologies/index.asp) a document titled "Standard Operating Procedures for Notification and Protocol Submission of New Technologies." This document specifies the standard operating procedures (SOPs) of the FSIS' NTS when an official meat and poultry (slaughter or processing), egg product establishment, or company that manufactures technology for use in official establishments submits a notification to the Agency of its intent to use a new technology or submits a protocol to the Agency for an in-plant trial of a new technology.

In an effort to encourage small and very small plants to use new technologies to achieve advances in food safety and in response to comments received at a public meeting on January 13, 2004, FSIS issued a **Federal Register** notice on June 18, 2004, announcing "New Technology Web Site Contents" and its intention to post on its Web site information regarding the use of new technologies in the production of meat, poultry, and egg products (69 FR 34119). The notice asked for comments on the value of the information to the public and the detrimental effects to a company if this information were made publicly available. Specifically, FSIS proposed posting on its Web site summaries of information about new technologies received by FSIS that are the subject of notifications. The summaries would provide brief descriptions of the new technologies that are the subjects of the notifications and protocols received from industry and would include the name of the submitter.

Access to this new technologies Web site would be especially valuable to small and very small establishments, which often have only small or no research budgets or other resources for exploring technologies that could enhance their operating procedures; make them more effective and efficient; increase food safety; and increase the establishment's security. The new technologies Web site will provide all establishments, but especially small and very small plants, with a cost effective way of learning what new technologies the Agency has received and with respect to whose use FSIS has written a "No Objection" letter. Having access to this information would allow establishments to be aware of, in a cost effective and timely manner, which new

technologies may be appropriate for use in their facilities.

In response to the notice, FSIS received two comments. After reviewing these comments, FSIS has decided to post on its Web site summary information about the new technologies that the Agency has reviewed and for which it has issued a "No Objection" letter.

#### Comments and Responses

*Comment:* One commenter stated that FSIS should not disclose technical information pertaining to the new technology but should post only the project name, submitter's name, and the "No Objection" letter date. The commenter stated that investment in the development of a new technology may exceed several hundred thousand dollars, and that this development work and investment should be protected. The commenter was concerned about disclosure of technical information. The commenter also stated that it is not the role of FSIS to be concerned about sharing new technologies developed by a company with other companies within the industry.

*Response:* FSIS understands and appreciates the amount of time and money needed to develop a new technology and to submit a notification or a protocol to FSIS. FSIS also understands and appreciates an establishment's concern about disclosure of technical information. FSIS believes, however, that sharing brief summary information on its Web site will not reveal any proprietary information but will promote industry awareness of technical innovations and encourage adoption of new ideas. Food safety is the mission of FSIS, and continued improvements in food safety will be achieved through the development and use of new technologies.

*Comment:* The second commenter was opposed to the posting of any information about new technologies under review by FSIS that are intended to be used in the manufacture of meat, poultry, and egg products. The commenter stated that the information contained in the notifications and protocols is proprietary.

*Response:* FSIS recognizes that a notification or protocol of a new technology may contain proprietary information. To protect this proprietary information from disclosure, FSIS intends to provide only a brief description of the new technology on the Web site and to post that description only after the Agency's review is complete. If a submitter is concerned about the disclosure of proprietary

information or a trade secret, the submitter may provide a brief description of the new technology for posting on the Web site.

The FSIS New Technology Web site will contain a listing of new technologies for which the Agency, after review, has issued a "No Objection" letter, which states that the Agency does not object to the use of the new technology. The Web site listing will provide the name of the company and a brief summary of the new technology, either provided by the submitting company or prepared by the Agency based on data provided by the submitter. The Web site listing will be updated on a weekly basis, and new technologies posted will remain on the Web site for a period of twelve months.

Once the Agency determines that it has no objection to the use of a proposed new technology, it sends the submitting company a "No Objection" letter. The letter will include the description of the new technology that the Agency intends to post to the Web site. The letter will state that, if the company does not object within five (5) working days from the date it receives the letter, the Agency will post the included description of the technology on the Web site. If the company objects to the description, it should state that it objects to the description, explain the basis for its objection (e.g., proprietary agreement, confidential commercial information, etc.), and provide an alternate description. FSIS will post the alternate description, unless the Agency concludes that the description does not fairly describe the technology. In such a case, FSIS will post the description that it prepared. FSIS will notify the company of its decision.

#### **Paperwork Reduction Act Requirements**

FSIS has reviewed the paperwork and recordkeeping requirements in this notice in accordance with the Paperwork Reduction Act (44 U.S.C. 3501–3520). FSIS has previously received approval from the Office of Management and Budget, under control number 0583–0127, to collect the information discussed in this notice. No new paperwork or recordkeeping requirements are being imposed on the industry as a result of this notice.

#### **Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through

the FSIS Web page located at [http://www.fsis.usda.gov/regulations/2005\\_Notices\\_Index/](http://www.fsis.usda.gov/regulations/2005_Notices_Index/). FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The new technology update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The new technology update is also available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an e-mail subscription service which provides an automatic and customized notification when popular pages are updated, including **Federal Register** publications and related documents. This service is available at [http://www.fsis.usda.gov/news\\_and\\_events/email\\_subscription/](http://www.fsis.usda.gov/news_and_events/email_subscription/) and allows FSIS customers to sign up for subscription options across eight categories. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves and have the option to password protect their account.

Done at Washington, DC on October 14, 2005.

**Barbara J. Masters,**  
*Administrator.*

[FR Doc. 05–20908 Filed 10–18–05; 8:45 am]

**BILLING CODE 3410–DM–P**

## **DEPARTMENT OF COMMERCE**

### **Foreign–Trade Zones Board**

#### **Order No. 1414**

#### **Expansion of Foreign–Trade Zone 222, Montgomery, Alabama, Area**

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

*Whereas*, the Montgomery Area Chamber of Commerce, grantee of Foreign–Trade Zone 222, submitted an application to the Board for authority to expand FTZ 222 to include two sites at the Airport Industrial Commercial Park

(Site 3 - 1,044 acres) and at the Montgomery County Technology Park (Site 4 - 368 acres) in Montgomery, Alabama, adjacent to the Birmingham Customs port of entry (FTZ Docket 57–2004, filed 12/8/04);

*Whereas*, notice inviting public comment has been given in the **Federal Register** (69 FR 74492, 12/14/04) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that approval of the application would be in the public interest;

*Now, therefore*, the Board hereby orders:

The application to expand FTZ 222 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and further subject to the Board's standard 2,000–acre limit for the overall zone project.

Signed at Washington, DC, this 5th day of October 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.*

Attest:

**Dennis Puccinelli,**  
*Executive Secretary.*

[FR Doc. 05–20931 Filed 10–18–05; 8:45 am]

**BILLING CODE: 3510–DS–S**

## **DEPARTMENT OF COMMERCE**

### **Foreign–Trade Zones Board**

#### **Order No. 1415**

#### **Termination Of Foreign–Trade Subzone 74A, Sparrows Point, Maryland**

Pursuant to the authority granted in the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign–Trade Zones Board Regulations (15 CFR Part 400), the Foreign–Trade Zones Board has adopted the following order:

*Whereas*, on March 14, 1985, the Foreign–Trade Zones Board issued a grant of authority to the City of Baltimore (the City), authorizing the establishment of Foreign–Trade Subzone 74A at the Baltimore Marine Industries Inc. facility, Sparrows Point, Maryland (Board Order 290, 50 FR 13057, 4/2/85);

*Whereas*, the City advised the Board on December 13, 2004 (FTZ Docket 2–2005), that zone procedures were no longer needed at the facility and

requested voluntary termination of Subzone 74A;

Whereas, the request has been reviewed by the FTZ Staff and Customs officials, and approval has been recommended;

Now, therefore, the Foreign-Trade Zones Board terminates the subzone status of Subzone 74A, effective this date.

Signed at Washington, DC, this 5th day of October 2005.

**Joseph A. Spetrini,**

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

**Dennis Puccinelli,**

Executive Secretary.

[FR Doc. 05-20932 Filed 10-18-05; 8:45 am]

BILLING CODE: 3510-DS-S

## DEPARTMENT OF COMMERCE

### International Trade Administration

A-560-815

#### Carbon and Certain Alloy Steel Wire Rod from Indonesia; Final Results of Antidumping Duty Administrative Review

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

**SUMMARY:** On July 11, 2005, the U.S. Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order covering carbon and certain alloy steel wire rod from Indonesia. See *Carbon and Certain Alloy Steel Wire Rod from Indonesia; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 39721 (July 11, 2005) (*Preliminary Results*). The merchandise covered by this order is carbon and certain alloy steel wire rod from Indonesia as described in the "Scope of the Order" section of this notice. The period of review (POR) is October 1, 2003, through September 30, 2004. We invited parties to comment on our *Preliminary Results*. Based on our analysis of the comments received, we made no changes to the margin calculation. Therefore, the final results do not differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of the Review."

**EFFECTIVE DATE:** October 19, 2005.

**FOR FURTHER INFORMATION CONTACT:**

Angelica Mendoza or Judy Lao, AD/CVD Operations, Office 7, Import

Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482-3019 or (202) 482-7924, respectively.

**SUPPLEMENTARY INFORMATION:**

**Period of Review**

The POR is October 1, 2003, through September 30, 2004.

**Background**

On July 11, 2005, the Department published in the **Federal Register** its preliminary results for this administrative review. See *Preliminary Results* at 70 FR 39721 (July 11, 2005). We invited parties to comment on the *Preliminary Results*. On August 10, 2005, we received a case brief from respondent, P.T. Ispat Indo (Ispat Indo). We received a rebuttal brief from petitioners, Gerdau Ameristeel U.S. Inc., ISG Georgetown Inc., Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc., on August 15, 2005. No public hearing was held.

**Scope of the Order**

The merchandise subject to this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the HTSUS definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality wire rod is defined as: (i) grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-

114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis - that is, the direction of rolling - of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered,

or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as "tire cord quality" or "tire bead quality" indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under the scope are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.<sup>1</sup>

#### Analysis of Comments Received

The issues raised in the case brief by Ispat Indo regarding this administrative review are addressed in the Issues and Decision Memorandum to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, from Barbara E. Tillman, Acting Deputy Assistant Secretary (Decision Memorandum), which is hereby adopted by this notice. A list of the issues addressed in the Decision Memorandum is appended to this notice. The Decision Memorandum is on file in the Central Records Unit (CRU) in Room B-099 of the main Commerce building, and can also be accessed directly on the Web at <http://>

<sup>1</sup> Effective January 1, 2004 and January 1, 2005, the CBP reclassified certain HTSUS numbers related to the subject merchandise. See [http://hotdocs.usitc.gov/tariff\\_chapters\\_current/toc.html#6](http://hotdocs.usitc.gov/tariff_chapters_current/toc.html#6)

[www.ia.ita.doc.gov/frn](http://www.ia.ita.doc.gov/frn). The paper copy and electronic version of the Decision Memorandum are identical in content.

#### Changes Since the Preliminary Results

Based on our analysis of comments received, we have made no adjustments to the analysis and programming used in calculating the preliminary dumping margin in this proceeding. Therefore, the weighted-average dumping margin calculated in the preliminary results is now final.

#### Final Results of Review

As a result of our review, we determine that the following weighted-average margin exists for the period of October 1, 2003, through September 30, 2004:

Manufacturer/Exporter	Weighted-Average Margin (Percentage)
P.T. Ispat Indo .....	0.38 ( <i>de minimis</i> )

#### Liquidation

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated exporter/importer-specific assessment rates. To calculate these rates, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review. We will direct Customs to assess the appropriate assessment rate against the entered Custom values for the subject merchandise on each of the importer's entries under the relevant order during the POR.

#### Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of carbon and certain alloy steel wire rod from Indonesia entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Tariff Act of 1930 as amended (the Act): (1) the cash deposit rate for the reviewed company will be zero, and no deposit will be required, due to the *de minimis* margin result (*i.e.*, less than 0.5 percent); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm

covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.06 percent. This rate is the "All Others" rate from the final determination in the LTFV investigation. See *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Indonesia*, 67 FR 55798 (August 30, 2002).

These deposit requirements shall remain in effect until the publication of the final results of the next administrative review.

#### Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these results and notice in accordance with sections 751(a)(1) and 777(I)(1) of the Act.

Dated: October 12, 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

#### Appendix

Issues and Decision Memorandum

Comment 1: Adjustment to Raw Material Cost

[FR Doc. E5-5777 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-DS-8**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

A-570-851

**Certain Preserved Mushrooms from the People's Republic of China: Notice of Final Results of the Eighth New Shipper Review**

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

**EFFECTIVE DATE:** October 19, 2005.

**SUMMARY:** On July 21, 2005, the U.S. Department of Commerce ("Department") published the preliminary results of the eighth new shipper review of the antidumping order on certain preserved mushrooms from the People's Republic of China ("PRC") (70 FR 42034) (July 21, 2005) ("Preliminary Results"). This review covers one exporter, Blue Field (Sichuan) Food Industrial Co., Ltd. ("Blue Field"). The period of review ("POR") is February 1, 2004, through July 31, 2004. Based on our analysis of the record, we have made minor changes to the margin calculation of the producer/exporter as described below. See "Final Results of Review" section below.

**FOR FURTHER INFORMATION CONTACT:** Stephen F. Berlinguette or Christopher D. Riker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-3740 or (202) 482-3441, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

We invited parties to comment on the *Preliminary Results*. Neither the Coalition for Fair Preserved Mushroom Trade ("petitioners") nor Blue Field submitted case briefs after the

publication of the *Preliminary Results*. Neither party requested a public hearing. On July 28, 2005, Blue Field submitted comments on the surrogate values the Department used in the *Preliminary Results*.

**Scope of the Order**

The products covered by this order are certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are "brined" mushrooms, which are pre-salted and packed in a heavy salt solution to provisionally preserve them for further processing.

Excluded from the scope of this order are the following: (1) all other species of mushrooms, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified," or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.<sup>1</sup>

The merchandise subject to this order is currently classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153 and 0711.51.0000 of the Harmonized Tariff Schedule of the

United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

**Analysis of Comments Received**

Neither the petitioners nor the respondent submitted case or rebuttal briefs after the publication of the *Preliminary Results*. Blue Field's July 28, 2005, submission did, however, provide comments on the Department's surrogate value calculations for tin plate, labor, and factory overhead, SG&A, and profit ratios. For a detailed discussion of this submission, see the *Issues and Decision Memorandum*, dated October 12, 2005, which is hereby adopted by this notice. A list of the issues discussed in the *Issues and Decision Memorandum* is attached to this notice as an Appendix. The *Issues and Decision Memorandum* is a public document that is on file in the Central Records Unit ("CRU"), room B-099 in the main Department building, and can be accessed online at <http://ia.ita.doc.gov/frn>. The paper copy and electronic version of the *Issues and Decision Memorandum* are identical in content.

**Changes Since the Preliminary Results**

Since the publication of the *Preliminary Results*, the Department's surrogate values for tin plate and labor have changed. Additionally, the Department has made changes to the surrogate factory overhead, selling, general, and administrative ("SG&A") expense, and profit ratios utilized in the *Preliminary Results*. (See *Issues and Decisions Memorandum*.)

**Final Results of New Shipper Reviews**

We determine that the following antidumping margin percentage existed during the period February 1, 2004, through July 31, 2004:

Exporter	Producer	Margin (percent)
Blue Field (Sichuan) Food Industrial Co., Ltd. ....	Blue Field (Sichuan) Food Industrial Co., Ltd.	0.00

**Assessment of Antidumping Duties**

The Department shall determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), we

calculated importer or customer specific ad valorem duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. In accordance with 19 CFR 351.106(c)(2), we will

instruct CBP to liquidate without regard to antidumping duties all entries of subject merchandise during the POR for which the importer or customer specific assessment rate is zero or de minimis (*i.e.*, less than 0.50 percent). The Department will issue appropriate

<sup>1</sup> On June 19, 2000, the Department affirmed that "marinated," "acidified," or "pickled" mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. See "Recommendation Memorandum-Final Ruling

of Request by Tak Fat, *et al.* for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China," dated June 19, 2000. The Department's scope

determination was affirmed by the Court of Appeals for the Federal Circuit in *Tak Fat Trading Company, et. al. v. United States, et. al.*, 396 F.3d 1378 (Fed. Cir., 2005).

assessment instructions directly to CBP within 15 days of publication of the final results of these reviews.

#### Cash Deposit Requirements

Bonding will no longer be permitted to fulfill security requirements for shipments from Blue Field of certain preserved mushrooms from the PRC entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this notice in the **Federal Register**. The cash deposit rate shall be required for merchandise subject to the order, entered or withdrawn from warehouse for consumption on or after the publication date of these final results for this new shipper review, as provided for by section 751(a)(1) of the Tariff Act of 1930, as amended: (1) The cash deposit rates for Blue Field (*i.e.*, for subject merchandise both manufactured and exported by Blue Field) will be zero; (2) the cash deposit rate for PRC exporters who received a separate rate in a prior segment of the proceeding will continue to be the rate assigned in that segment of the proceeding; (3) the cash deposit rate for the PRC entity and for subject merchandise exported by Blue Field, but not manufactured by Blue Field, will continue to be the PRC-wide rate (*i.e.*, 198.63 percent); and (4) the cash deposit rate for non-PRC exporters of subject merchandise from the PRC will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review. There are no changes to the rates applicable to any other companies under this antidumping duty order.

#### Notification to Interested Parties

The Department will disclose calculations performed in connection with these final results of review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the

disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a punishable violation.

The final results of this new shipper review and notice are published in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: October 12, 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

#### Appendix I

Issues in the Decision Memorandum

*Comment 1:* Appropriate surrogate value for tin plate

*Comment 2:* The Department should not adjust the surrogate labor rate for inflation

*Comment 3:* The Department should revise mistakes made in its surrogate factory overhead, SG&A, and profit ratio calculations

[FR Doc. E5-5776 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-DS-S**

#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

[Docket No. 051012261-5261-01; I.D. 092605A]

RIN 0648-AT68

##### 2006 Atlantic Sea Scallop Research Set-Aside Program

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

**ACTION:** Notice.

**SUMMARY:** NMFS requests research proposals for fishing year 2006 (March 1, 2006 - February 28, 2007) to utilize portions of the total allowable catch (TAC) and Days-at-Sea (DAS) allowance in the Atlantic sea scallop fishery that have been set aside by the New England Fishery Management Council (Council) for sea scallop research endeavors under a research set-aside (RSA) program. The program provides a mechanism to fund research and compensate vessel owners through the sale of fish harvested under the research quota. Vessels participating in an approved research project may be authorized by the Administrator, Northeast Region, NMFS (Regional

Administrator), to harvest and land species in excess of any imposed trip limit or to harvest and land during fishery closures. Landings from such trips would be sold to generate funds that would help defray the costs associated with research projects. No Federal funds will be provided for research under this notification.

**DATES:** Applications must be received by NMFS no later than 5 p.m. EDT, November 18, 2005.

**ADDRESSES:** Electronic application submissions must be transmitted on-line through <http://www.grants.gov>. Applications submitted through <http://www.grants.gov> will be accompanied by a date and time receipt indication on them. Since delays may be experienced when registering with Grants On-line near the end of a solicitation period, NOAA strongly recommends that you do not wait until the application deadline to begin the on-line application process. If an applicant does not have Internet access, hard copy proposals will be accepted, and the date will be recorded when the proposals are received in the program office. Paper applications must be sent to NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Electronic or hard copies received after the deadline will not be considered, and hard copy applications will be returned to the sender.

**FOR FURTHER INFORMATION CONTACT:** Information on the Atlantic Sea Scallop Fishery Management Plan (FMP), as it relates to this funding opportunity, contact Andrew Applegate, New England Fishery Management Council, by phone (978) 465-0492, or Paul Perra, NMFS, by phone (978) 281-9153, fax (978) 281-9135, or email [Paul.Perra@noaa.gov](mailto:Paul.Perra@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Application information is available at <http://www.grants.gov>. Electronic copies of the Standard Forms for submission of research proposals may be found on the Internet in a PDF (Portable Document Format) version at <http://www.ago.noaa.gov/grants/appkit.shtml>. Applicants without Internet access can contact Rich Maney, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930, by phone 978-281-9265, by fax 978-281-9117, or by email at [Rich.Maney@noaa.gov](mailto:Rich.Maney@noaa.gov).

For a copy of the full funding opportunity announcement for this request for proposals and to apply for this NOAA Federal funding

opportunity, please go to <http://www.grants.gov> and use the following funding opportunity number: NMFS-NERO-2006-2000403.

### Background

For fishing year 2006, the Council has set aside portions of the TAC and DAS allowance in the sea scallop fishery to be used for sea scallop research endeavors under a RSA program. The RSA program provides a mechanism to fund research and compensate vessel owners through the sale of fish harvested under the research quota. Research proposals are, therefore, sought to utilize the three set-asides implemented by Amendment 10 to the Atlantic Sea Scallop Fishery Management Plan (Amendment 10) (69 FR 35194, June 23, 2004), and Frameworks 16 to the Atlantic Sea Scallop FMP and 39 to the Northeast Multispecies FMP (Joint Frameworks) (69 FR 63460, November 2, 2004). For Scallop Fishing Year 2006, with the scallop value estimated at \$4.95 per lb, the values of TAC and DAC are estimated as follows: (1) The DAS set-aside for the open fishing areas is 373 DAS, with an average catch rate of 1,900 lb/DAS (862 kg/DAS) and value of \$3,508,065; (2) the research TAC set-aside for the Closed Area (CA) I Access Area is 56,482 lb (26 mt), with a value of \$279,586; and (3) the research TAC set-aside for the Nantucket Lightship Access Area (NLAA) is 135,937 lb (62 mt), with a value of \$672,888. Thus, for fishing year 2006, the total value of the set-asides available for scallop-related research is approximately \$4,460,539 (79 percent from the open area DAS set-aside, 6 percent from the CA I, and 15 percent from the NLAA). Researchers must specify the amount of set-aside (TAC or DAS, as appropriate) sought from each area.

Under the area access program implemented by Amendment 10, limited access sea scallop vessels will be allowed to land scallops in excess of the proposed possession limit or to take additional trips above those proposed in the area access program. The proceeds of the excess catch or additional trips may be used by such vessels to offset the costs of the research proposals submitted in response to this notice. The access areas will remain open until one of four events trigger a closure: (1) The fishing year ends (February 28, 2007); (2) finfish catches exceed TACs established by the Joint Frameworks; (3) the vessels use all of the trips authorized under the area access program; or (4) the fishing season, as established by the Joint Frameworks, ends.

Amendment 10 expanded the RSA program to all areas where scallop fishing occurs, including regular open fishing areas. For each fishing year, 2 percent of the total allowable DAS allocations will be set-aside for scallop related research activities, before determining annual fishing allocations for limited access scallop vessels. This pool of DAS is available for authorized research projects under which vessels may participate in scallop research programs and/or conduct trips to compensate for research expenses incurred. The vessel may be authorized to conduct additional trips of a specified duration that will not be counted against the vessel's annual DAS allocation as compensation.

Vessels participating in an approved project and fishing in a Sea Scallop Access Area, will be authorized by the Regional Administrator to: Take additional trips into the area(s) and/or to land scallops in excess of the possession limits established by the Joint Frameworks (18,000 lb or 8,165 kg for full-time vessels, 14,400 lb or 6,532 kg for part-time vessels, and 3,000 lb or 1,361 kg for occasional vessels).

### Funding Availability

No Federal funds are provided for research under this notification, but rather the opportunity to fish and sell the catch to generate income. The Federal Government's contribution to the project will be a Letter of Authorization (LOA) that will provide special fishing privileges in response to sea scallop research proposals selected to participate in this program. Funds generated from landings harvested and sold under the Scallop RSA Program shall be used to cover the cost of research activities, including vessel costs. For example, the funds may be used to pay for gear modifications, monitoring equipment, the salaries of research personnel, or vessel operation costs. The Federal Government shall not be liable for any costs incurred in the conduct of the project. Specifically, the Federal Government is not liable for any costs incurred by the researcher or vessel owner should the sale of catch not fully reimburse the researcher or vessel owner for his/her expenses. In the past, 2-6 awards have been approved each fishing year. During the 2005 fishing year, six awards were approved, distributing a total of 290,634 lb of TAC and 220 DAS.

### Statutory Authority

Issuing grants is consistent with sections 303(b)(11), 402(e), and 404(c) of the Magnuson-Stevens Fishery Conservation and Management Act, 16

U.S.C. 1853(b)(11), 16 U.S.C. 1881a(e), and 16 U.S.C. 1881(c), respectively.

The ability to set aside scallop TAC and DAS was established through Amendment 10 (69 FR 35194, June 23, 2004), and Joint Frameworks (69 FR 63460, November 2, 2004).

### CFDA Number

In the Catalog of Federal Domestic Assistance, the program number is 11.454, and the program name is Unallied Management Projects.

### Eligibility

1. Eligible applicants are institutions of higher education, hospitals, other nonprofits, commercial organizations, individuals, state, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice. Also, a person is not eligible to submit an application under this program if he/she is an employee of any Federal agency. Fishery Management Council members who are not Federal employees may submit an application.

2. DOC/NOAA supports cultural and gender diversity and encourages women and minority individuals and groups to submit applications to the RSA program. In addition, DOC/NOAA is strongly committed to broadening the participation of historically black colleges and universities, Hispanic serving institutions, tribal colleges and universities, and institutions that work in under served areas. DOC/NOAA encourages proposals involving any of the above institutions.

3. DOC/NOAA encourages applications from members of the fishing community and applications that involve fishing community cooperation and participation.

### Cost Sharing Requirements

None required.

### Evaluation and Selection Procedures

NMFS will solicit written technical evaluations from the Council members who make up the Scallop Committee and Research Steering Committee (Committees), and from three or more appropriate private and public sector experts (e.g., scallop industry, academia, or governmental experts) to determine the technical merit of the proposal and to provide a rank score of the project based on the criteria described in the Evaluation Criteria section of this document. Following completion of the technical evaluation, NMFS will convene a review panel, containing members from the Committees and technical experts, to review and individually critique the scored

proposals to enhance NOAA's understanding of the proposals. Initial successful applicants may be required, in consultation with NMFS, to further refine/modify the study methodology as a condition of project approval. No consensus recommendations will be made by the Committee members, technical experts, or by the review panel.

The merit review ratings shall provide a rank order to the Selecting Official (Regional Administrator) for final funding recommendations. A program officer may first make recommendations to the Selecting Official applying the selection factors. The Selecting Official shall award in the rank order unless the proposal is justified to be selected out of rank order based upon one or more of the factors listed under Selection Factors.

#### *Evaluation Criteria*

**1. Importance and/or relevance and applicability of the proposed project:** This criterion ascertains whether there is intrinsic value in the proposed work and/or relevance to NOAA, Federal, regional, state, or local activities. For the 2006 RSA program, applicants must provide a clear definition of the problem, need, issue, or hypothesis to be addressed. The proposal should describe its relevance to RSA program priorities and detail how the data gathered from the research will be used to enhance the understanding of the fishery resource or contribute to the body of information on which management decisions are made. (30 points)

**2. Technical/scientific merit:** This criterion assesses whether the approach is technically sound and/or innovative, if the methods are appropriate, and whether there are clear project goals and objectives. For the 2006 RSA Program, proposals should provide a clear definition of the approach to be used, including descriptions of field work, theoretical studies, and laboratory analysis to support the proposed research. (15 points)

**3. Overall qualifications of the project:** This criterion assesses whether the applicant and team members possess the necessary education, experience, training, facilities, and administrative resources to accomplish the project. For the 2006 RSA Program, proposals should provide adequate justification as to how the project is likely to achieve its stated objectives. Projects should demonstrate support, cooperation, and/or collaboration with the fishing industry. (35 points)

**4. Project costs:** This criterion evaluates the budget to determine if it

is realistic and commensurate with the project needs and time frame. For the 2006 RSA program, cost-effectiveness of the project will be considered. (10 points)

**5. Outreach and education:** This criterion assesses whether the project involves a focused and effective education and outreach strategy regarding NOAA's mission to protect the Nation's natural resources. For the 2006 RSA Program, proposals should provide identification of anticipated benefits, potential users, likelihood of success, and methods of disseminating results. (10 points)

#### *Selection Factors:*

1. Availability of funding.
2. Balance/distribution of funds:
  - a. Geographically
  - b. By type of institutions
  - c. By type of partners
  - d. By research areas
  - e. By project types
3. Whether this project duplicates other projects funded or considered for funding by NOAA or other Federal agencies.
4. Program priorities and policy factors.
5. Applicant's prior award performance.
6. Partnerships and/or participation of targeted groups.
7. Adequacy of information necessary to conduct a National Environmental Policy Act (NEPA) analysis and determination.

Key program policy factors (see item 4 above) to be considered by the Selecting Official are: (1) The time of year the research activities are to be conducted; (2) the ability of the proposal to meet the applicable experimental fishing requirements; (3) redundancy of research projects; and (4) logistical concerns. Therefore, the highest scoring projects may not necessarily be selected for an award. All approved research must be conducted in accordance with provisions approved by NOAA, and, if needed, provided in an Exempted Fishing Permit (EFP) issued by NMFS. Unsuccessful applications will be returned to the submitter. Successful applications will be incorporated into the award document.

For proposals that request exemptions from existing regulations (e.g., possession limits, closed areas, etc.), the impacts of the proposed exemptions must be analyzed. Any applicants who request regulatory exemptions that extend beyond the DAS or TAC set-aside implemented in Amendment 10 or the Joint Frameworks may be required to adhere to the regulations governing the issuance of an EFP by NMFS. As

appropriate, NMFS will consult with the Council and successful applicants to secure the information required for granting an exemption if issuance of an EFP is necessary for the research to be conducted. No research or usage of research TAC or DAS will be allowed until NMFS notifies the applicant that the applicant's EFP request is approved.

#### **NEPA Requirements**

NOAA must analyze the potential environmental impacts, as required by NEPA, for applicant projects or proposals which are seeking NOAA Federal assistance opportunities, including special fishing privileges. Detailed information on NOAA compliance with NEPA can be found at the following website: <http://www.nepa.noaa.gov/> including NOAA Administrative Order 216-6 for NEPA at: [http://www.nepa.noaa.gov/NAO216\\_6\\_TOC.pdf](http://www.nepa.noaa.gov/NAO216_6_TOC.pdf), and the Council on Environmental Quality implementation regulations at: [http://ceq.eh.doe.gov/nepa/regs/ceq/toc\\_ceq.htm](http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm).

Consequently, as part of an applicant's package, and under the description of program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species, and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). The impacts of the TAC and DAS set-asides were analyzed in the Final Supplemental Environmental Impact Statement for Amendment 10, and the Joint Frameworks' associated Environmental Assessment. Therefore, if the applicant does not request additional regulatory exemptions beyond the use of RSA TAC and/or DAS, additional NEPA analysis may not be required. However, if the research proposal requests exemptions from regulations that extend beyond the TAC and DAS RSA, applicants may be required to provide additional specific information that will serve as the basis for any required impact analyses. Applicants may also be requested to assist NOAA in drafting an environmental assessment if NOAA determines such an assessment is required. Applicants will also be required to cooperate with NOAA in identifying and implementing feasible measures to reduce or avoid any identified adverse environmental impacts associated with their proposed

research activity. The failure to do so shall be grounds for the denial of an application.

#### Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389), is applicable to this solicitation.

#### Reporting Requirements

Recipients will be required to submit the following financial and performance (technical) reports. These reports are to be submitted electronically unless the recipient does not have Internet access, in which case hard copy submissions will be accepted. Financial Status Reports (SF-269 and SF-272) are required to be submitted to the Grants Officer semi-annually. Performance or progress reports are required to be submitted to the NOAA Program Officer semi-annually. These reports will be due no later than 30 days following the end of each six-month period from the start date of an award. The final report is due 90 days after the award expiration.

The format of the final report may vary, but the report must contain:

1. A brief summary of the completion report (200-word or less abstract);
2. A description of the issue/problem that was addressed;
3. A detailed description of methods of data collection and analyses;
4. A discussion of results and any relevant conclusions presented in a format that is understandable to a non-technical audience. This should include benefits and/or contributions to management decision-making;
5. A list of entities, firms, or organizations that actually performed the work, and a description of how the work was accomplished;
6. A detailed final accounting of all the fish landed, sold, and the disbursement of program income to include a detailed accounting of all funds used to conduct fish research, including those provided through the research set-aside; and
7. Data from research projects must be submitted in electronic format with appropriate documentation to NMFS, as requested. All raw data collected under grants issued as a result of this solicitation belongs to, and shall remain the property of the Federal government. Grantees will be required to collect, assimilate, maintain and transmit any and all raw data in a format and time frame that may be specified by NMFS.

#### Universal Identifier

Applicants should be aware that they are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See the October 30, 2002 (67 FR 66177) **Federal Register** for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1-866-705-5711 or via the internet <http://www.dunandbradstreet.com>.

#### Executive Order 12372

Applications under this program are subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

#### Limitation of Liability

Funding for programs listed in this notice is contingent upon the availability of fishing year 2006 scallop TAC and/or DAS. In no event will NOAA or DOC be responsible for application preparation costs if these programs fail to receive a TAC or DAS award, or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

#### Paperwork Reduction Act (PRA)

This document contains collection-of-information requirements subject to the PRA. The use of Standard Forms 424, 424A, 424B, SF-LLL, CD-346, SF269 and SF272 has been approved by the Office of Management and Budget (OMB) under the respective OMB control numbers 0348-0043, 0348-0044, 0348-0040, 0348-0046, 0605-0001, 0348-0039 and 0348-0003. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

#### Executive Order 12866

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

#### Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

#### Administrative Procedure Act (APA)/Regulatory Flexibility Act (RFA)

Prior notice and an opportunity for public comment are not required by the

APA or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the RFA (5 U.S.C. 601 *et seq.*) do not apply. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: October 13, 2005.

**James W. Balsiger,**

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

[FR Doc. 05-20939 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 101305B]

#### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; committee meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) Herring Oversight Committee along with the Atlantic States Marine Fishery Council (ASMFC) Herring Section will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Thursday, November 10, 2005, from 9 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at the Sheraton Colonial, One Audubon Road, Wakefield, MA 01880; telephone: (781)245-9300.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978)465-0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

1. Review the specifics of a proposed no-cost contract module(s) which would establish a contractual relationship between NMFS and observer contractors for some portion of observer placements.
2. Review of overall program goals and objectives.

3. Discussion of potential long-term funding models for the observer program.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### Special Accommodations

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

Dated: October 14, 2005.

**Emily Menashes,**

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

[FR Doc. E5-5748 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 101305C]

#### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) is scheduling a public meeting of its Social Sciences Advisory Committee in November, 2005 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** The meeting will be held on Monday, November 7, 2005, at 10 a.m.

**ADDRESSES:** The meeting will be held at the Holiday Inn, One Newbury Street, Peabody, MA 01960; telephone: (978) 535-4600; fax: (978) 535-8248.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

**SUPPLEMENTARY INFORMATION:** The Committee will meet to review and discuss social and economic information and analysis provided in Draft Amendment 1 to the Atlantic Herring Fishery Management Plan (FMP) and its Draft Supplemental Environmental Impact Statement (DSEIS). The Committee will also develop recommendations regarding the social and economic analyses in Amendment 1 to the Herring FMP for Council consideration when selecting final management measures and developing the Final EIS for Amendment 1.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at 978-465-0492, at least 5 days prior to the meeting date.

Dated: October 14, 2005.

**Emily Menashes,**

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

[FR Doc. E5-5749 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 101305D]

#### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) is

scheduling a public meeting of its Magnuson-Stevens Committee in November, 2005 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** The meeting will be held on Wednesday, November 9, 2005, at 10 a.m.

**ADDRESSES:** The meeting will be held at the New England Fishery Management Council Office, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465-0492; fax: (978) 465-3116.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

**SUPPLEMENTARY INFORMATION:** The Committee will meet to review and Council positions on issues related to Magnuson-Stevens Fishery Conservation Management Act reauthorization and, if available, a new Senate staff draft of the Act. Any committee recommendations will be forwarded for approval at the Council's November 15-17, 2005 meeting scheduled in Hyannis, MA.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at 978-465-0492, at least 5 days prior to the meeting date.

Dated: October 14, 2005.

**Emily Menashes,**

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

[FR Doc. E5-5750 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

[I.D. 101405A]

**Fisheries off West Coast States and in the Western Pacific; Western Pacific Pelagic Fisheries; Western and Central Pacific Fisheries Convention; Public Meetings**

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

**ACTION:** Notice of public meetings; request for comments.

**SUMMARY:** The Pacific Islands Regional Office of NMFS will hold two public meetings related to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("Convention"). The purposes of the meetings are: to seek specific input for the U.S. delegation to the December 2005 session of the Commission established by the Convention, of which the United States is currently a cooperating non-member; and to provide general information about, and seek public input on, potential regulatory and other actions to be taken by NMFS should the U.S. Senate ratify the Convention and the Congress enact implementing legislation.

**DATES:** The San Diego meeting will be held on November 1, 2005, from 6:30 p.m. to 9:30 p.m. The Honolulu meeting will be held November 15, 2005, from 1 p.m. to 4 p.m.

**ADDRESSES:** The San Diego meeting will be held at the Hyatt Regency Islandia, Room Mission B, 1441 Quivira Road, San Diego, CA. The Honolulu meeting will be held at the Pacific Islands Regional Office, NMFS, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI. Submit written comments to William L. Robinson, Regional Administrator, Pacific Islands Regional Office, NMFS, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814. You may submit comments by email to [pir.wcpfc@noaa.gov](mailto:pir.wcpfc@noaa.gov) or facsimile (fax) to 808-973-2941.

**FOR FURTHER INFORMATION CONTACT:** Rhea Moss, NMFS, 808-944-2153.

**SUPPLEMENTARY INFORMATION:****Background on the Convention**

After over 4 years of complex negotiations among the coastal States of the western and central Pacific Ocean and States fishing in that region, the Convention was opened for signature at Honolulu on September 5, 2000.

The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1995 United Nations Agreement for the Implementation of the Provisions of the UNCLOS of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ("UN Fish Stocks Agreement"). For this purpose, the Convention establishes, among other things, the Commission, and a Secretariat located in Pohnpei, Federated States of Micronesia.

According to the Convention, the Commission has certain responsibilities and functions with respect to the conservation and management of highly migratory species (HMS) stocks within the Convention Area. Such HMS stocks include fish stocks of the species listed in Annex I of the UNCLOS and such other species as the Commission may determine. Conservation and management measures under the Convention may be applied throughout the range of the stocks, or to specific areas within the Convention Area, as determined by the Commission.

The Convention Area is defined in article 3 of the Convention and comprises a large area of the Pacific Ocean predominantly west of the 150° meridian W. long. and north of the 55° parallel S. lat.

The Convention was open for signature for 12 months from September 5, 2000, by the states and territories that participated in the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, namely: Australia, Canada, China, Cook Islands, Federated States of Micronesia, Fiji, France, Indonesia, Japan, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, New Zealand, Niue, Republic of Palau, Independent State of Papua New Guinea, Republic of the Philippines, Republic of Korea, Independent State of Samoa, Solomon Islands, Kingdom of Tonga, Tuvalu, United Kingdom of Great Britain and Northern Ireland in respect of Pitcairn, Henderson, Ducie and Oeno Islands, United States of America and Republic of Vanuatu. The depositary for the Convention is the Government of New Zealand.

In accordance with the provisions of its article 36, the Convention entered into force on June 19, 2004, 6 months after the deposit of the thirteenth instrument of ratification, acceptance,

approval or accession. As of October 2005, the following States had ratified or acceded to the Convention; Australia, China, Cook Islands, European Community, Federated States of Micronesia, Fiji, France, Japan, Korea, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Philippines, Samoa, Solomon Islands, Tonga and Tuvalu. The Convention also contains special arrangements for participation by fishing entities and by territories situated within the Convention Area. In accordance with the Arrangement for the Participation of Fishing Entities, Chinese Taipei has agreed to be bound by the regime established by the Convention in accordance with its article 9, and to participate in the work of the Commission. In accordance with article 43 on the participation of territories, Tokelau, French Polynesia, New Caledonia and Wallis and Futuna are authorized to participate in the Commission and its subsidiary bodies.

In accordance with paragraph 1 of article 35, the Convention shall remain open for accession by the States referred to in article 34, paragraph 1, and by any entity referred to in article 305, paragraph 1(c), (d) and (e) of the UNCLOS that is situated in the Convention Area. The Parties to the Convention may, by consensus, invite other States and regional economic integration organizations (e.g. European Union) whose nationals or fishing vessels wish to conduct fishing for HMS stocks in the Convention Area to accede to the Convention.

Further background information may be obtained from the Commission's website, <http://www.wcpfc.org>

**Potential NMFS action to implement the Convention**

Currently the scope of environmental review required under the National Environmental Policy Act (NEPA) for potential NMFS action related to the Convention is undetermined. A Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) under the authority of the NEPA has not been published. However, by way of this notice and these public meetings, NMFS is seeking public input on potential action by NMFS in the event that the U.S. States Senate ratifies the Convention and Congress enacts legislation that gives authority to the Secretary of Commerce and in turn NMFS to implement the relevant provisions of the Convention. Comments received during these public meetings and written comments received in response to this notice may be considered by NMFS as part of the

scoping process for subsequent environmental review, such as if NMFS later issues an NOI to prepare an EIS for a proposed action related to the Convention.

In the event of ratification of the Convention (in which case the United States would become a member of the Commission) and legislation the need for action would be limited to fulfilling the obligations of the United States with respect to the Convention provisions that are ready for decision-making. Examples of such provisions are in the articles of the Convention relating to: flag state duties; compliance and enforcement; boarding and inspection; port state measures; the implementation of a regional vessel observer program; and regulation and monitoring of transshipments.

**Commission's Second Annual Session, December 2005, Pohnpei, Federated States of Micronesia**

The United States has not ratified the Convention as of this date and thus will participate in the second session of the Commission in December 2005 as a cooperating non-member. Anticipated items of interest at the December 2005 Commission session include the status of bigeye and yellowfin tuna stocks and consideration of conservation and management measures to ensure sustainable use of those stocks, the establishment of the Northern Committee (NC), and the first meeting of the Technical and Compliance Committee (TCC).

The first meeting of the Commission's Scientific Committee (SC), held in Noumea, New Caledonia, in August 2005, resulted in updated stock assessments for the four primary tuna species in the Convention Area. The most recent results for bigeye tuna confirm previous analyses that the current level of fishing mortality is likely greater than the level associated with maximum sustainable yield (MSY). In addition the most recent yellowfin tuna assessment is more pessimistic than previous analyses, and suggests this stock is also subject to a fishing mortality rate greater than the level associated with MSY. As the Commission previously resolved (2004) to adopt conservation and management measures at the 2005 annual session and the SC's latest assessments suggest overfishing is occurring for two principal tuna stocks in the region, there will be considerable attention given to potential conservation and management measures for these stocks.

The NC is to be established as a subsidiary body of the Commission with responsibility to develop

recommendations for conservation and management measures for those stocks primarily located and fished north of the 20° parallel N. lat. Actions of the NC, once established, may include, in addition to establishing institutional processes for itself, proposing a Memorandum of Understanding between the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean and the Commission, and recommending that the Commission adopt a resolution to address the sustainable use of albacore tuna in the north Pacific.

The first meeting of the Commission's TCC is to be held immediately prior to the Commission session, and will likely focus on establishing a work plan for future action by the Committee. Other matters of priority will be the development of standards, specifications and procedures for the Commission's vessel monitoring system, the regional vessel observer program and the United Nations Food and Agricultural Organization Port State Model Scheme.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Rhea Moss, NMFS, 808-944-2153 (voice) or 808-973-2941 (fax), at least 5 working days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*, and 16 U.S.C. 5501 *et seq.*

Dated: October 14, 2005.

**Alan D. Risenhoover,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. 05-20940 Filed 10-18-05; 8:45 am]  
**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

[I.D. 101305A]

**Endangered Species; File No. 1552**

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that the NMFS, Southeast Fisheries Science Center (SEFSC), 75 Virginia Beach Drive, Miami, Florida 33149, has applied in due form for a permit to take green (*Chelonia mydas*), loggerhead

(*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), and olive ridley (*Lepidochelys olivacea*) sea turtles for purposes of scientific research.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before November 18, 2005.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713-2289; fax (301)427-2521; and Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824-5312; fax (727)824-5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427-2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing email comments is [NMFS.Pr1Comments@noaa.gov](mailto:NMFS.Pr1Comments@noaa.gov). Include in the subject line of the e-mail comment the following document identifier: File No. 1552.

**FOR FURTHER INFORMATION CONTACT:** Patrick Opay or Kate Swails, (301)713-2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222-226).

The applicant proposes to handle, measure, weigh, photograph, flipper tag, passive integrated transponder tag, skin biopsy, and release up to 110 green, 550 loggerhead, 195 Kemp's ridley, 110 hawksbill, 235 leatherback, 110 olive ridley, and 145 unidentified hardshell (combination of green, loggerhead, Kemp's ridley, hawksbill, olive ridley, or hybrids that would not be able to be identified at the time of capture) sea

turtles annually. The applicant would sample turtles captured incidentally during other activities including the shark gillnet fishery, longline fisheries, the shrimp trawl fishery, and surveys during oil/gas platform removal. The capture would be authorized by the incidental take statements of the biological opinions that cover these activities. The research would provide data on the turtles that interact with these activities and provide data useful to better understanding turtle migration, habitat use, genetics, and population dynamics. The information would be used to develop, implement, and evaluate conservation recovery efforts for sea turtles. The research would take place in Atlantic Ocean, Gulf of Mexico, Caribbean Sea, and tributaries. The permit would be issued for 5 years.

Dated: October 13, 2005.

**Carrie W. Hubbard,**

*Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 05-20894 Filed 10-18-05; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF DEFENSE

### Department of the Army

#### Publication of Families First Business Rules

**AGENCY:** Department of the Army, DOD.  
**ACTION:** Final notice.

**SUMMARY:** The Military Surface Deployment and Distribution Command (SDDC), as the Department of Defense (DoD) Traffic Manager for the Personal Property Program published the Defense Personal Property System (DPS) Phase II Business Rules for Industry comment. These rules were posted to the Families First Web Site located at <http://www.sddc.army.mil> under Families First.

This announcement is being made to provide an overview of the comments received by SDDC from the **Federal Register** notice published on April 26, 2005 (70 FR 21401). All stakeholders were given 30 days to review these draft business rules and provide SDDC their comments. Responses were returned in several ways, including letters, spreadsheets and the Frequently Asked Question process.

SDDC received approximately 1300 comments from the industry. Some of the comments were unique, but there were many duplicates.

After the initial review of the comments and identification of duplicates, the comments were assigned

to SDDC Subject Matter Experts (SME) in each of the associated Functional Areas related to the development of DPS. These SME's performed a detailed review of these comments to determine if revision to the business rules were appropriate.

Our review indicated that there were approximately 800 duplicates and 500 unique comments. Some of industries major concerns were: the new best value traffic distribution methodology, establishment of minimum performance score, claims metrics, issues with CWA/invoicing, prompt payment, hard copy documentation, low response customer survey response rate, lack of statistically valid number of Transportation Service Providers (TSPs), non-availability of interface with TSP systems, 13% cost growth limitation on the new program, access to rate filing instructions, tools required to perform rate filing, inadequate time to test the new system, shipment management, TSP/agent relationship and access to multiple SCACs.

Our review indicated that all the comments required clarification to the business rules. SDDC is currently in the process of providing these clarifications in the business rules and will publish the Final Business Rule when incorporation of these changes is completed. In the **SUPPLEMENTARY INFORMATION** section, SDDC has identified Industry's major concerns.

**ADDRESSES:** Surface Deployment and Distribution Command, ATTN: SDPP, Room 10N35-29 (Judith Tarbox), Hoffman Building II, 200 Stovall Street, Alexandria, VA 22332-5000.

**FOR FURTHER INFORMATION CONTACT:** Ms. Judith Tarbox at (703) 428-3004.

**SUPPLEMENTARY INFORMATION:** Industry's comments ranged from questions, suggestions, rewording of business rules and requesting of additional information. SDDC will continue to work with Industry to clarify interpretations of the program and develop the understanding necessary to make the implementation of DPS a success. During the review of these comments, several consistent themes emerged, including:

1. *Requests for the release of SDDC proprietary information.* As part of developing rules/logic for DPS; SDDC has developed several DoD specific logic, formulas, and additional information to assist our System Integrator (SI) to implement our new Personal Property System. For example, some of the logic involves computation of targets per market to keep the program cost growth under 13% etc. This is DoD specific proprietary

information and is therefore acquisition sensitive thus cannot be released outside DoD.

2. *Questions that SDDC believes have already been addressed.* Many of the industry's comments are addressed in other sections of the business rules or other business rules documents. For example, distribution of shipments, spread and blackout dates, filing and settlement of claims, new rate filing process and timeline etc.

3. *Recurring questions.* Several unique questions were asked by Industry, but most of these questions were recurring questions from the past two years that have been previously responded to by SDDC. SDDC believes that these questions reveal areas where Industry may need more information, and SDDC will provide responses as part of the FAQ section of the Families First Web site. Additionally, topics of some of these questions will be considered for future Families First info-grams.

4. *Documentation Edits and Changes.* Industry identified areas in the documentation where editorial changes or updates to the documentation are necessary that are not related to the content of the Business Rules. Where applicable, SDDC will make all appropriate updates to the documentation to correct these items. For example: mileage guide reference in the new domestic 400NG tariff, business rules and international tender language changes for clarity and some changes to footnotes in the business rules and cross referencing of business rules etc.

5. *Industry opinion.* In many cases Industry reiterated opinions and concerns with regards to the Families First Program. SDDC continues to provide a monthly In-Process Review (IPR) to the Industry to discuss these concerns and work towards a better understanding and resolution of issues.

6. *Business Rules Changes.* In some cases, Industry identified perceived gaps in the business rules or divergent business rule explanations in the documentation. In such cases SDDC will work to provide clarification to the business rule document. For example: Historical tonnage will be provided to all DoD qualified TSPs per market.

#### Regulatory Flexibility Act

This action is not considered rule making within the meaning of Regulatory Flexibility Act, 5 U.S.C. 601-612.

#### Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3051 *et seq.*, does not apply because no information collection or record keeping requirements are

imposed on contractors, offerors or members of the public.

**Steven L. Amato,**

*Lieutenant Colonel, U.S. Air Force, Deputy Chief of Staff for Passenger and Personal Property.*

[FR Doc. 05-20900 Filed 10-18-05; 8:45 am]

BILLING CODE 3710-08-M

**DEPARTMENT OF DEFENSE**

**Department of the Army; Corps of Engineers**

**Availability of Final General Reevaluation Report and Supplemental Environmental Impact Statement for the Poplar Island Environmental Restoration Project, Talbot County, MD**

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

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the requirements of the National Environmental Policy Act (NEPA), the U.S. Army Corps of Engineers (USACE), Baltimore District has prepared a Final General Reevaluation Report (GRR) and Supplemental Environmental Impact Statement (SEIS) for the Poplar Island Environmental Restoration Project (PIERP). The GRR/SEIS evaluated the vertical and/or lateral expansion of the PIERP, design modifications to the existing project, the addition of recreational/educational opportunities to the existing project, and the potential to accept dredged material from additional channels not specified in the 1996 EIS for the existing project. A Notice of Availability (NOA) for the Draft GRR/SEIS was published by the U.S. Environmental Protection Agency (EPA) in the **Federal Register** on June 22, 2005 (70 FR 36129).

The preferred alternative includes a northern lateral expansion consisting of approximately 575 acres, which would include wetland and upland habitat, and a protected open water embayment; construction of a 5-ft vertical raising of the existing upland Cells 2 and 6 at the PIERP; amending the existing project authorization and Project Cooperation Agreement to include the placement of dredged material from the southern approach channels to the Chesapeake and Delaware (C&D) Canal; incorporation of design modifications required for the completion of the existing project, and development of recreational and educational enhancement for the PIERP.

**DATES:** USACE filed the final document with EPA on September 30, 2005. EPA published a Notice of Availability in the

**Federal Register** on October 7, 2005 (70 FR 58700). A Record of Decision may be signed no earlier than 30 days after the EPA notice.

**FOR FURTHER INFORMATION CONTACT:** U.S. Army Corps of Engineers, Baltimore District, Attn: Mr. Mark Medelsohn, CENAB-PL-P, P.O. Box 1715, Baltimore, MD 21203-1715 or electronically at [mark.mendelsohn@usace.army.mil](mailto:mark.mendelsohn@usace.army.mil) or by telephone at (410) 962-9499 or (800) 295-1610.

**SUPPLEMENTARY INFORMATION:** PIERP is located in the Chesapeake Bay, approximately 39 miles south-southeast of the Port of Baltimore, and two miles northwest of Tilghman Island in Talbot County, MD. Approximately 10,000 acres of remote island habitat has been lost throughout the Chesapeake Bay in the last 150 years. Dredged material from the Upper Chesapeake Bay Approach Channels to the Port of Baltimore is being beneficially used to restore 1,140 acres of wetland and upland habitat (approximately 570 acres of wetland habitat and 570 acres of upland habitat), and it is estimated that by 2014 the PIERP will provide up to 40 million cubic yards (mcy) of dredged material placement capacity. To date, approximately 12 mcy of dredged material have been placed at the site. Construction and site operation at the PIERP is a collaborative effort that is cost shared between the Federal sponsor, the U.S. Army Corps of Engineers—Baltimore District and the non-Federal sponsor, Maryland Port Administration (MPA).

To address a predicted dredged material placement capacity shortfall, USACE-Baltimore and MPA initiated the Poplar Island Expansion Study (PIES) under the existing PIERP Congressional Authorization, Section 537 of the Water Resources Development Act (WRDA) of 1996. Authorization for ecosystem restoration projects using dredged material is included in Section 204 of the WRDA of 1992, as amended by Section 207 of the WRDA of 1996. A Notice of Intent (NOI) to initiate the preparation of the GRR/SEIS was published in the **Federal Register** in June 2003 (68 FR 33685).

The Final Integrated GRR/SEIS documents NEPA compliance for the proposed expansion of the PIERP, provides information specific to the actions of the GRR, and supplements the Poplar Island Restoration Study, Maryland: Integrated Feasibility Report and Environmental Impact Statement (ERP No. D-COE-D350557-MD) (USACE/MPA, 1996).

Public meetings on the draft document were held on July 19, 2005, in Easton Maryland, and on July 20, 2005, at Tilghman, Maryland. Both meetings provided an opportunity for the public to present oral and/or written comments.

You may view the Final GRR/SEIS and related information on our Web page at: <http://www.nab.usace.army.mil/projects/Maryland/PoplarIsland/expansion.html>.

The Final and Draft GRR/SEIS have been prepared in accordance with (1) NEPA of 1969, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), and (3) USACE regulations implementing NEPA (ER-200-2-2).

**Mark Mendelsohn,**

*Study Manager.*

[FR Doc. 05-20902 Filed 10-18-05; 8:45 am]

BILLING CODE 3710-41-M

**DEPARTMENT OF DEFENSE**

**Department of the Army; Corps of Engineers**

**Dredged Material Management Plan for the Lower Atchafalaya, Bayous Chene, Boeuf, and Black Navigation Channel, and the Gulf of Mexico, in Assumption, St. Mary, and Terrebone Parishes in the Vicinity of Morgan City, LA**

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

**ACTION:** Notice of intent.

**SUMMARY:** The Vicksburg District Corps of Engineers is preparing the Dredged Material Management Plan (DMMP) for the existing Atchafalaya River and Bayous Chene, Boeuf, and Black, Louisiana, navigation project. The DMMP will require a Supplemental Environmental Impact Statement (SEIS) No. 3 to the Final Environmental Impact Statement (FEIS) for the Atchafalaya River and Bayous Chene, Boeuf, and Black, Louisiana (March 1973), navigation project. The project was authorized by the River and Harbor Act of 1968 in accordance with House Document 155, 90th Congress, 1st Session. The purpose of the DMMP is to develop a long term management strategy to accomplish the placement of dredged material associated with the navigation project in the least costly manner, that is consistent with sound engineering practice, and that meets all applicable Federal environmental laws. The Atchafalaya River and Bayous Chene, Boeuf, and Black, Louisiana,

navigation project requires, at a minimum, yearly channel maintenance. Existing disposal sites are at their design capacity and new disposal areas are required. The SEIS objective is to document the potential impacts at newly designated disposal sites (adverse and beneficial) related to maintaining the navigation channel for the next twenty years. The dredged material would be used for beneficial purposes to extent practicable (barrier island and coastal wetlands restoration). A public scoping meeting will be held on November 17, 2005, at the City Auditorium, 728 Myrtle Street, Morgan City, Louisiana, from 7 p.m. to 9 p.m.

**DATES:** Public Scoping Meeting, November 17, 2005.

**ADDRESSES:** Correspondence may be sent to Mr. Larry Marcy at U.S. Army Corps of Engineers, Vicksburg District, CEMVK-PP-PQ, 4155 Clay Street, Vicksburg, MS 39180-3435.

**FOR FURTHER INFORMATION CONTACT:** Mr. Larry Marcy at phone (601) 631-5965, fax number (601) 631-5155, or e-mail at [larry.e.marcy@MVK02.uasce.army.mil](mailto:larry.e.marcy@MVK02.uasce.army.mil).

**SUPPLEMENTARY INFORMATION:** *Proposed Action.* The proposed action includes environmental impact assessment related to maintenance dredging of the existing Lower Atchafalaya River, Bayous Chene, Boeuf, and Black navigation channels to a depth of 24 feet (four feet over dredging required to maintain a 20-foot deep channel). The dredged material from channel maintenance would be used in the most environmentally sound and cost-effective manner to restore coastal wetlands and barrier islands, maximizing the beneficial use of dredged material as a resource.

*Alternatives.* alternative disposal sites could be identified, evaluated, and selected in cooperation with state and Federal agencies, local government, and the public.

*Scoping.* Scoping is the process for determining the range of the alternatives and significant issues to be addressed in the SEIS. For this analysis, a letter will be sent to all parties believed to have an interest in the analysis, requesting their input on alternatives and issues to be evaluated. The letter will also notify interested parties of the public scoping meeting that will be held in the local area. A notice will be sent to the local new media. All interested parties are invited to comment at this time, and anyone interested in this study should request to be included on the mailing list.

*Significant Issues.* The tentative list of resources and issues to be evaluated in the DMMP SEIS includes tidal wetlands

(marshes and swamps), aquatic resources, commercial and recreational fisheries, wildlife resources, essential fish habitat, water quality, air quality, threatened and endangered species, recreation resources, and cultural resources. Tentative socio economic items to be evaluated in the SEIS include navigation, business and industrial activity and service, tax revenues, population, community and regional growth, transportation, housing, community cohesion, and noise.

*Environmental Consultation and Review.* The U.S. Fish and Wildlife Service (USFWS) will be assisting in the documentation of existing conditions and assessment of effects of dredged material disposal at the various alternative disposal sites through Fish and Wildlife Coordination Act consultation procedures. The USFWS will provide a Fish and Wildlife Coordination Act report. Threatened and endangered species consultation will be accomplished with the USFWS and National Marine Fisheries Service (NMFS). The NMFS will be consulted on the effects of this proposed action on Essential Fish Habitat (EFH). The draft SEIS or a notice of availability will be distributed to all interested agencies, organizations, and individuals.

*Estimated Date of Availability.* The earliest that the draft SEIS is expected to be available is June 2007.

**Michael B. Rogers,**

*Director of Programs.*

[FR Doc. 05-20899 Filed 10-18-05; 8:45 am]

**BILLING CODE 3710-PU-M**

## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

#### Grant of Partially Exclusive or Exclusive Licenses

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

**ACTION:** Notice.

**SUMMARY:** The Department of the Army, U.S. Army Corps of Engineers, announces the general availability of partially exclusive licenses under the following pending patents listed under **SUPPLEMENTARY INFORMATION.** Any license granted shall comply with 35 U.S.C. 209 and 37 CFR Part 404.

**ADDRESSES:** Humphreys Engineer Center Support Activity, Office of Counsel, 7701 Telegraph Road, Alexandria, VA 22315-3860.

**DATES:** Applications for an exclusive or partially exclusive license may be

submitted at any time from the date of this notice. However, no exclusive or partially exclusive license shall be granted until January 17, 2006.

**FOR FURTHER INFORMATION CONTACT:** Patricia L. Howland (703) 428-6672.

#### SUPPLEMENTARY INFORMATION:

1. *Title:* Corrosion-Resistant Structure Incorporating Zinc or Zinc-Alloy Plated Lead or Lead-Alloy Wires and Methods of Making Same. Structure incorporating lead is fabricated from specially prepared components such that mobility of the lead is impeded when the structure is exposed to an unprotected environment such as weathering outdoors or saltwater. In a preferred embodiment, a bullet or bullet core is swaged from a number of bunched electroplated fine lead or lead-alloy wires placed in a die. The lead or lead-alloy wires may be fabricated from lead or lead-alloy wool. The lead alloy may comprise zinc and antimony. The electroplating process plates zinc on the fine wires and may plate a zinc alloy such as zinc-aluminum. The plated surface may be coated with a corrosion resistant coating such as molybdenum phosphate. In addition to bullets and bullet cores, fishing weights, lead shielding, counterweights, ballast, and other lead containing structure may be fabricated or treated using methods and materials of the present invention.

*Serial No.:* 10/462,707.

*Date:* 06/17/2003.

2. *Title:* Deconvolution Technique Employing Hermite Functions. A procedure generates deconvolution algorithms by first solving a general convolution integral exactly. Results are transformed, yielding a linear relationship between actual (undistorted) and captured (distorted) data. Hermite functions and the Fourier-Hermite series represent the two data classes. It circumvents the need for solving incompatible systems of linear equations derived from "numerically discretizing" convolution integrals, *i.e.*, the convolution integral is not evaluated. It is executed by exploiting a mathematical coincidence that the most common Point spread Function (PSF) used to characterize a device is a Gaussian function that is also a Fourier-Hermite function of zero order. By expanding the undistorted data in a Fourier-Hermite series, the convolution integral becomes analytically integrable. It also avoids an inherent problem or dividing by decimal "noisy data" values in conventional "combined deconvolution" in that division is by a function of the PS parameters yielding divisors generally greater than one.

*Serial No.:* 10/658,285.

*Date:* 09/10/2003.

3. *Title:* Automated Resource Management System (ARMS™). The Automated Resource Management System (ARMS™) automates collection, integration, analysis, reporting and archiving of data in a variety of applications while insuring data accuracy and reliability not attainable conventionally. Applications include: environmental, safety, security, military, educational, emergency management, land use, fish and wildlife management, construction and maintenance of highways and waterways, mining, exploration, manufacturing, recreational management, urban restoration, and archaeological preservation. ARMS™ integrates a number of portable devices, employing digital technology and specialized software in these portable devices as well as analysis devices, such as PCs and servers. ARMS™ increases efficiency and reduces cost, while accurately and timely preserving and integrating information. It is useful for both post-processing and real-time reporting, analysis, and pro-active direction of ongoing investigations.

*Serial No:* 10/729,269.

*Date:* 12/8/2003.

4. *Title:* System Employing Wireless Means for Governing Operation of an Apparatus and Methods of use Therefor. A system employing principles of the present invention governs operation of an apparatus by an operator. An embodiment of the present invention comprises means for receiving at least one signal, portable means affixed to the operator for transmitting the signal, and means for inactivating or interrupting the operation of the apparatus should the operator be beyond a pre-specified distance from the controls of the apparatus. The means for inactivating communicates with both the means for receiving and the apparatus, while the means for transmitting sends the signal to the means for receiving during normal operation of the apparatus, e.g., with the operator physically present. Without the presence of the signal, operation of the apparatus is interrupted. One embodiment provides for an emergency override of the system to permit operation of the apparatus without the presence of the signal. Methods of using embodiments of the present invention are also provided.

*Serial No:* 10778,706.

*Date:* 02/11/2004.

5. *Title:* A Portable Nuclear Detector. A portable nuclear material detector generally includes a scintillating fiber radiation sensor, a light detector, a conditioning circuit, a frequency shift keying (FSK) circuit, a fast Fourier transform (FFT) circuit, an electronic

controller, an amplitude spectral addition circuit, and an output device. A high voltage direct current (HVDC) source is provided to excite the light detector, while a separate power supply may be provided to power the remaining components. Portability is facilitated by locating the components of the detector within a handheld-sized housing. When bombarded by gamma particles, the radiation sensor emits light, which is detected by the light detector and converted into electrical signals. These electrical signals are then conditioned and converted to spectral lines. The frequency of a given spectral line is associated with a particular radioactive isotope, while the cumulative amplitude of all spectral lines having a common frequency is indicative of the strength and location of the isotope. All or part of this information (identity, strength, direction and distance) may be provided on the output device.

*Serial No:* 10/795,363.

*Date:* 03/9/2004.

6. *Title:* Modular Barrier System for Satisfying Needs Unique to a Specific User. Components and system for limiting access and egress. A properly scaled barrier of the present invention meets varied requirements for applications that include: security, safety, order, privacy and discipline. In one embodiment, pre-manufactured panels and connectors are delivered to a site that has been prepared for installation of the system. Local materials may be used for the panels in some cases. The panels and connectors can be assembled quickly by unskilled labor and, in some embodiments, the barrier just as quickly dismantled or repaired as necessary. One embodiment may be used as a temporary or emergency solution to access control while another may employ in-fill material to provide a permanent barrier. Another embodiment may be used in a residential setting, providing storage in some installations. In all embodiments, accessories for enhancing effectiveness may be installed on or within the barrier.

*Serial No:* 10/795,364.

*Date:* 03/9/2004.

7. *Title:* Measurement Device and Method. Apparatus for determining the thickness of a configuration having flat, parallel surfaces that are transparent, or nearly so, to pre-specified types of energy. Embodiments comprise a mechanism for illuminating a front surface with an energy source and mechanisms for measuring reflections of the illumination from a parallel back surface. The energy is contained in a spectrum of wavelengths, the energy

being refracted in components at unique wavelengths, e.g., different colored light bands, and similarly reflected from the back surface. The measuring mechanisms, e.g., spectrometers, determine the relative lateral displacement between two spectral lines in the refracted and reflected beams to enable determination of thickness. Other characteristics of the material of the configuration may be ascertained, e.g., chemical composition is ascertained by measuring the intensity of responses at multiple wavelengths and comparing this to responses of known materials.

*Serial No:* 10/867,700.

*Date:* 06/16/2004.

8. *Title:* Condition Survey Inspection (KBCSI). A knowledge-based condition survey inspection (KBSCI) framework and procedure for use with an engineering management system (EMS) that tailors types of condition survey inspections (CSIs) and inspection intervals to empirically-established life cycles of component-sections. Embodiments of the invention facilitate proactive life cycle management, scheduling appropriate types of CSIs only when needed. The frequency and type of inspection is tailored to items important to a facility manager, such as the importance to the operation of individual component-sections and their individual life cycle, not the overall life cycle of a system or facility. Further, additional useful information is available from the data collected to maintain embodiments of the KBCSI framework so that meaningful "What-If" analysis may be performed in support of decision makers. By tailoring CSIs to needs rather than an arbitrary inspection schedule designed to only catch deficiencies, significant life cycle cost savings are realized.

*Serial No:* 10/886,609.

*Date:* 08/24/2004.

9. *Title:* Self-Healing Coatings Using Microcapsules. Self-healing coatings incorporate microcapsules of about 60–150 microns diameter that contain film formers and dust suppression compounds suitable for controlling spalling of lead dust, for example. In one embodiment, a primer paint is mixed with these microcapsules and applied by brushing or rolling. After the coating has cured, any physical compromise of the coating results in microcapsules bursting to release liquid that fills and seals the compromised volume. The microcapsule contents protect the underlying substrate from damage and repair some of the outer coating. In one application, embodiments of these self-healing coatings seal existing lead-based paint

for suppression of lead dust. In another embodiment, microcapsules are provided separately to enhance commercially available products. For example, if a paint formulation is known a priori specifically configured microcapsules, packaged separately from the paint and designed for use with the paint formulation, are added to the paint just prior to application.

*Serial No.:* 10/923,890.

*Date:* 08/24/2004.

10. *Title:* Perlite Sorbents for Vapor Phase Metals and Metal Compounds. Perlite, particularly, perlite in powdered form, is employed to adsorb metals and metal compounds from a fluid flow. In select embodiments, the perlite is treated to expand its surface area and injected into a fluid stream, such as flue gas, held for a specific retention period, and removed for subsequent disposal. In other embodiments the perlite is provided in a fixed adsorption bed and the fluid flow permitted to pass through the bed until the perlite surface is exhausted. The perlite in the fixed bed is then replaced, with the exhausted perlite disposed of as appropriate. Treatment of perlite by boiling with sulfuric acid or suspending in a suspension of sulfur in carbon disulfide has been shown to significantly expand the surface area of perlite.

*Serial No.:* 10/931,232.

*Date:* 09/1/2004.

11. *Title:* Embedded Metal to Fluid Flow. A barrier to fluid passage is embedded within, instead of atop, porous material to retain the durability of the surface of the porous material. In one embodiment, a thin set mortar is applied to a concrete slab. A pleated metal foil is pressed into the wet mortar and a bond is established. The mortar is allowed to set and a top, or finish, section of concrete is then poured over the foil and finished conventionally. Provisions are made for sealing expansion joints in concrete slab floors and at the juncture of floor and wall. The foil may be provided in multiple layers to provide a mechanical bond via the concrete or mortar oozing through perforation or along pleats in each of the top and bottom layers of the multi-layer foil, while providing at least one solid layer through which a fluid will not pass, at least in one direction.

*Serial No.:* 10/715,430

*Date:* 11/19/2003.

12. *Title:* Self-healing coatings incorporate microcapsules of about 60–150 microns diameter that contain film formers and dust suppression compounds suitable for controlling spalling of lead dust, for example. In one embodiment, a primer paint is mixed with these microcapsules and

applied by brushing or rolling. After the coating has cured, any physical compromise of the coating results in microcapsules bursting to release liquid that fills and seals the compromise volume. The microcapsule contents protect the underlying substrate from damage and repair some of the outer coating. In one application, embodiments of these self-healing coatings seal existing lead-based paint for suppression of lead dust. In another embodiment, microcapsules are provided separately to enhance commercially available products. For example, if a paint formulation is known a priori, specifically configured microcapsules, packaged separately from the paint and designed for use with the paint formulation, are added to the paint just prior to application.

*Serial No.:* 10/923,890.

*Date:* 08/24/2004.

13. *Title:* Perlite, particularly, perlite in powdered form, is employed to absorb metals and metal compounds from a fluid flow. In select embodiments, the perlite is treated to expand its surface area and injected into a fluid stream, such as flue gas, held for a specific retention period, and removed for subsequent disposal. In other embodiments the perlite is provided in a fixed adsorption bed and the fluid flow permitted to pass through the bed until the perlite surface is exhausted. The perlite in the fixed bed is then replaced, with the exhausted perlite disposed of as appropriate. Treatment of perlite by boiling with sulfuric acid or suspending in a suspension of sulfur in carbon disulfide has been shown to significantly expand the surface area of perlite.

*Serial No.:* 10/931,232

*Date:* 09/01/2004.

14. *Title:* An apparatus for non-destructively testing the response of a specimen to temperature change. An embodiment temperature cycles a specimen, such as a wet mortar beam dynamically measuring change in dimension and the temperature of the specimen during the cycle. Among other elements, the apparatus employs an accelerometer, a thermistor, a thermocouple, a temperature control, linear variable differential transducer (LVDTs), an FET device, a data logger and a hat tape controller. A typically cycle involves using liquid nitrogen to reduce the temperature in an insulated test chamber from ambient to less than  $-60^{\circ}\text{C}$  and returning to ambient by dispersing the nitrogen with a source of ambient air. Further, in select embodiments, the apparatus measures fundamental frequencies induced by a micro-hammer as measured transversely

along a dimension of a specimen during the cooling-warming cycle. Also provided is a method for testing specimens using devices representative of embodiments of the present invention.

*Serial No.:* 10/941,958.

*Date:* 09/16/2004.

15. *Title:* A backstop for decelerating and trapping projectiles generally includes a support structure having an inclined surface and a projectile trapping medium disposed on the inclined surface. The projectile trapping medium may be either a resilient granular ballistic medium or a combination of a ballistic medium with a hydrated super absorbent polymer (SAP) gel. Preferably, the support structure is made of a shock absorbing, foamed, fiber-reinforced concrete, such as SACON<sup>®</sup>. In embodiments, the support structure also includes an enclosure. Additives may also be mixed into the projectile trapping medium to control alkalinity and prevent leaching of heavy metals.

*Serial No.:* 10/979,834.

*Date:* 11/03/2004.

16. *Title:* An unobtrusive on-grade barrier is provided. One embodiment comprises a concrete-lined trench over which a biased hinged plate is affixed to an end wall of the trench. The biased hinge holds the free end of the plate against a tab affixed to the other end wall, assuring the plate does not rise above grade. The plate is supported for vehicle passage by a sliding mechanism energized by an actuator controlled by a controller that may be automated or operated by security personnel. The barrier may be configured so that vehicles may approach from either end. Upon authorizing access to the driver, the vehicle is permitted to pass over the supported plate. If the driver is not authorized access, the support is slid out of the way and any vehicle attempting to pass slides into the trench. Means for clearing the trench of a trapped vehicle are provided in select embodiments.

*Serial No.:* 10/979,852.

*Date:* 11/03/2004.

17. *Title:* A dynamic pressure testing or calibration system packaged as a portable unit for characterizing pressure sensors, such as transducers. Embodiments are packaged for carry on the body, are batter operated, compatible with existing transducer mounts, and quickly learned and easily used by a single operator. The system supplies a pre-specified impulse (pressure pulse) of fluid, preferably a benign gas, such as air, or an inert gas such as helium, or nitrogen. In select embodiments, the gas pulse has a fast

rise time and its amplitude may be varied over a pre-specified dynamic range. For example, the rise time may emulate that of an impulse created during an explosion by a resultant pressure wave, i.e., less than 100 microseconds. Embodiments also incorporate a data acquisition capability that accurately captures and records both the supplied impulse and the response of the sensor under test.

*Serial No.:* 10/991,219.

*Date:* 11/18/2004.

18. *Title:* A barrier to fluid passage is embedded within, instead of atop, porous material to retain the durability of the surface of the porous material. In one embodiment, a thin set mortar is applied to a concrete slab. A pleated metal foil is pressed into the wet mortar and a bond is established. The mortar is allowed to set and a top, or finish, section of concrete is then poured over the foil and finished conventionally. Provisions are made for sealing expansion joints in concrete slab floors and at the juncture of floor and wall. The foil may be provided in multiple layers to provide a mechanical bond via the concrete or mortar oozing through perforations or along pleats in each of the top and bottom layers of the multi-layer foil, while providing at least one solid layer through which a fluid will not pass, at least in one direction.

*Serial No.:* 10/715,430.

*Date:* 11/19/2003.

19. *Title:* A method, and a compound for facilitating it, that enhances night vision by dispersing a luminescent to provide low-intensity area illumination. Luminescents may include naturally occurring bioluminescents (visible spectrum) or man-made, preferably non-toxic, chemical-based luminescents (also termed chemiluminescents), the latter available for use in either the visible or IR spectrum. It may be applied locally to a surface or remotely by means of a delivery system. Preferably, select luminescents are dispersed as an aerosol to contact targeted surfaces. These luminescents may be used in spaces otherwise difficult to image with night vision equipment. Specifically provided is a method for viewing a target under low ambient light conditions comprising dispersing a luminescent material on surfaces in a dark space to provide a low-level, spatially broad, source of supplemental scene illumination, and viewing the target with image enhancing devices that are otherwise marginally useful without the presence of the luminescent material.

*Serial No.:* 11/086,311.

*Date:* 03/23/2005.

20. *Title:* An "implant and forget" device for interacting with biota after a pre-established time period. Preferably, the biota are fauna and more particularly fish. In select embodiments, the device comprises packaging enclosing means for timing interaction via opening the packaging. In select embodiments of the present invention, the device is a sealed capsule inserted in fish. Embodiments of the present invention are implanted in triploid grass carp (*Ctenopharyngodon idella*) to facilitate control of aquatic weeds in bodies of water. When the carp have been in the water for a pre-established approximate period of time, toxins in the device are dispensed via long-term bioerosion of the sealed opening in the packaging. Otherwise, the carp may destroy all vegetation and harm the aquatic environment for other aquatic life. Several alternative bioerodible seal configurations are provided as embodiments.

*Serial No.:* 10/179,541.

*Date:* 07/13/2005.

**Richard L. Frenette,**

*Counsel.*

[FR Doc. 05-20901 Filed 10-18-05; 8:45 am]

**BILLING CODE 3710-92-M**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before December 19, 2005.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information

Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: October 13, 2005.

**Angela C. Arrington,**

*Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.*

### Office of Elementary and Secondary Education

*Type of Review:* Extension.

*Title:* Application Package for the REAP Small, Rural School Achievement Program.

*Frequency:* Annually.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 4,552.

Burden Hours: 4,830.

*Abstract:* LEAs will apply for funding under the REAP Small, Rural School Achievement Program. This collection consists of an additional form to the Spreadsheet and Instructions which will address the second tier of the Department's strategy for completing the funding process. The additional form will serve as the application package for LEAs under the REAP Small, Rural Schools Achievement Program.

Requests for copies of the proposed information collection request may be accessed from <http://edicsweb.ed.gov>, by selecting the "Browse Pending Collections" link and by clicking on link number 2896. When you access the information collection, click on

“Download Attachments” to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202-4700. Requests may also be electronically mailed to the Internet address [OCIO\\_RIMG@ed.gov](mailto:OCIO_RIMG@ed.gov) or faxed to 202-245-6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address [Kathy.Axt@ed.gov](mailto:Kathy.Axt@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 05-20942 Filed 10-18-05; 8:45 am]  
BILLING CODE 4000-01-P

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.  
**SUMMARY:** The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before November 18, 2005.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Rachel Potter, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395-6974.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information

Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 13, 2005.

**Angela C. Arrington,**  
*Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.*

### Institute of Education Sciences

*Type of Review:* Revision.

*Title:* Education Longitudinal Study of 2002, Second Followup Full Scale.

*Frequency:* One time.

*Affected Public:* Individuals or household; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 15,044.

Burden Hours: 7,021.

*Abstract:* The ELS:2002 second followup is the third time this cohort of students who were in 10th grade in 2002 will be interviewed and assessed. Data will be collected from students, dropouts, and school administrators. The field test for this study will be conducted in spring 2005. The full scale first followup study will be conducted in spring 2006. This longitudinal study is intended to measure school effectiveness and impact on postsecondary and labor market outcomes.

Requests for copies of the information collection submission for OMB review may be accessed from <http://edicsweb.ed.gov>, by selecting the “Browse Pending Collections” link and by clicking on link number 2903. When you access the information collection, click on “Download Attachments” to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202-4700. Requests may also be electronically mailed to the Internet address [OCIO\\_RIMG@ed.gov](mailto:OCIO_RIMG@ed.gov) or faxed to 202-245-6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Katrina Ingalls at her e-mail address [Katrina.Ingalls@ed.gov](mailto:Katrina.Ingalls@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 05-20943 Filed 10-18-05; 8:45 am]  
BILLING CODE 4000-01-P

## DEPARTMENT OF EDUCATION

### Arbitration Panel Decision Under the Randolph-Sheppard Act

**AGENCY:** Department of Education.

**ACTION:** Notice of arbitration panel decision under the Randolph-Sheppard Act.

**SUMMARY:** The Department gives notice that on June 17, 2005, an arbitration panel rendered a decision in the matter of *Arizona Department of Economic Security, Rehabilitation Services Division v. United States Postal Service (Docket No. R-S/03-4)*. This panel was convened by the U.S. Department of Education, under 20 U.S.C. 107d-1(b), after the Department received a complaint filed by the petitioner, Arizona Department of Economic Security, Rehabilitation Services Division.

**FOR FURTHER INFORMATION CONTACT:** You may obtain a copy of the full text of the arbitration panel decision from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., room 5022, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7374. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:** Under section 6(c) of the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d-2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

### Background

This dispute concerns the alleged improper payment of commissions to the United States Postal Service (USPS) by two blind licensees in violation of the Act (20 U.S.C. 107 *et seq.*) and the

implementing regulations in 34 CFR part 395.

A summary of the facts is as follows: The Arizona Department of Economic Security, Rehabilitation Services Division, the State licensing agency (SLA), alleged that between December 1995 and July 2001, Mr. Robert Kunau operated a vending facility at the Rio Salado Post Office and paid to USPS a 10 percent commission on his gross sales totaling \$116,684.02.

Similarly, the SLA alleged that since 1988 Mr. Scott Weber operated a vending facility at the Phoenix General Mail Facility (PGMF). In 1995, Mr. Weber assumed the operation of additional vending machines at PGMF. From October 1995 to May 2001, Mr. Weber also paid to USPS a 10 percent commission on his gross sales totaling \$88,444.57. Both vendors alleged that they paid the 10 percent commission to USPS as required by the agency until they were advised by their attorney to cease payment.

#### Arbitration Panel Decision

The issue heard by the panel was whether the actions taken by USPS violated the Act and implementing regulations concerning the placement and operation of vending facilities at the Rio Salado Post Office and the Phoenix General Mail Facility. If there was a violation, the panel was asked to determine the appropriate remedy.

After reviewing all of the records and hearing testimony of witnesses, the panel concluded that the Act requires Federal agencies to give priority to blind vendors in the operation of vending facilities on Federal properties. To accomplish this, Federal agencies and SLAs enter into permit agreements authorizing the operation of vending facilities by licensed blind vendors. However, the panel noted that the Act does not authorize Federal agencies to collect commissions from a blind vendor or the SLA without the authorization of the Secretary of Education. Moreover, Federal agencies are not permitted to go outside the Department of Education's regulations and substitute a negotiated vending agreement in place of the permit system.

Therefore, because USPS failed to obtain authorization from the Secretary of Education, the collection of commissions was a violation of the Act. Accordingly, the panel ruled that both Mr. Kunau and Mr. Weber were damaged by USPS's violation of the Act in the amounts of \$116,684.02 and \$88,444.57, respectively.

The panel further directed that, subject to any future finding by a court of competent jurisdiction that this order

exceeds the panel's authority under the Act, USPS must reimburse Mr. Kunau and Mr. Weber the amounts that they were damaged as a result of USPS's violation of the Act.

One panel member dissented.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

#### 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.

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Dated: October 14, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 05-20929 Filed 10-18-05; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF EDUCATION

### Arbitration Panel Decision Under the Randolph-Sheppard Act

**AGENCY:** Department of Education.

**ACTION:** Notice of arbitration panel decision under the Randolph-Sheppard Act.

**SUMMARY:** The Department gives notice that on October 18, 2004, an arbitration panel rendered a decision in the matter of *Bert Hansen, et al. v. Nevada Department of Rehabilitation, Bureau of Services to the Blind (Docket No. R-S/03-05 and 03-07 consolidated)*. This panel was convened by the U.S. Department of Education, under 20 U.S.C. 107d-1(a), after the Department received a complaint filed by the petitioners, Bert Hansen, *et al.*

**FOR FURTHER INFORMATION CONTACT:** You may obtain a copy of the full text of the arbitration panel decision from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., room 5022, Potomac Center Plaza,

Washington, DC 20202-2800.

Telephone: (202) 245-7374. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:** Under section 6(c) of the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d-2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

#### Background

This dispute concerned two separate complaints that were consolidated into one case in the interest of judicial economy. The complainants alleged violations of the Act (20 U.S.C. 107 *et seq.*), the implementing regulations in 34 CFR part 395, and State rules and regulations by the Nevada Department of Employment, Training and Rehabilitation, Bureau of Services to the Blind and Visually Impaired, the State licensing agency (SLA).

A summary of the facts in the first part of the complaint is as follows: On January 11, 2002, Mr. Bert Hansen, Chairman of the Nevada Committee of Blind Vendors, wishing to ensure that the 2002 election of Elected Committee of Blind Vendors (Committee) would be carried out in accordance with State rules and policy, wrote to the SLA on behalf of the Committee.

In his letter, Mr. Hansen noted that the 1999 bylaws of the Committee were not certified as required by the Nevada Administrative Code, section 426.080.2. Mr. Hansen suggested that, since clarification of the 1999 bylaws was needed, the 1983 certified bylaws be used for the 2002 election process. However, by memorandum dated January 30, 2002, the SLA rejected the Committee's proposal and indicated that the SLA would conduct its own Committee election. On February 24, 2002, under the leadership of Mr. Hansen, the Committee held the 2002 election.

Subsequently, the SLA informed the Committee it was holding a new election that took place on April 7, 2002. The complainants alleged that the SLA election was held without the participation of the Committee and that the individuals elected on April 7 were different from those elected on February 24. The complainants further alleged that the April 7 election was improperly

constituted under the bylaws being used by the SLA.

Following the April 7 election, the complainants petitioned the SLA to conduct another election. On March 21, 2002, the SLA denied the complainants' petition. Subsequently, complainants filed for a State evidentiary hearing on the matter that was held on May 30, 2002.

Regarding the second part of the complaint, complainants alleged problems with the SLA's administration of the Nevada vending facility program following an audit at the Hoover Dam by the State Legislative Counsel Bureau (LCB) on April 12, 2001. In particular, the complainants were upset with the audit report that indicated that high levels of set-aside payments were being assessed against the blind vendors. On July 28, 2001, the Committee comprised of the complainants voted to suspend set-aside payments to the SLA for July and August 2001.

On October 4, 2001, the SLA, following State rules and regulations, issued to the complainants notices of noncompliance in making timely set-aside payments. Dissatisfied with the noncompliance notices, the complainants requested a State evidentiary hearing that was held on March 29 and 30, 2002.

On February 28, 2003, a hearing officer affirmed the SLA's decision to deny complainants' request for a new election. In that same decision, the hearing officer affirmed the SLA's issuance of the noncompliance notices regarding complainants' nonpayment of set-aside payments, but reversed the late payment penalties assessed by the SLA.

Additionally, the hearing officer ruled that the Committee had actively participated in setting the set-aside payment schedule, but required the SLA to maintain adequate records to support the set-aside payments charged. The SLA adopted the hearing officer's February 28 decision as final agency action, and complainants sought review of that decision by a Federal arbitration panel.

#### Arbitration Panel Decision

The issues heard by the panel were: (1) Whether the SLA abused its authority, violated the Act, implementing regulations, and the Nevada Administrative Code and the functions of the Committee in conducting a Committee election; (2) whether the complainants' unilateral decision to withhold payment of set-aside fees for the months of July and August 2001 violated the Act and/or applicable Nevada statutory law; (3) whether the SLA had the authority to

compel the complainants to repay the set-aside payments and/or to impose penalties on the complainants; and (4) whether the SLA was properly administering the vending facility program in accordance with the Act, implementing regulations, and State rules and regulations.

After reviewing all of the records and hearing testimony of witnesses, the panel majority ruled concerning the election issue that the SLA acted in substantial compliance with the Act and regulations when it conducted the Committee election in April 2002.

Concerning the withholding of set-aside payments, the majority of the panel ruled that the complainants' withholding of set-aside payments in July and August of 2001 was not in compliance with the Act or applicable provisions of the Nevada Administrative Code. Accordingly, the panel directed the complainants to repay the set-aside payments to the SLA but without penalty. Regarding the question of the SLA's administration of the vending facility program, the majority of the panel ruled that the SLA's actions were consistent with the Act.

One panel member dissented.

One panel member concurred with the majority opinion concerning the election of the Committee and complainants' noncompliance with the Act and regulations in withholding set-aside payments from the SLA, but dissented in part regarding the appropriate remedy, believing that the complaints should repay the set-aside fees with penalty.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

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**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

Dated: October 14, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 05-20930 Filed 10-18-05; 8:45 am]

**BILLING CODE 4000-01-P**

#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

[Docket No. EC06-2-000]

**Brascan Power St. Lawrence River LLC, Erie Boulevard Hydropower L.P., Carr Street Generating Station, L.P., Brascan Power Piney & Deep Creek LLC, Great Lakes Holding America Co., BPC NY Holding Inc., Brascan Power New York Corp., Carr Street New York Holding Corp.; Notice of Filing**

October 12, 2005.

Take notice that on October 4, 2005, Brascan Power St. Lawrence River LLC, Erie Boulevard Hydropower, L.P., Carr Street Generating Station, L.P., Brascan Power Piney & Deep Creek LLC, Great Lakes Holding America Co., BPC NY Holding Inc., Brascan Power New York Corp., and Carr Street New York Holding Corp. (collectively, Applicants) submitted an application pursuant to section 203 of the Federal Power Act for authorization to complete a proposed intra-corporate reorganization.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for

review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 25, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5759 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-13-000]

#### CenterPoint Energy Gas Transmission Company; Notice of Request for Waiver of Tariff Provision

October 12, 2005.

Take notice that on October 7, 2005, CenterPoint Energy Gas Transmission Company (CEGT) tendered for filing with the Commission a Request for Waiver seeking the permission of the Commission to allow CEGT to waive section 14.2 of the general terms and conditions of its FERC Gas Tariff which requires CEGT to provide prior notice of termination to non-creditworthy Shippers. CEGT states that the Shipper in question is no longer doing business, and to provide such notice would be futile. CEGT requested expedited treatment of its request for waiver.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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*Comment Date:* 5 p.m. eastern time on October 20, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5770 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-9-000]

#### Colorado Interstate Gas Company; Notice of Operational Purchases/Sales; Annual Report

October 12, 2005.

Take notice that on October 6, 2005, Colorado Interstate Gas Company tendered for filing its annual report of operational purchases and sales in accordance with section 37.3 of the general terms and conditions of its FERC Gas Tariff, First Revised Volume No. 1.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant.

Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 19, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5754 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EC06-1-000]

#### Coral Power, L.L.C.; Constellation Energy Commodities Group, Inc.; Notice of Filing

October 12, 2005.

Take notice that on October 3, 2005, Coral Power, L.L.C. (Coral Power) and Constellation Energy Commodities Group, Inc. (CCG) (collectively, Applicants) filed an application under section 203 of the Federal Power Act requesting Commission authorization for the transfer of a full requirements service contract with Baltimore Gas and Electric Company from Coral Power to CCG. Applicants state that they are power marketers with market-based rate tariffs on file with the Commission. Applicants have requested confidential treatment of the contents of Exhibit G and Exhibit I to the section 203 application.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of

the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 24, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5758 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP05-553-001]

#### Egan Hub Storage, LLC; Notice of Compliance Filing

October 12, 2005.

Take notice that on October 11, 2005, Egan Hub Storage, LLC (Egan Hub) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective on the dates indicated.

*Effective September 12, 2005*

Sub First Revised Sheet No. 108.

*Effective November 11, 2005*

First Revised Sheet No. 108A.

Egan Hub states that it is making this filing in compliance with an order issued by the Commission on September 9, 2005.

Egan Hub states that copies of its filing have been served upon all affected customers of Egan Hub and interested state commissions, and all parties on the Commission's official service list.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5766 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-15-000]

#### Garden Banks Gas Pipeline, LLC; Notice of Proposed Changes in FERC Gas Tariff

October 12, 2005.

Take notice that on October 7, 2005, Garden Banks Gas Pipeline, LLC (Garden Banks) tendered for filing as

part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to become effective November 7, 2005:

Eighth Revised Sheet No. 2.

Third Revised Sheet No. 3.

Eighth Revised Sheet No. 57.

Second Revised Sheet No. 138.

Original Sheet No. 139.

Sheet Nos. 140-209 (sheets reserved for future use).

Garden Banks states it is filing these tariff sheets to reflect currently effective service agreements which do not conform with its form of service agreement. Garden requests that the Commission accept these non-conforming agreements for filing and grant any and all waivers necessary to allow these agreements to be effective as of their respective effective dates and to remain in effect in accordance with their respective terms.

Garden Banks states that copies of its filing have been mailed to all affected customers of Garden Banks and any interested state commissions. Garden Banks further states that due to the voluminous nature of this filing, it is not providing copies of the filed agreements or red-lines of such agreements as part of each service copy. Garden Banks states that the entire filing (excluding certain confidential information, as explained more fully in the filing) will be available in its offices and that it will provide copies of such agreements (excluding certain confidential information) to any affected customer or interested state commission who requests such copies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>.

Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5772 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP05-581-001]

#### Guardian Pipeline, L.L.C.; Notice of Compliance Filing

October 12, 2005.

Take notice that on October 7, 2005, Guardian Pipeline, L.L.C. (Guardian) tendered for filing certain gas price index information to comply with the Letter Order issued by the Commission on September 23, 2005 in Docket No. RP05-581-000.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5767 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ID-4482-000]

#### Christopher G. Huskilson; Notice of Filing

October 12, 2005.

Take notice that on September 30, 2005, Christopher G. Huskilson (Applicant) hereby submits an application pursuant to section 305(b) of the Federal Power Act, requesting authorization to hold the following interlocking positions: (1) Director and Chair of Bangor Hydro-Electric Company; and (2) Director of Maine Electric Power Company, Inc.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 30, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5762 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EG06-2-000]

#### Leaning Juniper Wind Power, LLC; Notice of Application for Commission Determination of Exempt Wholesale Generator Status

October 12, 2005.

Take notice that on October 3, 2005, Leaning Juniper Wind Power, LLC (Leaning Juniper) tendered for filing with the Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Leaning Juniper states that it is an Oregon limited liability company, and that it will be engaged directly and exclusively in the business of owning all or part of one or more eligible facilities, and selling electric energy at wholesale.

Leaning Juniper states that it has served a copy of the filing on the Securities and Exchange Commission, the California Public Utilities Commission, the Oregon Public Utilities Commission, the Washington Utilities and Transportation Commission, the Utah Public Service Commission, the Idaho Public Utilities Commission, and the Wyoming Public Service Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to

the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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*Comment Date:* 5 p.m. eastern time on October 24, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5760 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-16-000]

#### Maritimes & Northeast Pipeline, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

October 12, 2005.

Take notice that on October 7, 2005, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Eight Revised Sheet No. 11, to become effective on November 1, 2005.

Maritimes states that copies of this filing were mailed to all affected customers of Maritimes and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and

385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

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**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5773 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-11-000]

#### Northern Border Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

October 12, 2005.

Take notice that on October 7, 2005, Northern Border Pipeline Company (Northern Border) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Second Revised Sheet No. 260D, to become effective November 6, 2005.

Northern Border states that the filing is being made to amend Subsection 10.63(h) of the General Terms and Conditions of Northern Border's tariff to change Northern Border's Operational Flow Order charge from a fixed price to a formula based on a daily index price to more appropriately reflect today's volatile and increasing natural gas price environment.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

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**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5769 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP06-14-000]

**Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff**

October 12, 2005.

Take notice that on October 7, 2005, Northern Natural Gas Company (Northern) tendered for filing to become part of its FERC Gas Tariff, Fifth revised Volume No. 1, the following tariff sheets proposed to be effective on November 7, 2005 as follows:

23 Revised Sheet No. 54.  
Seventh Revised Sheet No. 300.  
Fifth Revised Sheet No. 301A.  
Third Revised Sheet No. 301B.  
Fourth Revised Sheet No. 301C.  
Sixth Revised Sheet No. 302.  
First Revised Sheet No. 302A.

Northern states that the above tariff sheets are being filed to revise the timing of the effective date of the Field Area Field fuel rate, the Field Area Mainline fuel rate, the Storage fuel rate, the Unaccounted For (UAF) rate and the electric compression charge from each June 1 to each April 1.

Northern further states that copies of the filing have been mailed to each of its customers and interested State commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission,

888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5771 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket Nos. EC03-131-003; EC03-131-004]

**Southwest Power Pool, Inc.; Oklahoma Gas and Electric Company; Notice of Filing**

October 12, 2005.

Take notice that on October 3, 2005, Southwest Power Pool, Inc. and Oklahoma Gas & Electric Company tendered for filing additional information pursuant to Commission's Order issued September 21, 2005.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 24, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5757 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP06-10-000]

**Tennessee Gas Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff**

October 12, 2005.

Take notice that on October 6, 2005, Tennessee Gas Pipeline Company (Tennessee) tendered for filing as part of its FERC Gas Tariff, Volume No. 1, the following tariff sheets, to become effective November 5, 2005:

Sixth Revised Sheet No. 209D.  
Sixth Revised Sheet No. 209F.  
Fifth Revised Sheet 593C.  
Third Revised Sheet No. 593D.

Tennessee states that the purpose of this filing is to modify Tennessee's tariff to make the pro forma Third Party Provider agreement available to all entities that are a party to a balancing agreement with Tennessee and want to resolve delivery point imbalances using Tennessee's storage swing option.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention

or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5768 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. CP88-391-031; and RP93-162-016]

#### Transcontinental Gas Pipe Line Corporation; Notice of Annual Cash-Out Filing

October 12, 2005.

Take notice that on September 19, 2005, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing its annual cash-out report and report of cash-out refunds for the period August 1, 2004 through July 31, 2005.

Transco states that its filing complies with the cash-out provisions in Section 15 of the General Terms and Conditions of Transco's FERC Gas Tariff.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 19, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5756 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER05-1049-001]

#### Union Electric Company; Notice of Compliance Filing

October 12, 2005.

Take notice that on September 21, 2005, Ameren Services Company, for and on behalf of Union Electric Company, hereby submits a refund report pursuant to Commission's Order issued in Docket No. ER05-1049-000.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy

of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on October 24, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5761 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP05-412-001]

#### USG Pipeline Company; Notice of Compliance Filing

October 12, 2005.

Take notice that on October 11, 2005, USG Pipeline Company (USGPC) submitted a compliance filing pursuant to the Commission's September 26, 2005 Order issued in Docket No. RP05-412-000.

USGPC states that complete copies of this filing are being provided to its sole customer, United States Gypsum Company, which receives service as certificated under part 157 of the Commission's regulations, and to interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of

section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5765 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP06-8-000]

#### Wyoming Interstate Company, Ltd.; Notice of Operational Purchases/Sales; Annual Report

October 12, 2005.

Take notice that on October 6, 2005, Wyoming Interstate Company, Ltd. tendered for filing its annual report of operational purchases and sales in accordance with section 33.3 of the general terms and conditions of its FERC Gas Tariff, Second Revised Volume No. 2.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing

an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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*Comment Date:* 5 p.m. eastern time on October 19, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5-5774 Filed 10-18-05; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

October 12, 2005.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER02-1947-006.

*Applicants:* Occidental Power Services, Inc.

*Description:* Occidental Power Services, Inc submits an amendment to its 8/1/05 updated market power analysis filing which consists of Substitute First Revised Sheet No. 1.

*Filed Date:* October 4, 2005.

*Accession Number:* 20051006-0022.

*Comment Date:* 5 p.m. eastern time on Tuesday, October 25, 2005.

*Docket Numbers:* ER04-115-004; EL04-47-004; ER04-242-003; EL04-50-002.

*Applicants:* California Independent System Operator Corporation, Pacific Gas and Electric Company.

*Description:* California Independent System Operator Inc submits its compliance refund report informing FERC of the manner in which they have calculated the refunds & surcharges due to customers pursuant to Commission Order issued 02/02/05.

*Filed Date:* September 30, 2005.

*Accession Number:* 20051005-0130.

*Comment Date:* 5 p.m. eastern time on Friday, October 21, 2005.

*Docket Numbers:* ER04-449-010.

*Applicants:* New York Independent System Operator, Inc.

*Description:* New York Independent System Operator, Inc submits its second Status Report on deliverability analysis.

*Filed Date:* October 5, 2005.

*Accession Number:* 20051012-0014.

*Comment Date:* 5 p.m. eastern time on Wednesday, October 26, 2005.

*Docket Numbers:* ER05-1101-002; ER05-1346-001; ER05-1532-000.

*Applicants:* NorthWestern Corporation.

*Description:* NorthWestern Corp submits revised open access transmission tariff, Sixth Revised Volume No. 5 pursuant to FERC's September 15, 2005 Order.

*Filed Date:* September 30, 2005.

*Accession Number:* 20051004-0216.

*Comment Date:* 5 p.m. eastern time on Friday, October 21, 2005.

*Docket Numbers:* ER05-1229-000 and 001.

*Applicants:* Old Dominion Electric Cooperative.

*Description:* Old Dominion Electric Cooperative submits a notice of withdrawal of the application for acceptance of a rate schedule for providing cost-based Reactive Power and Voltage Control.

*Filed Date:* October 5, 2005.

*Accession Number:* 20051011-0266.

*Comment Date:* 5 p.m. eastern time on Wednesday, October 26, 2005.

*Docket Numbers:* ER05-1518-000.

*Applicants:* PPM Energy, Inc.

*Description:* PPM Energy Energy, Inc on behalf of the City of Klamath Falls, OR & Klamath Energy, LLC submits its Rate Schedule FERC No. 2, together with supporting testimony and cost-of-service schedules.

*Filed Date:* September 30, 2005.

*Accession Number:* 20051003-0131.

*Comment Date:* 5 p.m. eastern time on Friday, October 21, 2005.

*Docket Numbers:* ER05-856-002.

*Applicants:* Virginia Electric and Power Company.

*Description:* Dominion Resources Services, Inc submits a signature page to be included in Attachment B of the First Revised Service Agreement 21 for the Purchase of Electricity for Resale.

*Filed Date:* October 4, 2005.  
*Accession Number:* 20051006-0018.  
*Comment Date:* 5 p.m. eastern time on Tuesday, October 25, 2005.

*Docket Numbers:* ER06-6-000.  
*Applicants:* Pacific Gas and Electric Company.

*Description:* Pacific Gas & Electric Co submits proposed changes to its Second Revised Rate Schedule FERC No. 136 and revision to Appendix E.

*Filed Date:* October 4, 2005.  
*Accession Number:* 20051006-0092.  
*Comment Date:* 5 p.m. eastern time on Tuesday, October 25, 2005.

*Docket Numbers:* ER06-7-000.  
*Applicants:* Midwest Independent Transmission System Operator, Inc.

*Description:* Midwest Independent Transmission System Operator Inc and American Transmission Company LLC submits a notice of cancellation for the Washington Island Electric Cooperative Service Agreement for Network Integration Service.

*Filed Date:* October 5, 2005.  
*Accession Number:* 20051006-0090.  
*Comment Date:* 5 p.m. eastern time on Wednesday, October 26, 2005.

*Docket Numbers:* ER06-8-000.  
*Applicants:* Arizona Public Service Company.

*Description:* Arizona Public Service Co submits Cancellation of First Revised Sheet Nos. 78 through 121 of FERC Electric Rate Schedule No. 192 with the City of Williams.

*Filed Date:* October 5, 2005.  
*Accession Number:* 20051006-0091.  
*Comment Date:* 5 p.m. eastern time on Wednesday, October 26, 2005.

*Docket Numbers:* ER06-11-000.  
*Applicants:* Nevada Power Company  
*Description:* Nevada Power Co submits a Notice of Cancellation of a Purchase Power Agreement with Sierra Pacific Power Co designated as FERC Rate Schedule No. 95.

*Filed Date:* October 3, 2005.  
*Accession Number:* 20051011-0072.  
*Comment Date:* 5 p.m. eastern time on Monday, October 24, 2005.

*Docket Numbers:* ER06-12-000.  
*Applicants:* Nevada Power Company.  
*Description:* Nevada Power Co submits a Notice of Cancellation of a Purchase Power Agreement with Sierra Pacific Power Co designated as FERC Rate Schedule No. 94.

*Filed Date:* October 3, 2005.  
*Accession Number:* 20051011-0066.  
*Comment Date:* 5 p.m. eastern time on Monday, October 24, 2005.

*Docket Numbers:* ER94-1384-033; ER99-2329-005; ER00-1803-004; ER01-457-005; ER02-1485-007; ER03-1108-006; ER03-1109-006; ER03-1315-005; ER04-733-003.

*Applicants:* Morgan Stanley Capital Group, Inc.; South Eastern Electric Development Corp.; South Eastern Generating Corp.; Naniwa Energy LLC; Power Contract Finance, L.L.C.; Power Contract Financing II, L.L.C.; Power Contract Financing II, Inc.; MS Retail Development Corp.; Utility Contract Funding II, LLC.

*Description:* Morgan Stanley Capital Group, Inc on behalf of Morgan Stanley Affiliates submits revised tariff sheets and revised market-based rate schedule in compliance with FERC's August 31, 2005 Order.

*Filed Date:* September 30, 2005.  
*Accession Number:* 20051005-0022.  
*Comment Date:* 5 p.m. eastern time on Friday, October 21, 2005.

*Docket Numbers:* ER99-3665-005.  
*Applicants:* Occidental Power Marketing, L.P.

*Description:* Occidental Power Marketing, LP submits an amendment to its August 1, 2005 updated market power analysis.

*Filed Date:* October 4, 2005.  
*Accession Number:* 20051006-0023.  
*Comment Date:* 5 p.m. eastern time on Tuesday, October 25, 2005.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5753 Filed 10-18-05; 8:45 am]  
**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP05-411-000]

#### **Northern Natural Gas Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Cunningham Service Expansion Project and Request for Comments on Environmental Issues**

October 12, 2005.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Cunningham Service Expansion Project involving construction and operation of facilities by Northern Natural Gas Company (Northern) in Pratt County, Kansas.<sup>1</sup> These facilities would consist of two reciprocating compressors rated at 3,550 horsepower (hp) each. This EA will be used by the Commission in its decisionmaking process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping period that will be used to gather environmental input from the public and interested agencies on the project. Please note that the scoping period will close on November 11, 2005.

This notice is being sent to potentially affected landowners; Federal, State, and

<sup>1</sup>Northern's application was filed with the Commission under section 7 of the Natural Gas Act and part 157 of the Commission's regulations.

local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; local libraries and newspapers. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility on My Land? What Do I Need to Know?" was attached to the project notice Northern provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (<http://www.ferc.gov>).

### Summary of the Proposed Project

Northern is seeking authorization to increase the certificated withdrawal and injection rates at the existing Cunningham Storage Field located in Pratt and Kingman Counties, Kansas by replacing two 2,400 hp reciprocating compressors with two new compressors rated at 3,550 hp each. Northern would also install associated valves and piping to connect the new units with existing station piping. Furthermore, Northern would use the additional horsepower to increase the certificated withdrawal rates (from 650 million cubic feet per day (MMcf/d) to 720 MMcf/d) and injection rates (from 500 MMcf/d to 545 MMcf/d) to provide the requested amount of firm deferred delivery (FDD) service. Northern indicates that the proposed facilities and the increase in withdrawal and injection rates are required to meet FDD service of 4 billion cubic feet of natural gas (Bcf) requested by shippers. Following installation of the proposed facilities, the certificated Cunningham Storage Field capacity would remain unchanged at 62 Bcf.

Northern contends that the modifications will cause minor ground disturbance outside of the compressor building to make the piping connections to the new units. No ground disturbance will occur outside of the existing compressor station yard. Because the work will generally take place within the existing compressor station building, additional land or work space will not be required for the project.

The location of the project facilities is shown in Appendix 1.<sup>2</sup>

<sup>2</sup> The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail.

### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as "scoping". The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we<sup>3</sup> will discuss impacts that could occur as a result of the construction and operation of the proposed project.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, State, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section.

### Currently Identified Environmental Issues

We have already identified one issue that we think deserves attention based on a preliminary review of the proposed facilities and the environmental information provided by Northern. This preliminary issue may be changed based on your comments and our analysis.

- The installation of additional compression may contribute to an

<sup>3</sup> "We", "us", and "our" refer to the environmental staff of the Office of Energy Projects (OEP).

increase in noise levels at nearby noise sensitive areas.

### Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative locations), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 1.
- Reference Docket No. CP05-411-000.
- Mail your comments so that they will be received in Washington, DC on or before November 11, 2005.

We will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. To expedite our receipt and consideration of your comments, the Commission strongly encourages electronic submission of any comments or interventions or protests to this proceeding. See 18 Code of Federal Regulations (CFR) 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at <http://www.ferc.gov> under the "e-Filing" link and the link to the User's Guide. Before you can file comments, you will need to create a free account which can be created on-line.

We may mail the EA for comment. If you are interested in receiving it, please return the Information Request (Appendix 2). If you do not return the Information Request, you will be taken off the mailing list.

### Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding, or "intervenor". To become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214). Intervenor has the right to seek rehearing of the Commission's decision. Motions to Intervene should be electronically submitted using the Commission's

eFiling system at <http://www.ferc.gov>. Persons without Internet access should send an original and 14 copies of their motion to the Secretary of the Commission at the address indicated previously. Persons filing Motions to Intervene on or before the comment deadline indicated above must send a copy of the motion to the Applicant. All filings, including late interventions, submitted after the comment deadline must be served on the Applicant and all other intervenors identified on the Commission's service list for this proceeding. Persons on the service list with e-mail addresses may be served electronically; others must be served a hard copy of the filing.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

**Additional Information**

Additional information about the project is available from the Commission's Office of External Affairs, at 1-866-208-FERC or on the FERC Internet Web site (<http://www.ferc.gov>) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at 1-866-208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to <http://www.ferc.gov/esubscribenow.htm>.

**Magalie R. Salas,**  
Secretary.

[FR Doc. E5-5775 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. PF05-10-000]

**Northern Star Natural Gas LLC; Notice of an Informational Meeting for the Proposed Northern Star LNG Project**

October 12, 2005.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) is issuing this notice to announce the date, time, and location of an informational meeting for Northern Star's Bradwood Landing liquefied natural gas (LNG) Project proposed for Clatsop and Columbia Counties, Oregon, and Cowlitz County, Washington. The purpose of this meeting is for staff to conduct an informational workshop to explain the public's role in the FERC's Pre-filing environmental review process. The meeting will take place on Wednesday, October 26, 2005, starting at 7 p.m. (p.s.t) (ending by 10 p.m.), at the multipurpose room, Julius A. Wendt Elementary School, 265 S. 3rd St., Cathlamet, Washington 98612; (telephone number: (360) 795-3261).

This event is posted on the Commission's calendar located at <http://www.ferc.gov/EventCalendar/EventsList.aspx> along with other related information. For additional information, please contact the Commission's Office of External Affairs at (202) 502-8004.

**Magalie R. Salas,**  
Secretary.

[FR Doc. E5-5764 Filed 10-18-05; 8:45 am]  
BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**Sunshine Act Meeting**

October 13, 2005.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. No. 94-409), 5 U.S.C 552b:

**AGENCY HOLDING MEETING:** Federal Energy Regulatory Commission, DOE.

**DATE AND TIME:** October 20, 2005, 10 a.m.

**PLACE:** Room 2C, 888 First Street, NE., Washington, DC 20426.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Agenda.

\*Note—Items listed on the agenda may be deleted without further notice.

**CONTACT PERSON FOR MORE INFORMATION:** Magalie R. Salas, Secretary, Telephone (202) 502-8400. For a recorded listing item stricken from or added to the meeting, call (202) 502-8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Public Reference Room.

**897TH—MEETING, REGULAR MEETING, OCTOBER 20, 2005, 10 A.M.**

Item No.	Docket No.	Company
<b>ADMINISTRATIVE AGENDA</b>		
A-1 .....	AD02-1-000 .....	Agency Administrative Matters.
A-2 .....	AD02-7-000 .....	Customer Matters, Reliability, Security and Market Operations.
A-3 .....	AD05-16-000 .....	Winter Energy Market Assessment 2005-2006.
<b>MARKETS, TARIFFS, AND RATES—ELECTRIC</b>		
E-1 .....	ER02-1406-006, ER02-1406-007, ER02-1406-008, ER02-1406-009, ER03-1372-003, ER99-3855-004, ER99-3855-005, ER01-1099-008, ER03-1368-002, ER99-2300-006, ER99-2300-007, R03-1369-002, ER99-2928-003, ER99-2928-004, ER99-2928-005, ER03-1371-002.	Acadia Power Partners, LLC  Cleco Power LLC.  Cleco Marketing & Trading LLC.  Cleco Evangeline LLC.

## 897TH—MEETING, REGULAR MEETING, OCTOBER 20, 2005, 10 A.M.—Continued

Item No.	Docket No.	Company
	ER01-1397-004, ER01-1397-005, ER01-1397-006, ER03-1370-003, EL05-113-000, EL05-113-001.	Perryville Energy Partners, LLC.
E-2	ER99-1005-004	Kansas City Power & Light Company.
	ER02-725-005, ER05-1441-000	Great Plains Power, Inc.
	EL05-3-000	Kansas City Power and Light Company and Great Plains Power, Inc.
E-3	ER04-691-057, ER04-691-060	Midwest Independent Transmission System Operator, Inc.
	EL04-104-054, EL04-104-057	Public Utilities With Grandfathered Agreements in the Midwest ISO Region.
E-4	OMITTED.	
E-5	ER98-1466-003, ER05-1314-000, ER05-1314-001.	Allegheny Power.
	ER00-814-004	Allegheny Energy Supply Company, LLC.
	ER01-2067-004	Allegheny Energy Supply Gleason Generating Facility, LLC.
	ER01-2068-004, ER05-1429-000	Allegheny Energy Supply Wheatland Generating Facility, LLC.
	ER01-332-003	Allegheny Energy Supply Hunlock Creek, LLC.
	ER00-2924-004	Green Valley Hydro, LLC.
	ER02-1638-003	Buchanan Generation, LLC.
E-6	OMITTED.	
E-7	EC05-105-000	Allegheny Energy, Inc.
	ER05-1212-000	Monongahela Power Company, The Potomac Edison Company, Allegheny Energy Supply Company, LLC, Allegheny Energy OVEC Supply Company, LLC.
E-8	ER05-667-000, ER05-667-001, ER05-667-002, ER05-667-003.	Midwest Independent Transmission System Operator, Inc.
E-9	OMITTED.	
E-10	ER05-719-000	Entergy Services, Inc.
	ER05-719-001	
E-11	RT01-74-000	Carolina Power & Light Company, Duke Energy Corporation, South Carolina Electric & Gas Company, GridSouth Transco, L.L.C.
E-12	ER04-961-002, ER04-961-003	Midwest Independent Transmission System Operator, Inc.
E-13	ER04-691-046, ER04-691-050	Midwest Independent Transmission System Operator, Inc.
	EL04-104-044, EL04-104-048	Public Utilities With Grandfathered Agreements in the Midwest ISO Region.
E-14	≤OMITTED.	
E-15	ER94-1188-036	LG&E Energy Marketing, Inc.
	ER98-4540-005	Louisville Gas and Electric Company.
	ER99-1623-005	Kentucky Utilities Company.
	ER98-1279-007	Western Kentucky Energy Corporation.
	ER98-1278-011	WKE Station Two, Inc.
	EL05-99-000	LG&E Energy Marketing, Inc.
E-16	ER03-1003-002	Michigan Electric Transmission Company.
E-17	ER04-121-003	ISO New England, Inc.
E-18	OMITTED.	
E-19	EL03-15-000	City of Anaheim, California.
	EL03-20-000	City of Riverside, California.
E-20	EL05-16-000	<i>Aquila Merchant Services, Inc. v. Southwest Power Pool, Inc.</i>
E-21	ER04-981-001	Connecticut Yankee Atomic Power Company.
	EL04-109-001	Connecticut Department of Public Utility Counsel and Connecticut Office of Consumer Counsel.
E-22	ER05-763-001, ER04-1209-002, EL05-29-001, ER05-410-002.	Southern California Edison Company.
E-23	OMITTED.	
E-24	ER98-3809-000	3E Technologies, Inc.
	ER97-2867-000	AC Power Corporation.
	ER99-2369-000	ACES Power Marketing LLC.
	ER98-4685-000	ACN Power, Inc.
	ER00-105-000	AI Energy, Inc.
	ER97-512-000	A'Lones Group, Inc.
	ER00-861-000	Alrus Consulting, LLC.
	ER97-2132-000	Atlantic Energy Technologies, Inc.
	ER01-2355-000	Beacon Generating, LLC.
	ER00-679-000	Black River Power, LLC.
	ER98-701-000	California Polar Power Broker, L.L.C.
	ER01-1701-000	Callaway Golf Company.
	ER02-246-000	Cambridge Electric Light Company.
	ER00-2945-000	Candela Energy Corporation.
	ER01-2138-000	Capital Energy, Inc.
	ER90-225-000	Chicago Electric Trading, L.L.C.
	ER99-964-000	Cielo Power Market, L.P.
	ER97-1968-000	Colonial Energy, Inc.
	ER05-737-000	Commerce Energy Inc.
	ER02-246-000	Commonwealth Electric Company.
	ER98-1790-000	Competisys LLC.

## 897TH—MEETING, REGULAR MEETING, OCTOBER 20, 2005, 10 A.M.—Continued

Item No.	Docket No.	Company
	ER96-2624-000	Cumberland Power, Inc.
	ER01-2071-000	Desert Power, L.P.
	ER94-1161-000	Direct Electric Inc.
	ER94-1099-000	Eclipse Energy, Inc.
	ER99-3098-000	EGC 1999 Holding Company, L.P.
	ER98-2020-000	Energy Clearinghouse Corp.
	ER98-2918-000	Energy PM, Inc.
	ER96-358-000	Energy Resource Management Corp.
	ER01-2221-000	Energy Transfer-Hanover Ventures, LP.
	ER00-874-000	Energy West Resources, Inc.
	ER96-138-000	EnergyOnline, Inc.
	ER99-254-000	ENMAR Corporation.
	ER98-3233-000	Environmental Resources Trust, Inc.
	ER01-666-000	EWO Marketing, L.P.
	ER97-382-000	Exact Power Co., Inc.
	ER96-918-000	Federal Energy Sales, Inc.
	ER00-1258-000	First Electric Cooperative Corporation.
	ER97-3580-000	First Power, LLC.
	ER02-687-000	FMF Energy, Inc.
	ER96-1933-000	Gelber Group, Inc.
	ER01-1078-000	George Colliers, Inc.
	ER01-2405-000	GNA Energy, LLC.
	ER98-4334-000	Golden Valley Power Company.
	ER01-3023-000	Hinson Power Company, LLC.
	ER01-2129-000	Holt Company of Ohio.
	ER96-1819-000	ICC Energy Corporation.
	ER95-802-000	IEP Power Marketing, LLC.
	ER98-3478-000	INFINERGY Services, LLC.
	ER00-1519-000	InPower Marketing Corporation.
	ER01-688-000	IPP Energy LLC.
	ER00-2306-000	It's Electric & Gas, L.L.C.
	ER95-784-000	J. Anthony & Associates Ltd.
	ER95-295-000	Kaztex Energy Ventures, Inc.
	ER95-232-000	Kimball Power Company.
	ER03-1259-000	Kloco Corporation.
	ER94-1672-000	Lambda Energy Marketing Company.
	ER02-30-000	Longhorn Power, LP.
	ER01-1507-000	Lumberton Power, LLC.
	ER00-1781-000	Marquette Energy, LLC.
	ER99-801-000	Metro Energy Group, LLC.
	ER99-1156-000	Michigan Gas Exchange, L.L.C.
	ER95-78-000	Mid-American Reesources, Inc.
	ER96-2027-000	Midwest Energy, Inc.
	ER99-1293-000	Monmouth Energy, Inc.
	ER01-2509-000	Morrow Power, LLC.
	ER02-1238-000	MPC Generating, LLC.
	ER94-1593-000	National Power Exchange Corp.
	ER95-192-000	National Power Management Company.
	ER01-352-000	Natural Gas Trading Corporation.
	ER98-2618-000	Nautilus Energy Company.
	ER99-2537-000	Navitas, Inc.
	ER97-2681-000	New Millennium Energy Corp.
	ER96-2892-000	NGTS Energy Services.
	ER98-1915-000	Nine Energy Services, LLC.
	ER94-152-000	North American Energy Conservation, Inc.
	ER97-1716-000	North Atlantic Utilities Inc.
	ER01-904-000	North Carolina Power Holdings, LLC.
	ER98-622-000	North Star Power Marketing, LLC.
	ER02-41-000	North Western Energy Marketing, LLC.
	ER98-3048-000	Northeast Electricity Inc.
	ER98-1125-000	Northeast Empire L.P. #2.
	ER01-1479-000	Northwest Regional Power, LLC.
	ER02-845-000	Northwestern Wind Power, LLC.
	ER97-181-000	Oceanside Energy, Inc.
	ER01-2783-000	ODEC Power Trading, Inc.
	ER99-2883-000	Old Mill Power Company.
	ER95-379-000	Peak Energy, Inc.
	ER03-372-000	Peak Power Generating Company.
	ER01-1821-000	Power Dynamics, Inc.
	ER99-3275-000	Power Management Co., LLC.
	ER96-2303-000	Power Providers Inc.
	ER97-3187-000	Power Systems Group, Inc.

## 897TH—MEETING, REGULAR MEETING, OCTOBER 20, 2005, 10 A.M.—Continued

Item No.	Docket No.	Company
	ER96-1-000 .....	Powertec International, LLC.
	ER01-2463-000 .....	Pro-Energy Development LLC.
	ER95-968-000 .....	Progas Power Inc.
	ER99-1876-000 .....	
	ER96-404-018 .....	PS Energy Group, Inc., Questar Energy Trading Company.
	ER02-809-000 .....	Renewable Energy Resources LLC.
	ER96-1516-000 .....	SEMCOR Energy.
	ER96-2591-000 .....	Strategic Power Management, Inc.
	ER01-2217-002 .....	Sunrise Power Company.
	ER96-2524-000 .....	Symmetry Device Research, Inc.
	ER00-1250-000 .....	Tacoma Energy Recovery Company.
	ER95-581-000 .....	Tennessee Power Company.
	ER95-1787-000 .....	Texaco Natural Gas Inc.
	ER01-2694-000 .....	The Energy Group of America, Inc.
	ER99-3571-000 .....	The Legacy Energy Group, LLC.
	ER01-373-002 .....	Tiger Natural Gas, Inc.
	ER00-494-000 .....	TransAlta Centralia Generation LLC.
	ER98-1055-000 .....	TransAlta Energy Marketing (US) Inc.
	ER01-3148-000 .....	TransAlta Energy Marketing Corp. (US).
	ER01-2234-000 .....	Travis Energy & Environment, Inc.
	ER04-957-000 .....	TXU Electric Delivery Company.
	ER96-105-000 .....	U.S. Power & Light, Inc.
	ER01-1709-000 .....	VIASYN, Inc.
	ER02-1046-000 .....	Walton County Power, LLC.
	ER98-537-000 .....	Western Energy Marketers, Inc.
	EL05-111-000 .....	3E Technologies, Inc.
E-25 .....	ER03-409-000, EL05-35-000 .....	Pacific Gas and Electric Company.

## MARKETS, TARIFFS, AND RATES—MISCELLANEOUS

M-1 .....	RM06-3-000 .....	Prohibition of Energy Market Manipulation.
M-2 .....	PL06-1-000 .....	Enforcement of Statutes, Orders, Rules, and Regulations.
M-3 .....	OMITTED.	
M-4 .....	RM06-2-000 .....	Procedures for Disposition of Contested Audit Matters.

## MARKETS, TARIFFS, AND RATES—GAS

G-1 .....	RP04-248-005, RP04-251-006, RP04-248-006, RP04-251-007.	El Paso Natural Gas Company.
G-2 .....	RP98-39-000, RP98-39-029 .....	Northern Natural Gas Company.
G-3 .....	OMITTED.	
G-4 .....	OMITTED.	
G-5 .....	OR05-9-000 .....	Flint Hills Resources Alaska, LLC v. ConocoPhillips Alaska, Inc., Exxon Mobil Corporation, Tesoro Alaska Company BP America Production Company, BP Exploration (Alaska) Inc., OXY USA Inc., Union Oil Company of California Petro Star Inc., State of Alaska, BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC., Unocal Pipeline Company.
G-6 .....	OR89-2-016, OR89-2-017 .....	Trans Alaska Pipeline System.
	OR96-14-005, OR96-14-006 .....	Exxon Company, U.S.A. v. Amerada Hess Pipeline Corporation.
	OR98-24-000, OR98-24-002 .....	Tesoro Alaska Petroleum Company v. Amerada Hess Pipeline Corporation.
	IS03-137-000, IS03-137-001 .....	BP Pipelines (Alaska), Inc.
	IS03-141-000, IS03-141-001 .....	ExxonMobil Pipeline Company.
	IS03-142-000, IS03-142-001 .....	Phillips Transportation Alaska, Inc.
	IS03-143-000, IS03-143-001 .....	Unocal Pipeline Company.
	IS03-144-000, IS03-144-001 .....	Williams Alaska Pipeline Company, L.L.C.

## ENERGY PROJECTS—HYDRO

H-1 .....	P-12480-001 .....	Wind River Hydro, LLC.
	P-12457-001 .....	Eastern Shoshone Tribe of the Wind River Reservation.
H-2 .....	P-1934-014 .....	Southern California Edison Company.
H-3 .....	P-400-042 .....	Public Service Company of Colorado.

## ENERGY PROJECTS—CERTIFICATES

C-1 .....	CP05-76-000, CP05-77-000, CP05-78-000.	Dominion South Pipeline Company, L.P.
C-2 .....	OMITTED.	
C-3 .....	OMITTED.	
C-4 .....	OMITTED.	
C-5 .....	OMITTED.	

## 897TH—MEETING, REGULAR MEETING, OCTOBER 20, 2005, 10 A.M.—Continued

Item No.	Docket No.	Company
C-6 .....	CP04-365-001 .....	Dominion Transmission, Inc.
C-7 .....	CP04-34-001 .....	Columbia Gas Transmission Corporation.

**Magalie R. Salas,**  
*Secretary.*

The Capitol Connection offers the opportunity for remote listening and viewing of the meeting. It is available for a fee, live over the Internet, via C-Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703-993-3100) as soon as possible or visit the Capitol Connection Web site at <http://www.capitolconnection.gmu.edu> and click on "FERC"

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in Hearing Room 2. Members of the public may view this briefing in the Commission Meeting overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 05-21013 Filed 10-17-05; 2:05 pm]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 12533-001]

#### Christopher James Phil; Notice of Surrender of Preliminary Permit

October 12, 2005.

Take notice that Christopher James Phil, permittee for the proposed May Creek Project, has requested that its preliminary permit be terminated. The permit was issued on March 8, 2005, and would have expired on February 29, 2008.<sup>1</sup> The project would have been located on May Creek and Lake Isabel in Snohomish County, Washington.

The permittee filed the request on September 26, 2005, and the preliminary permit for Project No. 12533 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007,

in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. E5-5763 Filed 10-18-05; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. AD05-17-000]

#### Electric Energy Market Competition Task Force; Notice Requesting Comments on Wholesale and Retail Electricity Competition

October 13, 2005.

#### Overview

Section 1815 of the Energy Policy Act of 2005 requires the Electric Energy Market Competition Task Force to conduct a study of competition in wholesale and retail markets for electric energy in the United States. Over the past several years, wholesale competition has developed unevenly in many regions of the country. Moreover, fewer than 20 States have adopted retail choice programs that allow some electricity consumers to choose their retail electric generation supplier. The purpose of this study is to analyze and report to Congress on the critical elements for effective wholesale and retail competition, the status of each element, impediments to realizing each element, and suggestions for overcoming these impediments.

In recent years, some states and the Federal government have taken steps to encourage competition in the electric power industry. In the Energy Policy Act of 2005, Congress established an inter-agency task force, known as the "Electric Energy Market Competition Task Force" (the Task Force), to conduct a study and analysis of competition within the wholesale markets and retail markets for electric energy in the United States. The Task Force consists of 5 members:

(1) 1 employee of the Department of Justice, appointed by the Attorney General of the United States—J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division; (2) 514-1157, [bruce.mcdonald@usdoj.gov](mailto:bruce.mcdonald@usdoj.gov).

(2) 1 employee of the Federal Energy Regulatory Commission, appointed by the Chairperson of that Commission—Michael Bardee, Associate General Counsel, Office of the General Counsel—Markets, Tariffs, and Rates; (2) 502-8068, [michael.bardee@ferc.gov](mailto:michael.bardee@ferc.gov).

(3) 1 employee of the Federal Trade Commission, appointed by the Chairperson of that Commission—Michael Wroblewski, Assistant General Counsel for Policy Studies; (2) 326-2166, [mwroblewski@ftc.gov](mailto:mwroblewski@ftc.gov).

(4) 1 employee of the Department of Energy, appointed by the Secretary of Energy—David Meyer, Deputy Director, Division of Permitting, Siting, and Analysis, Office of Electricity Delivery and Energy Reliability; (2) 586-1411, [David.Meyer@hq.doe.gov](mailto:David.Meyer@hq.doe.gov).

(5) 1 employee of the Rural Utilities Service, appointed by the Secretary of Agriculture—Karen Larsen, Office of Assistant Administrator, Electric Programs (202) 720-9545, [Karen.Larsen@usda.gov](mailto:Karen.Larsen@usda.gov).

Section 1815(c) of the Energy Policy Act of 2005 requires the Task Force to "consult with and solicit comments from any advisory entity of the task force, the States, representatives of the electric power industry, and the public." This Notice begins this process. The Task Force also will publish a draft final report for public comment, before submitting the final version to Congress as required by Section 1815(b)(2)(B).

Listed below is a series of questions for which the Task Force seeks public comment. For both wholesale and retail competition for electric power, we focus on the current state of competition and on factors that help support competition, or that otherwise may limit competition, among suppliers and buyers in regional wholesale markets and retail markets at the state level. The questions listed below are by no means exhaustive. The Task Force encourages commentors to raise any other additional factors that affect competition in wholesale and retail electric power markets. It is not necessary to respond to each question. Rather, it would be helpful for

<sup>1</sup> 110 FERC ¶ 62,227 (2005).

respondents to provide, for example, specific information about market responses to particular governing regulations, or to compare and contrast the market reaction to the means individual states have used to address various retail competition issues (*e.g.*, generation siting, provider of last resort pricing, etc.).

#### Overview Questions

1. What are the critical elements or attributes of competition in wholesale electricity markets that the Task Force should examine?

2. What are the critical elements or attributes of competition in retail electricity markets that the Task Force should examine?

3. What benefits have occurred because of competition in wholesale and retail electricity markets? What additional benefits are expected? What benefits were forecasted and have not occurred? Why? What harms have occurred because of competition in wholesale and retail electricity markets?

4. What are the major public policy concerns that the Task Force should examine in its review of competition in wholesale and retail electricity markets?

5. In what significant ways do wholesale and retail electricity markets differ from other energy or commodity markets? What implications do their differences have for public policy?

#### Wholesale Market Questions

Commentors should answer with a specific regional wholesale market in mind and should be as specific as possible.

##### A. Wholesale Supply Trading and Participation

1. To what extent does wholesale trading help result in an economic and reliable supply of electricity in each region? What are ways to improve the provision of an economic and reliable supply of electricity?

2. What share of electric power used to serve retail (or ultimate consumer) load is obtained through wholesale market transactions in each state or region? In what ways has this share changed over the past 10 years and the past 5 years and why?

3. What share of electric power used to serve ultimate consumer load is generated by a utility for its own native load? What share of electric power used to serve utility customer load comes from utility affiliates? What share comes from unaffiliated generators?

4. What opportunities exist for generation owners to sell output in wholesale markets?

5. What opportunities exist for wholesale power buyers to purchase electricity in wholesale markets? Is demand (megawatts) a product that can be traded in the wholesale market?

6. Is there an organized regional market or exchange serving buyers and sellers in the region? What products does the organized market provide? What percentage of energy supplied is secured through organized markets and through bilateral trades? Are there liquid trading points in the region? What are the volumes traded? What is the trend of bid/ask spreads (getting greater or smaller)?

7. To what extent do wholesale buyers and sellers participate in futures or other commodity markets or transactions to balance the financial risks of competitive electricity markets? How liquid are forward markets in different regions and how far ahead can one transact in these markets?

8. What role have credit issues played in the ability of market participants to participate in wholesale markets, including forward markets?

9. Are there competitive processes by which distribution utilities solicit proposals for native load or default service?

10. How can changes and trends in wholesale market prices by region be measured?

11. How should the performance of wholesale markets in serving the needs of various types of power sellers (*e.g.*, marketer, generator, independent producer, merchant, public utility, nonpublic utility, qualified facility, renewable power producer, co-generator) be measured?

12. How has restructuring of incumbent utility operations and the introduction of competitive retail markets in retail choice states affected participation in regional wholesale markets? Has the introduction of retail markets affected the level of long-term contracting in wholesale markets?

13. Please describe instances in which competition has resulted in relatively higher prices or lower reliability in a specific regional market.

##### B. Generation Ownership

1. How has ownership of electric generating plants changed over the past 10 years?

2. In the past 10 years, when generations assets have been sold or transferred, how much capacity was sold or transferred to (a) Utility or utility affiliates, (b) existing non-utility market participants; (c) new market participants?

3. How much existing merchant or non-utility generation assets have been

sold or transferred? What were the reasons for these transactions?

4. How much existing capacity has been sold or transferred to utilities and converted to rate-based assets? Of those how many were previously affiliated with a utility and how many were purchased from other entities?

##### C. Generation Adequacy

1. How is generation adequacy addressed in each region or system? Is there a specific enforceable requirement that load serving entities or market participants must meet? How is planning for generation adequacy conducted?

2. Has new generation construction kept pace with demand growth in the state or market region? If not, why not? What are the most important factors that affect whether generation will be built?

3. What role does the ability to enter into long-term contracts play in financing new generation projects?

4. What generation facilities have been installed in the past five years? What was the experience in the process?

5. What generation facilities have been cancelled in the past five years and why?

6. What difficulties, if any, have developers of new generation facilities encountered in bringing generation supply to market? (*E.g.*, difficulties in financing, siting, permitting, licensing, interconnection, transmission access, fuel supply.) What are ways to improve the process?

7. Are there instances in the past five years in which a new generation facility has been completed that caused prices in a previously congested area to decline?

8. How do the approaches and responsibilities for assuring the availability of sufficient generation capacity to meet peak load and load growth vary among regions and states that have retail choice and/or tightly organized regional markets and those that do not?

9. What incentives do competitive suppliers have to maintain adequate reserve capacity?

10. What incentives or responsibilities do load serving utilities have to maintain adequate reserve capacity?

11. How can competitive markets assure adequacy of generation supply? How is reserve sharing to meet state or regional generation adequacy standards accomplished in competitive markets? How can other institutions/market processes provide an effective substitute for reserve sharing?

#### *D. Transmission Investment and Regulation*

1. What are the most important factors that affect whether transmission will be built? What are ways to improve the process? What difficulties have transmission owners had in upgrading or building new transmission facilities? What are the prospects for merchant transmission?

2. Over the past 10 years, what have been the trends in investments in transmission by utilities by state or region? Are there any prevailing patterns in transmission investments in upgrades and replacement of existing plant versus new lines, interconnections, automation? Have these patterns of investment shifted over this period? Are there any projected changes in patterns of transmission investment over the next 5 years?

3. How are transmission needs of merchant generators and renewable energy projects included in regional or utility transmission planning and upgrades?

4. How has the establishment of Regional Transmission Organizations (RTOs) changed transmission operations, transmission planning, and investment patterns?

5. Within a region or RTO, is there a different process for transmission upgrades that are not required for reliability but would increase access to lower priced power in areas with economic congestion?

6. In the absence of RTOs, how is transmission planning, siting, and construction for regional needs coordinated among utilities, generators, and State regulators? What challenges do transmission owners face upgrading or building new transmission facilities?

7. How have transmission costs changed for transmission owners and for transmission customers over the past 10 years? What are the reasons for any increases or decreases?

#### *E. Wholesale Market Transparency and Information*

1. Do purchasers and sellers view markets as providing stable, transparent prices? Are there differences among products and markets?

2. Is there sufficient timely and accurate publicly available information to assure that market participants can adequately assess the economics of proposed wholesale power transactions or assess the financial implications of self build versus competitive alternatives for generation supply?

3. How can any information deficits be remedied to improve the utility of market information? Are there any

competitive risks associated with greater transparency of prices or of other information about market participants?

4. Are there open and transparent processes by which load serving entities solicit proposals for generation from independent firms and/or from affiliated generators?

#### **Retail Market Questions**

Commentors can answer the following questions based on their knowledge and experience in any state with retail competition:

##### *A. Retail Markets Overview*

1. What factors or measures should the Task Force examine in reviewing state retail choice experiences? How should these factors and measures be evaluated?

2. How should the Task Force assess the performance of evolving competitive retail markets?

3. How can the performance of competitive retail markets for retail customers be measured in the absence of competitive suppliers for residential and small business customers in many areas?

4. Why did your state implement a retail electric choice program?

5. Why did your state decide not to implement a retail electric choice program?

##### *B. State Retail Choice Experience*

1. How have consumers benefited from retail electric competition? How have consumers been harmed by retail electric competition?

2. How have retail customer prices changed since the beginning of the transition to retail choice? Have the changes been comparable across all classes of customers?

3. How many alternative competitive retail suppliers are currently soliciting or accepting new customers in each service area? Has the number increased or decreased since the state introduced retail choice?

4. Does the availability of alternative competitive suppliers differ among service areas, customer classes, load size, rural and urban areas, or other geographic areas, or by credit policies? If so, why? If not, why not?

5. Have suppliers offered new types of products and services (e.g., time of day pricing, interruptible contracts, green power, etc.) in states where retail competition has been implemented? If so, describe the products and what customer response has been.

6. How do retail customers obtain information about competitive alternatives? Do retail consumers have enough information to readily make

informed choices among competing suppliers?

7. Does the state allow groups of retail customers to aggregate their electricity demand? How are they structured? What customer groups are included? Is participation on an opt-in or an opt-out basis? Has aggregation enabled consumers to benefit from retail electricity competition? If not, why not?

8. Now that many state-mandated transition periods to phase-in retail competition are ending, what issues do states face to ensure competitive retail markets?

##### *C. Retail Supply Questions in States With Retail Competition*

1. How does the state program address assurance of adequate generation supplies for default service customers (i.e., customers that: (a) Do not choose a competitive provider, or (b) have lost their competitive supplier for whatever reason)?

2. How do default service obligations affect retail power competition? Do the transmission services allowed for default service obligations affect retail competition and, if so, how? What changes, if any, would you suggest in these transmission services?

3. How has the development of RTOs affected the development of retail competition in the state?

4. Did the state require that the incumbent utility divest all or some of its generation assets used to serve its retail native load when retail competition was introduced? Did incumbent utilities voluntarily divest generation assets as part of restructuring to implement retail competition? Did incumbent utilities transfer ownership of generation assets used to serve native load to an affiliated entity?

5. What has been the result of generation ownership transfers serving the state or region since the start of retail competition? Has there been a consolidation of generation ownership in the state or region?

6. If a retail load serving utility no longer owns sufficient generation assets to meet its obligations to its retail customers (existing customers, or as the supplier of last resort or default service provider) what mechanism (e.g., spot market purchases, buy back or output contracts, etc.) does it use to obtain generation services to fulfill these obligations? What share of a utility's load is obtained via the different mechanisms? How are these shares trending?

7. How do non-utility retail service providers in the state secure access to transmission and distribution services

needed to deliver power to their retail customers?

8. What difficulties have retail supplier entrants encountered in entering the market? What conditions/incentives attract suppliers to retail markets?

#### D. Demand Side Participation

1. How do rate structures affect the incentives of large, medium, or small electric customers to participate in demand side response programs? Does this effect differ if a state has a retail choice program?

2. What measures have states taken to make customer demand responsive to changes in availability and price of electricity supply? Do these measures differ if a state has a retail choice program?

3. What mechanisms allow for the participation of load response measures "interruptible load, self-generation, demand-side management, conservation and energy efficiency measures as alternatives in wholesale electric markets and or load serving utility resource portfolios? How has the performance of these measures been monitored?

4. Have states adopted alternatives to average cost pricing to encourage demand response?

5. What has been the effect on demand and demand elasticity in light of these measures?

6. How prevalent is the use of distributed resources (e.g., distributed generation and distributed energy storage) within the state?

7. To what extent are retail customers within the state or region increasing use of distributed resources and what types of resources are involved?

#### E. Rising Fuel Prices

1. Are changes in prices for oil, natural gas, and coal affecting the results of competitive wholesale markets and viability of competitive suppliers and if so, how?

2. How are changes in prices for oil, natural gas, and coal affecting retail electricity costs?

3. Are there differences in retail price impacts between states and/or utility systems operating under retail competition models and those that operate under traditional utility cost based rate models?

#### How To File Comments

Any interested person may submit a written comment that will be considered part of the public record. Comments may be filed electronically via the e-Filing link on the Federal Energy Regulatory Commission's Web

site at <http://www.ferc.gov> for Docket No. AD05-17-000. Most standard word processing formats are accepted, and the e-Filing link provides instructions for how to Login and complete an electronic filing. First-time users will have to establish a user name and password. User assistance for electronic filing is available at 202-208-0258 or by e-mail to [efiling@ferc.gov](mailto:efiling@ferc.gov). Comments should not be submitted to the e-mail address. Commentors filing electronically do not need to make a paper filing. Commentors that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. eastern time on November 18, 2005.

**Magalie R. Salas,**  
*Secretary.*

[FR Doc. 05-20896 Filed 10-18-05; 8:45 am]

**BILLING CODE 5717-01-P**

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## ENVIRONMENTAL PROTECTION AGENCY

[OPP-2005-0257; FRL-7741-3]

### Cambridge Environmental Inc. and Dynamac; Transfer of Data

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Cambridge Environmental Inc. and its subcontractor, Dynamac, in accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Cambridge Environmental Inc. and its subcontractor, Dynamac, have been awarded a contract to perform work for OPP, and access to this information will enable Cambridge Environmental Inc.

and its subcontractor, Dynamac, to fulfill the obligations of the contract.

**DATES:** Cambridge Environmental Inc. and its subcontractor, Dynamac, will be given access to this information on or before October 24, 2005.

**FOR FURTHER INFORMATION CONTACT:** Felicia Croom, Acting Information Security Officer, Information Technology and Resources Management Division (ITRMD), (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-0786; e-mail address: [croom.felicia@epa.gov](mailto:croom.felicia@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

###### A. Does this Action Apply to Me?

This action applies to the public in general. As such, 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-2005-0257. 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, 1801 S. Bell St., 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. 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. Once in the system, select "search," then key in the appropriate docket ID number.

## II. Contractor Requirements

Under Contract No. EP-W-05-044, Cambridge Environmental Inc. and its subcontractor, Dynamac, will perform critical reviews of data evaluation records submitted by a registrant. The contractor shall evaluate the accuracy, credibility and scientific credibility of each record (also called studies), its suitability for meeting data requirements, and any necessary graphic displays of data and/or summary tables necessary to allow one to reach an independent conclusion about the results of the study. The Contractor shall also be asked to screen studies and data sets. Not all studies will have FIFRA CBI information. However, OPP expects to receive many new chemicals for registration. Most of these studies will contain FIFRA CBI. This work is described in Task 3 of the contract's Statement of Work.

The OPP has determined that access by Cambridge Environmental Inc. and its subcontractor, Dynamac, to information on all pesticide chemicals is necessary for the performance of this contract.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(2), the contract with Cambridge Environmental Inc. and its subcontractor, Dynamac, prohibits use of the information for any purpose not specified in the contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the *FIFRA Information Security Manual*. In addition, Cambridge Environmental Inc. and its subcontractor, Dynamac, are required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Cambridge Environmental Inc. and its

subcontractor, Dynamac, until the requirements in this document have been fully satisfied. Records of information provided to Cambridge Environmental Inc. and its subcontractor, Dynamac, will be maintained by EPA Project Officers for this contract. All information supplied to Cambridge Environmental Inc. and its subcontractor, Dynamac, by EPA for use in connection with this contract will be returned to EPA when Cambridge Environmental Inc. and its subcontractor, Dynamac, have completed their work.

## List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: October 5, 2005.

### Robert Forrest,

*Acting Director, Information Technology and Resources Management Division, Office of Pesticide Programs.*

[FR Doc. 05-20605 Filed 10-18-05; 8:45 am]

BILLING CODE 6560-50-S

## ENVIRONMENTAL PROTECTION AGENCY

[OPP-2005-0203 FRL-7741-1]

### Ethylene Oxide Risk Assessment; Notice of Availability; Reopening of Comment Period

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice; Reopening of Comment Period.

**SUMMARY:** EPA issued a notice in the **Federal Register** of August 3, 2005, concerning the availability of the risk assessment for ethylene oxide. This document is reopening the comment period for 30 days, until November 18, 2005.

**DATES:** Comments must be received on or before November 18, 2005.

**ADDRESSES:** Comments, identified by docket identification (ID) number OPP-2005-0203, may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION** of the August 3, 2005 **Federal Register** document.

**FOR FURTHER INFORMATION CONTACT:** Susan Bartow, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-

0001; telephone number: (703) 603-0065; fax number: (703) 308-8041; e-mail address: bartow.susan@epa.gov.

## SUPPLEMENTARY INFORMATION:

### I. General Information

#### A. Does this Action Apply to Me?

The Agency included in the Notice of Availability a list of those who may be potentially affected by this action. If you have 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 ID number OPP-2005-0203. 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, 1801 S. Bell St., 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.

#### C. How and to Whom Do I Submit Comments?

To submit comments, or access the official public docket, please follow the detailed instructions as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION** of the August 3, 2005 **Federal Register** document. If you have

questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

## II. What Action is EPA Taking?

This document reopens the public comment period established in the **Federal Register** of August 3, 2005 (70 FR 44632) (FRL-7729-2). In that document, EPA made available the human health risk assessment for ethylene oxide (ETO). ETO is a fumigant/sterilant used to sterilize medical or laboratory equipment, pharmaceuticals, and aseptic packaging, or to reduce microbial load on cosmetics, whole and ground spices or other seasoning materials, and artifacts, archival material or library objects. The Agency developed this risk assessment as part of its public process for making pesticide reregistration eligibility and tolerance reassessment decisions. Through these programs, EPA is ensuring that pesticides meet current standards under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). The Agency received a request by a stakeholder to extend the comment period. EPA is hereby reopening the comment period, which ended on October 3, 2005; comments must now be received on or before *[insert date 30 days after date of publication in the Federal Register]*. This extension is being given based on the request to have additional time to review the extensive amount of information provided and the nature of the issues involved.

### List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 5, 2005.

#### Peter Caulkins,

*Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. 05-20821 Filed 10-18-05; 8:45 am]

BILLING CODE 6560-50-S

## ENVIRONMENTAL PROTECTION AGENCY

[OPP-2005-0229; FRL 7740-4]

### Flumiclorac pentyl; Tolerance Reassessment Decision for Low Risk Pesticide; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of EPA's Tolerance

Reassessment Decision (TRED) for the pesticide flumiclorac pentyl, and opens a public comment period on this document, related risk assessments, and other support documents. EPA has reviewed the low risk pesticide flumiclorac pentyl through a modified, streamlined version of the public participation process that the Agency uses to involve the public in developing pesticide tolerance reassessment and reregistration decisions. Through the tolerance reassessment program, EPA is ensuring that all pesticides meet current health and food safety standards.

**DATES:** Comments must be received on or before November 18, 2005.

**ADDRESSES:** Comments, identified by docket identification (ID) number OPP-2005-0229 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:

Tawanda Spears, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460-0001; telephone number: (703) 308-8050; fax number: (703) 308-8005; e-mail address: [spears.tawanda@epa.gov](mailto:spears.tawanda@epa.gov).

#### SUPPLEMENTARY INFORMATION:

### I. General Information

#### A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may 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 ID number OPP-2005-0229. 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, 1801 S. Bell St., 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-2005-0229. 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 [toopp-docket@epa.gov](mailto:toopp-docket@epa.gov), Attention: Docket ID Number OPP-2005-0229. 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) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001, Attention: Docket ID Number OPP-2005-0229.

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, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP-2005-0229. 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 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 your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

## II. Background

### A. What Action is the Agency Taking?

EPA completed its evaluation of the uses of flumiclorac pentyl, reassessed five (5) existing tolerances or legal residue limits, and reached a tolerance reassessment decision for this low risk pesticide on August 23, 2005. Flumiclorac pentyl is a post-emergence herbicide used on field corn, soybeans and non-crop areas, such as: industrial sites, airports, military installations, roadsides and associated rights-of-way,

and other similar areas to control a selected group of broadleaf weeds, specifically morning-glory and velvet leaf. Although there are no labeled residential homeowner uses, there is potential risk for non-occupational exposure from other treated areas, such as golf courses, athletic fields, recreational areas, schools, apartment buildings, etc. The Agency is now issuing for comment the resulting Report on Food Quality Protection Act (FQPA) Tolerance Reassessment Progress and Risk Management Decision for flumiclorac pentyl, known as a TRED, as well as related risk assessments and technical support documents.

EPA developed the flumiclorac pentyl TRED through a modified, streamlined version of its public process for making tolerance reassessment and reregistration eligibility decisions. Through these programs, the Agency is ensuring that pesticides meet current standards under the Federal Food, Drug, and Cosmetic Act (FFDCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended by FQPA. EPA must review tolerances and tolerance exemptions that were in effect when the FQPA was enacted, to ensure that these existing pesticide residue limits for food and feed commodities meet the safety standard established by the new law. Tolerances are considered reassessed once the safety finding has been made or a revocation occurs. EPA has reviewed and made the requisite safety finding for the flumiclorac pentyl tolerances included in this notice.

The flumiclorac pentyl TRED presents the Agency's tolerance reassessment conclusions for flumiclorac pentyl alone; however, section 408(b)(2)(D)(v) of the FFDCA directs the Agency also to consider available information on the cumulative risk from substances sharing a common mechanism of toxicity. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to flumiclorac pentyl and any other substances, and flumiclorac pentyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that flumiclorac pentyl has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by

EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at <http://www.epa.gov/pesticides/cumulative/>.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** of May 14, 2004 (69 FR 26819) (FRL-7357-9), explains that in conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. EPA can expeditiously reach decisions for pesticides like flumiclorac pentyl, which pose no risk concerns, have low use, affect few if any stakeholders, and require no risk mitigation. Once EPA assesses uses and risks for such low risk pesticides, the Agency may go directly to a decision and prepare a document summarizing its findings, such as the flumiclorac pentyl TRED.

The tolerance reassessment program is being conducted under Congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public in finding ways to effectively mitigate pesticide risks. Flumiclorac pentyl, however, poses no risks that require mitigation. The Agency therefore is issuing the flumiclorac pentyl TRED, its risk assessments, and related support documents simultaneously for public comment. The comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the TRED. All comments should be submitted using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for flumiclorac pentyl. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

EPA will consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and electronic EDOCKET. If any comment significantly affects the document, EPA also will publish an amendment to the TRED in the **Federal Register**. In the absence of substantive comments

requiring changes, the decisions reflected in the TRED will be implemented as presented. These decisions may be supplemented by risk mitigation measures when EPA considers its cumulative assessment of pesticides.

*B. What is the Agency's Authority for Taking this Action?*

Section 408(q) of the FFDCA, 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

**List of Subjects**

Environmental protection, Pesticides, and pests.

Dated: October 5, 2005.

**Peter Caulkins,**

*Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. 05-20708 Filed 10-18-05; 8:45 am]

**BILLING CODE 6560-50-S**

**ENVIRONMENTAL PROTECTION AGENCY**

[OPP-2004-0182; FRL-7727-6]

**Pesticide Product Registrations; Conditional Approval**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces Agency approval of applications submitted by Monsanto Company, to conditionally register the pesticide products, Event MON 863: Corn Rootworm Protected Corn (ZMIR13L) and YieldGard Plus containing a new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

**FOR FURTHER INFORMATION CONTACT:** Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8715; e-mail address: [mendelsohn.mike@epa.gov](mailto:mendelsohn.mike@epa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in Unit II. of this notice. 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-2004-0182. 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, 1801 S. Bell St., 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.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public

inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, Arlington, VA (703) 305-5805. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A-101), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

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. 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. Once in the system, select "search," then key in the appropriate docket ID number.

Electronic versions of the MON 863 Fact Sheet and Biopesticide Regulatory Action Document, as well as the YieldGard Plus Fact Sheet are available at <http://www.epa.gov/biopesticides/>.

## II. Did EPA Conditionally Approve the Application?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest.

The Agency has considered the available data on the risks associated with the proposed use of *Bacillus thuringiensis Cry3Bb1* protein and the

genetic material necessary for its production (Vector ZMIR13L) in event MON 863 corn, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of *Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production Vector ZMIR13L in Event MON 863 corn during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

The Agency has considered the available data on the risks associated with the proposed use of YieldGard Plus *Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production (Vector ZMIR13L) in Event MON 863 corn stacked with *Bacillus thuringiensis Cry1A(b)* delta endotoxin and the genetic material necessary for its production in corn via conventional breeding, and information on social, economic, and environmental benefits to be derived from such use.

Based on these reviews, the Agency was able to make basic environmental, health, and safety determinations which show that use of YieldGard Plus [*Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production (Vector ZMIR13L) in Event MON 863 corn stacked with *Bacillus thuringiensis Cry1A(b)* delta endotoxin and the genetic material necessary for its production in corn via conventional breeding], consistent with the terms and conditions of registration during the period of conditional registration, will not significantly increase the risk of unreasonable adverse effect on the environment.

The YieldGard Plus product is conditionally registered in accordance with FIFRA section 3(c)(7)(B). If the conditions are not complied with the registration will be subject to cancellation in accordance with FIFRA section 6(e).

### III. Conditionally Approved Registrations

EPA issued a notice, published in the **Federal Register** of March 13, 2002 (67 FR 11333) (FRL-6827-3), which announced that Monsanto Company, 800 N. Lindberg Blvd., St. Louis, MO 63167, had submitted an application to conditionally register the pesticide product, Event MON 863: Corn Rootworm Protected Corn (ZMIR13L), a plant-incorporated protectant (EPA File Symbol 524-LEI), containing *Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production (Vector ZMIR13L) in corn, an active ingredient not included in any previously registered product.

The application was conditionally approved on February 24, 2003 for the product listed below:

1. Event MON 863: Corn Rootworm Protected Corn (ZMIR13L) (EPA Registration Number 524-528) for use as a plant-incorporated protectant in corn.

EPA issued a notice, published in the **Federal Register** of April 2, 2003 (68 FR 16036) (FRL-7286-1), which announced that Monsanto Company, 800 N. Lindberg Blvd., St. Louis, MO 63167, had submitted an application to conditionally register the pesticide product, YieldGard Plus Corn, a plant-incorporated protectant (EPA File Symbol 524-LUL), containing *Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production (Vector ZMIR13L) in corn and *Bacillus thuringiensis CryBacillus thuringiensis Cry1A(b)* delta endotoxin and the genetic material necessary for its production in corn via conventional breeding. The stacking of *Bacillus thuringiensis Cry3Bb1* protein and the genetic material necessary for its production (Vector ZMIR13L) in corn and *Bacillus thuringiensis Cry1A(b)* delta endotoxin and the genetic material necessary for its production in corn via conventional breeding resulted in a pesticide product involving a changed use pattern for its active ingredients pursuant to the provision of section 3(c)(4) of FIFRA.

The application was conditionally approved on October 25, 2003 for the product listed below:

2. YieldGard Plus Corn (EPA Registration Number 524-545) for use as a plant-incorporated protectant in corn.

#### List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: October 11, 2005.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 05-20905 Filed 10-18-05; 8:45 am]

BILLING CODE 6560-50-S

### ENVIRONMENTAL PROTECTION AGENCY

[OPPT-2005-0053; FRL-7741-9]

#### Certain New Chemicals; Receipt and Status Information

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from September 12, 2005 to September 23, 2005, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

**DATES:** Comments identified by the docket ID number OPPT-2004-0053 and the specific PMN number or TME number, must be received on or before November 18, 2005.

**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:** Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 554-1404; e-mail address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

**SUPPLEMENTARY INFORMATION:**

### I. General Information

#### A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the 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 OPPT-2004-0053. 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 EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566-1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566-0280.

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. 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. 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 and specific PMN number or TME 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 OPPT-2004-0053. 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 [oppt.ncic@epa.gov](mailto:oppt.ncic@epa.gov), Attention: Docket ID Number OPPT-2004-0053 and PMN Number or TME Number. 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: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

3. *By hand delivery or courier.* Deliver your comments to: OPPT Document Control Office (DCO) in EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number OPPT-20040053 and PMN Number or TME Number. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564-8930.

### 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 technical 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 or collection activity.
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 and the specific PMN number you are commenting on in

the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

**II. Why is EPA Taking this Action?**

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from September 12, 2005 to September 23, 2005 consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the

Agency has received under TSCA section 5 during this time period.

**III. Receipt and Status Report for PMNs**

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit II, to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

**I. 43 PREMANUFACTURE NOTICES RECEIVED FROM: 09/12/05 TO 09/23/05**

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P-05-0780	09/12/05	12/10/05	CBI	(G) Polymeric additive used to improve separation of wax from partially refined feedstock	(G) Alkyl methacrylate copolymer
P-05-0782	09/12/05	12/10/05	Huntsman LLC	(S) Metalworking additive for lubricity and corrosion control	(S) Nitric acid, reaction products with cyclododecanol and cyclododecanone, by-products from, high-boiling fraction, compounds with 2,2'-(methylimino)bis[ethanol] (1:2)
P-05-0783	09/12/05	12/10/05	CBI	(G) Additive, open, non-dispersive use	(G) Styrene-acrylate copolymer
P-05-0784	09/12/05	12/10/05	CBI	(G) Additive, open, non-dispersive use	(G) Styrene-acrylate copolymer
P-05-0785	09/12/05	12/10/05	CBI	(G) Additive, open, non-dispersive use	(G) Styrene-maleic anhydride copolymer, reaction product with amino compounds
P-05-0786	09/12/05	12/10/05	Huntsman LLC	(S) Metalworking additive for lubricity and corrosion control	(S) Nonanoic acid, compound with 2,2'-(methylimino)bis[ethanol] (1:1)
P-05-0787	09/12/05	12/10/05	Huntsman LLC	(S) Metalworking additive for lubricity and corrosion control	(S) Fatty acids, tall-oil, compounds with 2,2'-(methylimino)bis[ethanol]
P-05-0788	09/12/05	12/10/05	Huntsman LLC	(S) Metalworking additive for lubricity and corrosion control	(S) Decanoic acid, compound with 2,2'-(methylimino)bis[ethanol] (1:1)
P-05-0789	09/12/05	12/10/05	Huntsman LLC	(S) Metalworking additive for lubricity and corrosion control	(S) Neodecanoic acid, compound with 2,2'-(methylimino)bis[ethanol] (1:1)
P-05-0790	09/13/05	12/11/05	CBI	(S) A component in ultraviolet-, visible light and electron beam curable formulations	(G) 2-propenoic acid, multifunctional alcohol with 2-hydroxyethyl acrylate and propylene glycol mono[[3-(carboxyamino)methylphenyl]carbamate] ether with glycerol (3:1)
P-05-0791	09/13/05	12/11/05	CBI	(G) Ingredient in personal care products	(G) Quaternary copolymer
P-05-0792	09/14/05	12/12/05	Eastman Kodak Company	(G) Chemical intermediate, destructive use	(G) Substituted benzenediamine
P-05-0793	09/14/05	12/12/05	CBI	(G) Reactant in thermoset coating or adhesive formulation; degree of containment --- (c) open, non-dispersive use	(G) Amino polyether prepolymer ester

## I. 43 PREMANUFACTURE NOTICES RECEIVED FROM: 09/12/05 TO 09/23/05—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P-05-0794	09/15/05	12/13/05	CBI	(G) Auxiliary for coatings	(G) Aromatic diacid, polymer with aromatic anhydrides, alkanetriol, alkyl acid, alkanediol, compound with 2-(dimethylamino)ethanol
P-05-0795	09/15/05	12/13/05	CBI	(G) Open, non-dispersive use	(G) Polyester resin
P-05-0796	09/16/05	12/14/05	CBI	(G) Auxiliary for coatings	(G) Hydroxyalkanoic acid polymer with alkyl isocyanate, oxime-blocked, compounds with 2-(dimethylamino)ethanol
P-05-0797	09/16/05	12/14/05	CBI	(G) One pack adhesives	(G) Modified imidazole
P-05-0798	09/19/05	12/17/05	CBI	(G) Machine seals, wheels and rollers	(G) Aromatic diisocyanate-based polyurethane
P-05-0799	09/19/05	12/17/05	CBI	(G) Machine seals, wheels and rollers	(G) Aromatic diisocyanate-based polyurethane
P-05-0800	09/19/05	12/17/05	CBI	(G) Machine seals, wheels and rollers	(G) Aromatic diisocyanate-based polyurethane
P-05-0801	09/19/05	12/17/05	CBI	(G) Industrial liquid coatings.	(G) Polymer of vegetable oils, aliphatic diols, aliphatic polyols, and aromatic acids.
P-05-0802	09/21/05	12/19/05	CBI	(G) Developer	(G) Derivative acetamide
P-05-0803	09/21/05	12/19/05	CBI	(G) Spacer in electronics parts	(S) 2-propenoic acid, 2,2-bis[[1-oxo-2-propenyl]oxy]methyl]-1,3-propanediyl ester, polymer with diethenylbenzene and ethenylethylbenzene
P-05-0804	09/21/05	12/19/05	CBI	(S) Catalyst for urethane foam	(G) Amine
P-05-0805	09/21/05	12/19/05	CBI	(S) Catalyst for urethane foam	(G) Amine
P-05-0806	09/21/05	12/19/05	CBI	(G) Developer	(G) Derivative acetamide
P-05-0807	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and CN 292
P-05-0808	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and ebecryl 810
P-05-0809	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and cn 292
P-05-0810	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and ebecryl 810
P-05-0811	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and ebecryl 810

## I. 43 PREMANUFACTURE NOTICES RECEIVED FROM: 09/12/05 TO 09/23/05—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P-05-0812	09/20/05	12/18/05	Ashland Inc., Environmental Health and Safety	(G) Ink, coating, adhesive	(G) .beta.-ketoester, polymers with .beta.-diketone, 2-propenoic acid, 1,6-hexanediyl ester, cycloaliphatic diisocyanate, 2-propenoic acid, hydroxyl acrylate, hexanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and CN 292
P-05-0813	09/22/05	12/20/05	CBI	(G) Accelerator for concrete	(G) Mixed aluminum, magnesium salt
P-05-0814	09/22/05	12/20/05	CBI	(S) Functions to facilitate dispersability and stability in a product used as a binder of soil in road construction.; functions to facilitate dispersability and stability in product used as a binder of aggregate material in architectural paving.	(S) Tall-oil pitch, sapond., neutralized, sterol-low, ammonium salts
P-05-0815	09/22/05	12/20/05	CBI	(S) Functions to facilitate dispersability and stability in a product used as a binder of soil in road construction.; functions to facilitate dispersability and stability in product used as a binder of aggregate material in architectural paving.	(S) Tall-oil pitch, sapond., neutralized, sterol-low, potassium salts
P-05-0816	09/22/05	12/20/05	CBI	(S) Functions to facilitate dispersability and stability in a product used as a binder of soil in road construction.; functions to facilitate dispersability and stability in product used as a binder of aggregate material in architectural paving.	(S) Tall-oil pitch, sapond., neutralized, sterol-low, sodium salts
P-05-0817	09/22/05	12/20/05	CBI	(G) Wetting agent and/or defoamer	(G) Alkanol, reaction products with epichlorohydrin and thiohydroxyalkanol
P-05-0818	09/22/05	12/20/05	CBI	(G) Refinery unit feed C <sub>12</sub> -C <sub>41</sub>	(S) Distillates (petroleum), heavy thermal cracked, hydrotreated
P-05-0819	09/23/05	12/21/05	CBI	(S) Coatings application	(G) Oxazolidine functional acrylic polyol
P-05-0820	09/23/05	12/21/05	CBI	(G) Open non-dispersive (coatings)	(G) Polyacrylate resin
P-05-0821	09/23/05	12/21/05	Mitsubishi Gas Chemical America, Inc.	(G) Epoxy curing agent	(G) Methacrylate amine based polymer

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as

CBI) on the Notices of Commencement to manufacture received:

## II. 20 NOTICES OF COMMENCEMENT FROM: 09/12/05 TO 09/23/05

Case No.	Received Date	Commencement Notice End Date	Chemical
P-02-1059	09/16/05	01/13/04	(G) Acrylate, acrylonitrile, butadiene rubber-extended epoxy resin
P-02-1068	09/16/05	07/21/03	(G) Acrylonitrile, butadiene rubber-extended epoxy resin
P-03-0449	09/16/05	08/20/03	(G) Acrylate, acrylonitrile, butadiene rubber-extended epoxy resin
P-03-0626	09/15/05	08/23/05	(G) Urethane acrylate
P-04-0086	09/14/05	09/07/05	(G) C <sub>16-18</sub> fatty acid product with polyethylene, phosphonomethylated
P-04-0178	09/16/05	08/23/05	(G) Polyester acrylate
P-04-0306	09/19/05	07/07/04	(G) Superwetter carboxylate
P-04-0341	09/12/05	08/24/05	(G) Hydrofluoroether
P-04-0845	09/19/05	08/31/05	(G) Alkenoic acid, polymer with alkyl methacrylate, alkenylbenzene, hydroxy alkyl methacrylate, poly (ε-caprolactone) ester with hydroxy ester acrylate, peroxide-initiated.
P-04-0871	09/19/05	08/31/05	(G) Fatty acids, vegetable oil, polymers with aromatic carboxylic acid, alkanediol, alkanetriol, vegetable oil, tetra hydroxy alkane and carboxylic acid anhydride.
P-04-0895	09/19/05	09/03/05	(G) Fatty acids, C <sub>16-18</sub> and C <sub>18</sub> -unsaturated., branched and linear, polymers with C <sub>18</sub> -unsaturated. fatty acids dimers, and an amine
P-04-0902	09/19/05	09/03/05	(G) Fattys acids, C <sub>16-18</sub> and C <sub>18</sub> -unsaturated., branched and linear, polymers with C <sub>18</sub> -unsaturated. fatty acid dimers, triethylenetetramine and an amine

## II. 20 NOTICES OF COMMENCEMENT FROM: 09/12/05 TO 09/23/05—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P-05-0069	09/14/05	08/25/05	(G) Alkyl modified polysiloxane copolymer
P-05-0317	09/14/05	08/16/05	(G) Mono-methyl maleate/acrylic acid/hydroxypropyl methacrylate copolymer ammonium salt
P-05-0336	09/12/05	08/09/05	(G) Isoxadifen-ethyl
P-05-0344	09/16/05	08/13/05	(G) Polyether glycol
P-05-0433	09/22/05	09/09/05	(G) Carboxyalkenyl, telomer with mercaptoalkylol and sulfoalkyl-aminocarbonylalkenyl, sodium salt
P-05-0445	09/14/05	08/05/05	(G) Octylphenol novolak resin
P-05-0460	09/15/05	09/06/05	(G) Polymer of aminoalkyl terminated polysiloxane with alkyl isocyanate
P-05-0482	09/19/05	09/13/05	(G) Styrene-methacrylate copolymer
P-05-0535	09/21/05	09/09/05	(G) Arylsulfonate salt
P-05-0571	09/13/05	08/30/05	(G) Acrylate, polymer with styrene and methylamino chloride compounds
P-05-0590	09/19/05	09/12/05	(G) Substituted benzenesulfonamide
P-97-0099	09/13/05	08/24/05	(G) Aromatic urethane acrylate
P-99-0107	09/14/05	08/23/05	(G) Isocyanate terminated polyurethane resin

**List of Subjects**

Environmental protection, Chemicals, Premanufacturer notices.

Dated: October 5, 2005.

**Vicki A. Simons,**

*Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.*

[FR Doc. 05-20709 Filed 10-18-05; 8:45 am]

BILLING CODE 6560-50-S

**ENVIRONMENTAL PROTECTION AGENCY**

[OPPT-2005-0052; FRL-7741-8]

**Certain New Chemicals; Receipt and Status Information**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from August 29, 2005 to September 9, 2005, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

**DATES:** Comments identified by the docket ID number OPPT-2004-0052 and the specific PMN number or TME number, must be received on or before November 18, 2005.

**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:** Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 554-1404; e-mail address: *TSCA-Hotline@epa.gov*.

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does this Action Apply to Me?*

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the 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 OPPT-2004-0052. 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 EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566-1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566-0280.

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. 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. 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 and specific PMN number or TME 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 OPPT-2004-0052. 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 [oppt.ncic@epa.gov](mailto:oppt.ncic@epa.gov), Attention: Docket ID Number OPPT-2004-0052 and PMN Number or TME Number. 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: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

3. *By hand delivery or courier.* Deliver your comments to: OPPT Document Control Office (DCO) in EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number OPPT-20040052 and PMN Number or TME Number. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564-8930.

### 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 technical 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 or collection activity.

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 and the specific PMN number you are commenting on in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from August 29, 2005 to September 9, 2005, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

## III. Receipt and Status Report for PMNs

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

### I. 41 PREMANUFACTURE NOTICES RECEIVED FROM: 08/29/05 TO 09/09/05

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P-05-0758	08/29/05	11/26/05	CBI	(G) Acrylic pressure sensitive adhesive	(G) Acrylic solution polymer
P-05-0759	08/29/05	11/26/05	CBI	(G) Resin solution additive	(G) Aluminum alkoxide complex
P-05-0760	08/31/05	11/28/05	CBI	(G) Colorant for ink	(G) Pyrazolylazo pyrazol derivative
P-05-0761	08/31/05	11/28/05	CBI	(G) Colorant for ink	(G) Pyridylazo thiazol derivative
P-05-0762	08/31/05	11/28/05	CBI	(G) Colorant for ink	(G) Carbonyl bis(imino phenyleneazo) derivative
P-05-0763	08/31/05	11/28/05	CBI	(G) Colorant for ink	(G) Pyridylazo pyrazol derivative
P-05-0764	09/01/05	11/29/05	CBI	(G) Colorant for ink	(G) Substituted pyrazole-3-carboxylic acid azo dye, metal salt
P-05-0765	09/01/05	11/29/05	CBI	(G) Dyestuff for ink	(G) Substituted benzenedicarboxylic acid anthraquinone dye, metal salt
P-05-0766	09/01/05	11/29/05	Cognis Corporation	(G) Polyalkylene glycol lubricant basefluid (contained use); polyalkylene glycol lubricant additive (contained use)	(S) Poly[oxy(methyl-1,2-ethanediyl)], .alpha.-methyl-.omega.-(4-nonylphenoxy)-, branched
P-05-0767	09/02/05	11/30/05	CBI	(G) Component of mixtures for highly dispersive applications	(G) Substituted cyclopropylcarboxylic acid ester
P-05-0768	09/02/05	11/30/05	CBI	(G) Open, non-dispersive use.	(G) Siloxy functional urea derivative
P-05-0769	09/02/05	11/30/05	CBI	(G) Non-dispersive use	(G) Epoxy-amine adduct salt
P-05-0770	09/02/05	11/30/05	CBI	(G) Non-dispersive use	(G) Blocked aromatic isocyanate
P-05-0771	09/02/05	11/30/05	CBI	(G) Polymer for use in the manufacture of automotive parts	(G) Acrylic polymer
P-05-0772	09/07/05	12/05/05	Forbo Adhesives, LLC	(G) Hot melt polyurethane coating	(G) Isocyanate functional polyester polyether urethane polymer
P-05-0773	09/06/05	12/04/05	CBI	(G) Surface coating resin	(G) Siloxanes and silicones, di-me, hydroxy alkyl group-terminated, polymers with epichlorohydrin, alkoxy terminated di-me, alkoxy ph siloxanes - ph silsesquioxanes polymer, and 4,4'(alkylidene)bis[cycloalkanol]
P-05-0774	09/09/05	12/07/05	CBI	(G) Contained use (chemical intermediate used in closed process)	(G) (orixane, 2-halocycloalkyl-, 2-halophenylalkyl-)
P-05-0775	09/09/05	12/07/05	CBI	(G) Contained use (chemical intermediate used in closed process)	(G) (benzeneethanol, halo-, halocycloalkyl-, hydrazinealkyl-)
P-05-0776	09/09/05	12/07/05	CBI	(G) Contained use (intermediate used in closed process)	(G) (ethanone, 1-halocycloalkyl-)
P-05-0777	09/09/05	12/07/05	Septon Company of America	(S) A base polymer for ultra violet curable adhesives	(S) 1,3-butadiene, 2-methyl-, homopolymer, maleated, 2-[(2-methyl-1-oxo-2-propenyl)oxy]ethyl esters

## I. 41 PREMANUFACTURE NOTICES RECEIVED FROM: 08/29/05 TO 09/09/05—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P-05-0778	09/09/05	12/07/05	Septon Company of America	(S) A base polymer for ultra violet curable adhesives	(S) 1,3-butadiene, 2-methyl-, homopolymer, epoxidized
P-05-0779	09/09/05	12/07/05	Ashland Inc., Environmental Health and Safety	(G) Reinforced building applications	(G) 1,3-isobenzofurandione, polymer with 1,2-ethanediol, diisocyanate and 2-propenoic acid, monoalkylester with alkyldiol
P-05-0781	09/09/05	12/07/05	Ineos Melamines	(S) Resin for paints and coatings	(G) Formaldehyde, polymer with 6-phenyl-1,3,5-triazine-2,4-diamine and 1,3,5-triazine-2,4,6-triamine, alkylated

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

## II. 25 NOTICES OF COMMENCEMENT FROM: 08/29/05 TO 09/09/05

Case No.	Received Date	Commencement Notice End Date	Chemical
P-01-0627	09/08/05	08/31/05	(G) Polybasic acids, polymers with branched alkyl alcohols
P-02-0310	08/30/05	08/22/05	(G) Aliphatic polyisocyanate
P-03-0323	08/26/05	08/10/05	(G) Alkyldiisocyanate polymer, alkyl esters blocked
P-03-0324	08/26/05	08/10/05	(G) 2-oxepanone, polymer with alkyldiisocyanate and substituted alkyl diol, alkyl esters blocked
P-03-0446	09/06/05	08/29/03	(G) Acrylate, acrylonitrile, butadiene rubber-extended tetra epoxy resin
P-04-0323	08/31/05	07/18/05	(G) Multifunctional acrylate oligomer resin
P-04-0914	09/08/05	07/23/05	(G) Amino polyether prepolymer ester
P-04-0961	08/29/05	08/23/05	(G) Arylalkyl sulfonic acid
P-04-0962	08/29/05	08/23/05	(G) Arylalkyl sulfonic acid
P-05-0039	09/06/05	08/11/05	(G) Diglycidyl bisphenol a trimellitic acid adduct
P-05-0168	08/31/05	08/02/05	(G) Polyester amidoamine
P-05-0329	08/31/05	08/09/05	(G) Halogenated phenoxy aromatic
P-05-0330	08/29/05	07/28/05	(G) Carboxylic acid and ketone-functional polyurethane polymer, 2-dimethylaminoethyl salt
P-05-0335	09/06/05	08/20/05	(S) 2-propenoic acid, 2-methyl-, dodecyl ester, polymer with 1-ethenyl-2-pyrrolidinone and 2-propenoic acid
P-05-0428	08/30/05	07/21/05	(G) 1,3-benzenedicarboxylic acid, polymer with 1,3-diisocyanatomethylbenzene, 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, hexanedioic acid, 1,6-hexanediol, 3-hydroxy-2-(hydroxymethyl)-2-methylpropanoic acid, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane, and (alkylidene)bis[cyclohexanol], 3-oxobutanoate, compound with n,n-diethylethanamine
P-05-0429	08/30/05	08/12/05	(G) Modified fatty acids, polymer with 1,6-hexanediol, isophthalic acid, and trimellitic anhydride
P-05-0488	08/31/05	07/20/05	(S) Acetic acid, [2-(2-methoxyethoxy)ethoxy]-
P-05-0499	09/07/05	08/05/05	(G) Acrylic copolymer
P-05-0512	09/06/05	08/31/05	(G) Alkyl methacrylate copolymer
P-05-0548	09/02/05	08/25/05	(G) Alkyl carboxylate salt

**List of Subjects**

Environmental protection, Chemicals, Premanufacturer notices.

Dated: October 5, 2005.

**Vicki A. Simons,**

*Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.*

[FR Doc. 05-20710 Filed 10-18-05; 8:45 am]

**BILLING CODE 6560-50-S**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION****Sunshine Act Meeting**

**AGENCY HOLDING THE MEETING:** Equal Employment Opportunity Commission.

**DATE AND TIME:** Tuesday, October 25, 2005, 9:30 a.m., eastern time.

**PLACE:** Clarence M. Mitchell, Jr., Conference Room on the Ninth Floor of the EEOC, Office Building, 1801 "L" Street, NW., Washington, DC 20507.

**STATUS:** The meeting will be open to the public.

**MATTERS TO BE CONSIDERED:***Open Session*

1. Announcement of Notation Votes, and
2. Emergency Preparedness and Individuals with Disabilities: Is the Workplace Ready?

**Note:** In accordance with the Sunshine Act, the meeting will be open to the public observation of the Commission's deliberations and voting. (In addition to publishing notices on EEOC Commission

meetings in **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 663-7100 (voice) and (202) 663-4074 (TTY) at any time for information on these meetings.

**CONTACT PERSON FOR MORE INFORMATION:** Stephen Llewellyn, Acting Executive Officer on (202) 663-4070.

This notice issued October 13, 2005.

**Stephen Llewellyn,**

*Acting Executive Officer, Executive Secretariat.*

[FR Doc. 05-20954 Filed 10-14-05; 4:06 pm]

**BILLING CODE 6750-06-M**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

October 11, 2005.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 19, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** You may submit your Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to: *PRA@fcc.gov*. To submit your comments by U.S. mail, mark it to the attention of Judith B. Herman, Federal Communications Commission, 445 12th Street, SW., Room 1-C804, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202-418-0214.

**SUPPLEMENTARY INFORMATION:**

*OMB Control No.:* 3060-0512.

*Title:* The ARMIS Annual Summary Report.

*Report No.:* FCC Report 43-01.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit, not-for-profit institutions.

*Number of Respondents:* 126.

*Estimated Time Per Response:* 88 hours.

*Frequency of Response:* Annual reporting requirement

*Total Annual Burden:* 11,088 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Needs and Uses:* This collection is being revised to remove one row of data from the report.

After the 60-day comment period has ended, the Commission will submit this revision to OMB for review and approval.

The Automated Reported Management Information System (ARMIS) was implemented to facilitate the timely and efficient analysis of revenue requirements, rates of return and price caps; to provide an improved basis for audits and other oversight functions; and to enhance the Commission's ability to quantify the effects of alternative policy. The ARMIS Report 43-01 contains financial and operating data and is used to monitor the incumbent local exchange carriers ("ILECs") and to perform routine analyses of costs and revenues.

*OMB Control No.:* 3060-0513.

*Title:* The ARMIS Joint Cost Report.

*Report No.:* FCC Report 43-03.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 82.

*Estimated Time Per Response:* 50 hours.

*Frequency of Response:* Annual reporting requirement.

*Total Annual Burden:* 4,100 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.  
*Needs and Uses:* This collection will be submitted as a revision to OMB after the 60-day comment period has ended. This to implement a Commission Order, FCC 04-149, paragraph 9 through 14, which was released on 6/24/2004. In that Order, the Commission approved two rows that will report wholesale and retail percentages for Account 6623 which affects FCC Report 43-03.

The Automated Reported Management Information System (ARMIS) was implemented to facilitate the timely and efficient analysis of revenue requirements, rates of return and price caps; to provide an improved basis for audits and other oversight functions; and to enhance the Commission's ability to quantify the effects of alternative policy. The ARMIS Report 43-03 details the incumbent local exchange carriers ("ILECs") regulated and nonregulated cost and revenue allocations by study area pursuant to Part 64 of the Commission's rules.

*OMB Control No.:* 3060-0763.

*Title:* The ARMIS Customer Satisfaction Report.

*Report No.:* FCC Report 43-06.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 7.

*Estimated Time Per Response:* 720 hours.

*Frequency of Response:* Annual reporting requirement.

*Total Annual Burden:* 5,040 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Needs and Uses:* This collection will be submitted as an extension (no change) in order to obtain the full three-year clearance from OMB. After the 60-day comment period has ended, this collection will be submitted to OMB for review and approval.

ARMIS was implemented to facilitate the timely and efficient analysis of revenue requirements, rates of return and price caps; to provide an improved basis for audits and other oversight functions; and to enhance the Commission's ability to quantify the effects of alternative policy.

The ARMIS Report 43-06 reflects the results of customer satisfaction surveys conducted by individual carriers from residential and business customers. The ARMIS Report 43-06 captures trends in service quality as a result of consumer satisfaction surveys.

*OMB Control No.:* 3060-0848.

*Title:* Deployment of Wireline Services Offering Advanced

Telecommunications Compatibility, CC Docket No. 98–147.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 1,750.

*Estimated Time Per Response:* .50–44 hours.

*Frequency of Response:* On occasion and annual reporting requirements, recordkeeping requirement and third party disclosure requirement.

*Total Annual Burden:* 165,600 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Needs and Uses:* These collections of information implement Section 251 of the Communications Act of 1934, as amended. In CC Docket Nos. 98–147 and 96–98, the Commission sought to further Congress's goal of promoting innovation and investment by all participating in the telecommunications marketplace, in order to stimulate competition for all services, including advanced services. In furtherance of this goal, the Commission imposes certain collections of information on incumbent local exchange carriers (LECs) in order to ensure compliance with the incumbent LEC's collocation obligations and to assist incumbent LECs in protecting network integrity.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05–20839 Filed 10–18–05; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

October 12, 2005.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Persons wishing to comment on this information collection should submit comments December 19, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** You may submit your Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to: [PRA@fcc.gov](mailto:PRA@fcc.gov). To submit your comments by U.S. mail, mark it to the attention of Judith B. Herman, Federal Communications Commission, 445 12th Street, SW., Room 1—C804, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection(s) send an e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) or contact Judith B. Herman at 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

*OMB Control No.:* 3060–0783.

*Title:* Section 90.176, Coordination Notification Requirements on Frequencies Below 512 MHz.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for profit.

*Number of Respondents:* 15 respondents; 3,900 responses.

*Estimated Time Per Response:* .50 hours.

*Frequency of Response:* On occasion reporting requirement and third party disclosure requirement.

*Total Annual Burden:* 1,950 hours.

*Annual Cost Burden:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Needs and Uses:* Section 90.176 requires each Private Land Mobile frequency coordinator to provide, within one business day, a listing of their frequency recommendations to all other frequency coordinators in their respective pool, and, if requested, an engineering analysis. Any method can be used to ensure this compliance with

the “one business day requirement” and must provide, at a minimum, the name of the applicant; frequency or frequencies recommended; antenna locations and heights; the effective radiated power; the type(s) of emission; the description of the service area; and the date and time of the recommendation. If a conflict in recommendations arises, the affected coordinators are jointly responsible for taking action to resolve the conflict, up to and including notifying the Commission that an application may have to be returned.

This requirement seeks to avoid situations where harmful interference is created because two or more coordinators recommend the same frequency in the same area at approximately the same time to different applicants.

After the 60 day comment period ends, the Commission will submit this information to OMB as an extension (no change in requirements) in order to obtain the full three year clearance.

*OMB Control No.:* 3060–0966.

*Title:* Sections 80.385, 80.475, and 90.303, Automated Marine Telecommunications Systems (AMTS).

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Individuals or households; business or other for profit.

*Number of Respondents:* 20.

*Estimated Time Per Response:* .50 hours.

*Frequency of Response:* On occasion reporting requirement, third party disclosure requirement and recordkeeping requirement.

*Total Annual Burden:* 10 hours.

*Annual Cost Burden:* N/A.

*Privacy Act Impact Assessment:* Yes.

*Needs and Uses:* This collection will be submitted to OMB after the 60-day comment period as an extension (no change) to an existing collection. The reporting and recordkeeping requirements are for both Automated Marine Telecommunications Systems (AMTS) and amateur radio operators (or “ham operators”), who share AMTS spectrum. The AMTS is a specialized system of coast stations providing integrated and interconnected marine voice and data communications, somewhat like a cellular phone system for tugs, barges, and other vessels on these waterways. The amateur radio operators (“ham operators”) use some of the same frequencies (219–200 MHz) as AMTS stations on a secondary, non-interference basis for digital message forwarding systems. The reporting requirements, as established in 47 CFR

80.383 and 97.303 require amateur radio licensees ("ham operators"), who participate in point-to-point fixed digital message forwarding systems, such as intercity packet backbone networks, and who operate within 398 miles (640 kms) of an AMTS coast station, to notify the AMTS station in writing. The amateur radio licenses must provide: (1) Their station's specific geographic location for the transmission; and (2) their station's technical characteristics, including transmitter type, operating frequencies, emissions, transmitter output power, and antenna arrangement. This notification must be submitted at least 30 days prior to the initiation of the amateur radio licensee's operations in the 219–220 MHz band. In addition, under 47 CFR 80.475, applicants and licensees of AMTS coast stations must notify two organizations—the American Radio Relay League (ARRL) and the Interactive Systems, Inc. (ISI), of the location of the AMTS fill-in stations. ARRL and ISI maintain databases of AMTS locations for the benefit of amateur radio operators. These notification requirements insure that any amateur radio operator seeking to commence operations within close proximity of an AMTS station will not cause any interference to an AMTS licensee. Amateur radio licensees also must give the ARRL written notification of the geographic location of a station at least 30 days prior to transmitting in the 219–220 MHz band. As a "station in a secondary service", amateur stations must accept any harmful interference from AMTS operations. Furthermore, under 47 CFR 80.475, AMTS licensees are permitted to operate fill-in stations. While no prior FCC authorization is required to construct and operate an AMTS fill-in station, at the time the station is added, the AMTS licensee must make a record of the station's technical and administrative information, and upon request, supply such information to the FCC. The station must also send notification of the station's location to the ARRL and the ISI. In general, the notification process(es) functions without the FCC's direct involvement, except as required by 47 CFR 80.475, the AMTS station licensee must maintain a record of the station's technical and administrative functions and also provide a copy to the FCC upon request. The records of amateur radio operators include information about individuals or households, and the use(s) and disclosure of this information is governed by the requirements of a system of records, FCC/WTB–1,

"Wireless Services Licensing Records." However, the FCC makes all information about amateur radio operators publicly available on its Universal Licensing System (ULS) Web page, except that the amateur operator's telephone number(s) and his/her e-mail address(es) are redacted. The public is entitled to download this public information, although ULS does not contain the locations of the amateur radio transmitters and information which amateur radio operators ("ham operators") have to provide to ARRL and to the AMTS licensees.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

[FR Doc. 05–20840 Filed 10–18–05; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

October 12, 2005.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 19, 2005. If you anticipate that you will be submitting comments, but find it

difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** You may submit your all Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to [PRA@fcc.gov](mailto:PRA@fcc.gov). To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection(s) send an e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) or contact Cathy Williams at (202) 418–2918.

#### SUPPLEMENTARY INFORMATION:

*OMB Control Number:* 3060–0174.  
*Title:* Sections 73.1212, 76.1615 and 76.1715, Sponsorship Identification.  
*Form Number:* Not applicable.  
*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; Individuals or households.

*Number of Respondents:* 23,215.

*Estimated Time per Response:* four seconds to 0.1 hours.

*Frequency of Response:* Recordkeeping requirement; On occasion reporting requirement; Third party disclosure requirement.

*Total Annual Burden:* 112,096 hours.

*Total Annual Cost:* None.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* 47 CFR 73.1212 requires a broadcast station to identify the sponsor of any matter transmitted for consideration. 47 CFR 76.1615 states that, when a cable operator engaged in origination cable casting presents any matter for which consideration is provided to such cable television system operator, the cable television system operator, at the time of the telecast, shall identify the sponsor. For both sections, for advertising commercial products or services, the mention of the sponsor's name or product, when it is clear that the mention of the product constitutes sponsorship identification, is all that is required. In the case of television political advertisements concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four (4) percent of the vertical height of the television screen that airs for no less than four (4) seconds. 47 CFR 73.1212 and 76.1715 state that, with respect to sponsorship announcements that are waived when the broadcast/origination cablecast of "want ads" sponsored by an individual,

the licensee/operator shall maintain a list showing the name, address and telephone number of each such advertiser. These lists shall be made available for public inspection. 47 CFR 73.1212 states that, when an entity rather than an individual sponsors the broadcast of matter that is of a political or controversial nature, the licensee is required to retain a list of the executive officers, or board of directors, or executive committee, etc., of the organization paying for such matter in its public file.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05-20857 Filed 10-18-05; 8:45 am]

**BILLING CODE 6712-10-P**

## FEDERAL COMMUNICATIONS COMMISSION

[ET Docket No. 03-104 and ET Docket No. 04-37; DA 05-2701]

### Broadband Power Line Systems

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Office of Engineering and Technology (OET) announces that the United Telecom Council (UTC) will serve as the Access Broadband over Power Line (Access BPL) database manager.

**DATES:** Effective November 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Anh Wride, Office of Engineering and Technology, (202) 418-0577, e-mail: [Anh.Wride@fcc.gov](mailto:Anh.Wride@fcc.gov), TTY (202) 418-2989.

**SUPPLEMENTARY INFORMATION:** 1. By Public Notice dated October 13, 2005, DA 05-2701, the Office of Engineering and Technology (OET) announces that the United Telecom Council (UTC) will serve as the Access Broadband over Power Line (Access BPL) database manager, pursuant to § 15.615 (a) through (e) of the Commission's rules, effective immediately. Access BPL systems will be required to comply with the requirements of § 15.615 by November 19, 2005.

2. On October 14, 2004, the Commission adopted a *Report and Order*, amending part 15 of the rules to establish specific interference mitigation requirements for Access BPL systems. (*Report and Order* in ET Docket Nos. 04-37 and 03-104 (19 FCC Rcd 21265 (2004)), 70 FR 1360, January 7, 2005. In conjunction with those requirements, the Commission required that the BPL

industry establish a centralized publicly accessible Access BPL notification database, run by an administrator to be selected by the BPL industry, and that Access BPL operators submit certain information regarding their systems into that database.

3. On May 17, 2005, the UTC submitted a letter notifying the Commission that it has designed and implemented a database that will enable Access BPL operators to comply with the notification requirements of § 15.615 (a) through (e) of the Commission's rules, and included a petition in support signed by thirty-five Access BPL companies. (DA 05-1637, released June 9, 2005.)

4. On September 15, 2005, the Office of Management and Budget (OMB) approved the information collection requirements contained in 47 CFR 15.615 (a) through (e) which establish the Access BPL database. (OMB Control No. 3060-1087.) All information on Access BPL systems as required by 47 CFR 15.615(a) must be entered into the database and be available to the public by November 19, 2005. BPL operators should contact UTC at [admin@utc.org](mailto:admin@utc.org) to receive a user name and password for administrative access. This information is required for BPL operators to enter the necessary information regarding their BPL systems into the database.

5. Public Access to the UTC BPL database. The public may access the UTC BPL database via the Internet at <http://www.bpldatabase.org>. This access is open and requires no login information. Detailed instructions are provided on the Web site to guide users in entering the requested information. Users experiencing problems in accessing the database via the Internet may contact the UTC database administrator at [admin@utc.org](mailto:admin@utc.org), or (202) 872-0030.

Federal Communications Commission.

**Bruce Romano,**

*Associate Chief (Legal), Office of Engineering and Technology.*

[FR Doc. 05-20992 Filed 10-18-05; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[DA 05-2669]

### Eighth Meeting of the Advisory Committee for the 2007 World Radiocommunication Conference (WRC-07 Advisory Committee)

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the eighth meeting of the WRC-07 Advisory Committee will be held on December 9, 2005, at the Federal Communications Commission. The purpose of the meeting is to continue preparations for the 2007 World Radiocommunication Conference. The Advisory Committee will consider any preliminary views and draft proposals introduced by the Advisory Committee's Informal Working Groups.

**DATES:** December 9, 2005; 11 a.m.-12 noon.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Room TW-C305, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Alexander Roytblat, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418-7501.

**SUPPLEMENTARY INFORMATION:** The Federal Communications Commission (FCC) established the WRC-07 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2007 World Radiocommunication Conference (WRC-07).

In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the eighth meeting of the WRC-07 Advisory Committee. The WRC-07 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the eighth meeting is as follows:

#### Agenda

Eighth Meeting of the WRC-07 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW-C305, Washington, DC 20554.

*December 9, 2005; 11 a.m.-12 noon.*

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the Seventh Meeting
4. Reports on Recent WRC-07 Preparatory Meetings
5. NTIA Draft Preliminary Views and Proposals
6. Informal Working Group Reports and Documents relating to:
  - a. Consensus Views and Issues Papers
  - b. Draft Proposals
7. Future Meetings

## 8. Other Business

Federal Communications Commission.

**Roderick Porter,***Acting Chief, International Bureau.*

[FR Doc. 05-20614 Filed 10-18-05; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL MARITIME COMMISSION****Notice of Agreement Filed**

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Office of Agreements (202-523-5793 or [tradeanalysis@fmc.gov](mailto:tradeanalysis@fmc.gov)).

*Agreement No.:* 011488-002.*Title:* CSAV/Lauritzen Reefers Space Charter Agreement.*Parties:* CSAV Sud Americana de Vapores S.A. and LauritzenCool AB.*Filing Party:* Wayne R. Rohde, Esq., Sher & Blackwell LLP, 1850 M Street, NW., Suite 900, Washington, DC 20036.*Synopsis:* The amendment changes LauritzenCool AB to NYKLauritzenCool AB in the agreement, changes the agreement name, and republishes the agreement.

Dated: October 14, 2005.

By Order of the Federal Maritime Commission.

**Karen V. Gregory,***Assistant Secretary.*

[FR Doc. 05-20914 Filed 10-18-05; 8:45 am]

BILLING CODE 6730-01-P

**FEDERAL MARITIME COMMISSION****Ocean Transportation Intermediary License Applicants**

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

**Non-Vessel-Operating Common Carrier Ocean Transportation Intermediary Applicants**

Ameroasia Int'l, 1315 Magnolia Avenue, #3, Gardena, CA 90247. *Officer:* Jun Yin, President (Qualifying Individual).

West Point Relocation, 10505 Glenoaks Blvd., Pacoima, CA 91331. *Officer:* Elo Chhen, President (Qualifying Individual).

Hoyer Global (USA), Inc., 16055 Space Center Blvd., Suite 500, Houston, TX 77062. *Officers:* Ylna Flores, Secretary (Qualifying Individual), Cor Mol, CEO.

Embarque Puerto Plata, Inc., 1426 Cromwell Avenue, Bronx, NY 10452. *Officers:* Estebaldo Garcia, President (Qualifying Individual), Hyde Garcia, Vice President.

S.F. Systems Ltd., 167-10 South Conduit Avenue, Suite 205, Jamaica, NY 11434. *Officer:* Richard Shifu Lin, President, (Qualifying Individual).

NEX Worldwide Express Inc., 267 Fifth Avenue, Suite B-1, New York, NY 10016. *Officers:* Hasan Akipek, Secretary (Qualifying Individual), Kayhan Ozcilingir, President.

Zenith Logistic (USA) Inc., 67-39 165 Street, Fresh Meadows, NY 11356. *Officers:* Xiao Jun He, Vice President (Qualifying Individual).

Advanced Courier Express (ACE), Ltd., dba Hanjin Express NY, JFK International Airport Bldg. #9, Suite #14, Jamaica, NY 11430. *Officer:* Byung Min Kim, President (Qualifying Individual).

Colorado International Transportation Company, 541 East Cimarron Street, Colorado Springs, CO 80903. *Officers:* Anthony T. Marulli, Treasurer (Qualifying Individual), Edward Sobczewski, President.

MTM International Logistics LLC, 9725 NW 52nd Street, Suite #118, Miami, FL 33178. *Officers:* Guillermo Sigfrido Carbi Haubold, Manager (Qualifying Individual), Mariano Banez Perez, Manager.

Prodemeca Corp., 4744 NW 114th Avenue, Suite #202, Doral, FL 33178. *Officers:* Michael Tomasicchio, President (Qualifying Individual), Michele Tomasicchio, President.

Amilcar Rene Estrada dba Transportes Estrada, 7400 #B Harry Hines Blvd., Dallas, TX 75235. *Officer:* Amilcar Bene Estrada, Owner (Qualifying Individual).

**Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants**

J.M.S. Logistics Corp., 6611 NW 84 Avenue, Miami, FL 33166. *Officer:*

Soraima I. Martinez, President (Qualifying Individual).

Intercargo Express, 10911 Dennis Road, #405, Dallas, TX 75229. Reyna Isabel Bleeker, Sole Proprietor.

Allen Lund Company, Inc., 4529 Angeles Crest Highway, #300, La Canada, CA 91011. *Officer:* Robert R. Bush, Manager (Qualifying Individual).

**Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants**

AM Worldwide, Inc., 2928-B Greens Road, Suite 450, Houston, TX 77032. *Officers:* Anthony Mello, President (Qualifying Individual) Kimberly Mello, Vice President.

Guempel Lynnwood Corporation dba Galaxsea, Freight Forwarding, 13024 Beverly Park Road, Suite 101, Mukilteo, WA 98275. *Officers:* Terrina R. Guempel, President (Qualifying Individual), John Guempel, Vice President.

All-in-One Shipping, Inc., 8358 West Oakland Park Blvd. Suite 203g, Sunrise, FL 33351. *Officer:* Joshua Sean Morales, President (Qualifying Individual).

FM Shipping, 26542 Soteio Street, Mission Viejo, CA 92692. *Officers:* Imad Farah, President (Qualifying Individual), Raed Mashaqi, Vice President.

BF International Inc., 3080 North Rield Place, Suite 109, Roswell, GA 30076. *Officers:* Markos Baghoasarian, President (Qualifying Individual), Edgar Bagdosaryan, Vice President.

Kimmel Worldwide Logistics, L.L.C., 46 Haywood Street, Suite #215, Asheville, NC 28801. *Officers:* Tylene Kay Ashcroft, Vice President (Qualifying Individual), Paul J. Samuels, President.

Gunhill Shipping, 1444 E. Gunhill Road, Bronx, NY 10469. *Officer:* Dave Stewart, President (Qualifying Individual).

Active Shipping of New York, Inc., 178-28 Jamaica Avenue, Jamaica, NY 11432. *Officers:* Rohan Moonisar, Vice President (Qualifying Individual), Tara B. Ramnath, President.

Omega Forwarding Group LLC, 18860 Woodfield Road, Unit C, Gaithersburg, MD 20879. *Officers:* Raguel Fazio, Export Manager (Qualifying Individual), Pablo Yanez, President.

Transcarveca USA Corp., 8375 N.W. 68th Street, Miami, FL 33166. *Officer:* Luis Alberto Fuenmayor, President (Qualifying Individual).

Dated: October 14, 2005.

**Karen V. Gregory,**

*Assistant Secretary.*

[FR Doc. 05-20913 Filed 10-18-05; 8:45 am]

BILLING CODE 6730-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

#### Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for "The Centers for Education and Research on Therapeutics (CERTs)," are to be reviewed and discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

*SEP Meeting on:* The Centers for Education and Research on Therapeutics (CERTs).

*Date:* November 2-3, 2005 (Open on November 2 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting).

*Place:* John M. Eisenberg Building, AHRQ Conference Center, 540 Gaither Road, Rockville, Maryland 20850.

*Contact Person:* Anyone wishing to obtain a roster of members, agenda or minutes of the non-confidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville,

Maryland 20850, Telephone (301) 427-1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: October 07, 2005.

**Carolyn M. Clancy,**

*Director.*

[FR Doc. 05-20937 Filed 10-18-05; 8:45 am]

BILLING CODE 4160-90-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 2003D-0367]

#### Guidance for Industry on Providing Regulatory Submissions in Electronic Format—Human Pharmaceutical Product Applications and Related Submissions Using the Electronic Common Technical Document Specifications; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Human Pharmaceutical Product Applications and Related Submissions Using the eCTD Specifications." This is one in a series of guidance documents on providing regulatory submissions to FDA in electronic format. This guidance discusses issues related to the electronic submission of new drug applications (NDAs), abbreviated new drug applications (ANDAs), biologics license applications (BLAs), investigational new drug applications (INDs), master files, advertising material, and promotional labeling using the electronic common technical document (eCTD) specifications. The submission of these documents in electronic format should improve the agency's efficiency in processing, archiving, and reviewing them.

**DATES:** Submit written or electronic comments on agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of the guidance to the Division of Drug Information (HFD-240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, or to the Office of Communication, Training, and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research, Food and Drug

Administration, 1401 Rockville Pike, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist that office in processing your requests. Submit telephone requests to 800-835-4709 or 301-827-1800. Submit written comments on the guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.fda.gov/dockets/ecomments>. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

#### FOR FURTHER INFORMATION CONTACT:

Randy Levin, Center for Drug Evaluation and Research (HFD-001), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-5411, e-mail: [levinr@cder.fda.gov](mailto:levinr@cder.fda.gov), or Robert Yetter, Center for Biologics Evaluation and Research (HFM-25), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-827-0373.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is announcing the availability of a guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Human Pharmaceutical Product Applications and Related Submissions Using the eCTD Specifications." This document provides guidance to industry regarding submission of marketing applications (NDAs, ANDAs, BLAs), INDs, and related submissions (master files, advertising, and promotional labeling) in electronic format based on the International Conference on Harmonisation eCTD specifications.

In the **Federal Register** of August 29, 2003 (68 FR 52044), FDA made available a draft guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Human Pharmaceutical Product Applications and Related Submissions" and gave interested persons an opportunity to submit comments by October 28, 2003. The agency considered received comments as it finalized this guidance.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on providing applications and related submissions in electronic format. 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 statutes and regulations.

**II. Comments**

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the guidance at any time. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

**III. Paperwork Reduction Act of 1995**

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in this guidance have been approved under OMB control number 0910–0014 (until January 31, 2006), OMB control number 0910–0001 (until May 31, 2008), and OMB control number 0910–0338 (until September 30, 2008).

**IV. Electronic Access**

Persons with access to the Internet may obtain the document at <http://www.fda.gov/cder/guidance/index.htm>, <http://www.fda.gov/cber/guidelines.htm>, or <http://www.fda.gov/ohrms/dockets/default.htm>.

Dated: October 12, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–20921 Filed 10–18–05; 8:45 am]

**BILLING CODE 4160–01–S**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Substance Abuse and Mental Health Services Administration**

**Agency Information Collection Activities: Proposed Collection; Comment Request**

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are 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 proposed collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology.

**Proposed Project: Projects for Assistance in Transition From Homelessness (PATH) Program Annual Report (OMB No. 0930–0205)—Revision**

The Center for Mental Health Services awards grants each fiscal year to each of the States, the District of Columbia, the

Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands from allotments authorized under the PATH program established by Public Law 101–645, 42 U.S.C. 290cc–21 et seq., the Stewart B. McKinney Homeless Assistance Amendments Act of 1990 (section 521 et seq. of the Public Health Service (PHS) Act). Section 522 of the PHS Act requires that the grantee States and Territories must expend their payments under the Act solely for making grants to political subdivisions of the State, and to non-profit private entities (including community-based veterans organizations and other community organizations) for the purpose of providing services specified in the Act. Available funding is allotted in accordance with the formula provision of section 524 of the PHS Act.

This submission is for a revision of the current approval of the annual grantee reporting requirements. Section 528 of the PHS Act specifies that not later than January 31 of each fiscal year, a funded entity will prepare and submit a report in such form and containing such information as is determined necessary for securing a record and description of the purposes for which amounts received under section 521 were expended during the preceding fiscal year and of the recipients of such amounts and determining whether such amounts were expended in accordance with statutory provisions.

The estimated annual burden for these reporting requirements is summarized in the table below.

Respondents	Number of respondents	Responses per respondent	Burden per response (hrs.)	Total burden
States .....	56	1	26	1,456
Local provider agencies .....	450	1	31	13,950
Totals .....	506	.....	.....	15,406

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 71–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: October 11, 2005.

**Anna Marsh,**

*Director, Office of Program Services.*

[FR Doc. 05–20884 Filed 10–18–05; 8:45 am]

**BILLING CODE 4162–20–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

[USCG–2005–22721]

**Lower Mississippi River Waterway Safety Advisory Committee**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC) will meet to discuss various issues relating to navigational safety on the Lower Mississippi River and related waterways. The meeting will be open to the public.

**DATES:** The next meeting of LMRWSAC will be held on Tuesday, November 15, 2005, from 9 a.m. to 12 p.m. This meeting may adjourn early if all business is finished. Requests to make

oral presentations or submit written materials for distribution at the meeting should reach the Coast Guard on or before November 2, 2005. Requests to have a copy of your material distributed to each member of the committee in advance of the meeting should reach the Coast Guard on or before November 2, 2005.

**ADDRESSES:** The meeting will be held in the World Trade Center of New Orleans, 2 Canal Street, 18th Floor, Crescent City Room, New Orleans, Louisiana.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Officer, USCG Sector New Orleans, Attn: LMRWSAC Assistant Committee Administrator, 201 Old Hammond Highway, Metairie, LA 7005. This notice is available on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade (LTJG) Melissa Owens, Assistant Committee Administrator, e-mail [mowens@msoneworleans.uscg.mil](mailto:mowens@msoneworleans.uscg.mil).

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

#### Agenda of Meeting

*Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC).* The agenda includes the following:

- (1) Introduction of committee members.
- (2) Opening Remarks.
- (3) Approval of the May 18, 2005 minutes.
- (4) Old Business:
  - (a) Captain of the Port status report.
  - (b) VTS update report.
  - (c) Subcommittee/Working Group update reports.
- (5) New Business.
- (6) Adjournment.

#### Procedural

The meeting is open to the public. Please note that the meeting may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify the Committee Administrator no later than November 2, 2005. Written material for distribution at the meeting should reach the Coast Guard no later than November 2, 2005. If you would like a copy of your material distributed to each member of the committee in advance of the meeting, please submit 25 copies to the Committee Administrator no later than November 2, 2005.

#### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meetings, contact the Committee Administrator at the location indicated under Addresses as soon as possible.

Dated: October 13, 2005.

**Steve Venckus,**

*Chief, Office of Regulations & Administrative Law, Office of the Judge Advocate General, United States Coast Guard.*

[FR Doc. 05-20886 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-15-P**

#### DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4975-N-34]

#### Notice of Proposed Information Collection: Comment Request; Mortgagee's Certification of Assistance Payments and Application for Assistance or Interest Reduction Payments Due Under Sections 235(b) 235(j), or 235(i)

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be 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 19, 2005.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or [Wayne\\_Eddins@hud.gov](mailto:Wayne_Eddins@hud.gov).

**FOR FURTHER INFORMATION CONTACT:** Joe McCloskey, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708-1672 (this is not a toll free number) for copies of the proposed forms and other available information.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed

information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Mortgagee's Certification of Assistance Payments and Application for Assistance or Interest Reduction Payments Due Under Sections 235(b), 235(j), or 235(i).

*OMB Control Number, if applicable:* 2502-0081.

*Description of the need for the information and proposed use:* HUD must monitor all assistance payments disbursed under the Section 235 Program. Mortgagees submit these information collections in order to receive assistance payments each month. The information collection is used to bill HUD for these payments.

*Agency form numbers, if applicable:* HUD-300 and HUD-93102.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* The estimated total number of hours needed to prepare the information collection is 750, the number of respondents is 50 generating approximately 1,200 annual responses, the frequency of response is on occasion and monthly, and the estimated time needed to prepare the responses varies from 15 minutes to one hour.

*Status of the proposed information collection:* This is an extension of a currently approved collection.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: October 7, 2005.

**Frank L. Davis,**

*General Deputy Assistant Secretary for Housing, Deputy Federal Housing Commissioner.*

[FR Doc. E5-5741 Filed 10-18-05; 8:45 am]

**BILLING CODE 4210-27-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Notice of Intent To Prepare an Environmental Impact Statement for a Proposed Land Exchange in Yukon Flats National Wildlife Refuge, AK

**AGENCY:** Fish and Wildlife Service, Department of the Interior.

**ACTION:** Notice of intent.

**SUMMARY:** This notice advises the public that the Fish and Wildlife Service intends to prepare an Environmental Impact Statement, pursuant to the National Environmental Policy Act of 1969 and its implementing regulations, for a proposed land exchange and acquisition of certain lands owned by Doyon, Limited within the Yukon Flats National Wildlife Refuge, Alaska. The Service is furnishing this notice to advise the public and other agencies of our intentions and to solicit suggestions and information on the scope of issues to be addressed in the environmental document. Special mailings, newspaper articles, and other media releases will announce opportunities to provide written and oral input. Public meetings will be held in the cities of Fairbanks, Anchorage, and in communities within and adjacent to the Refuge. The Draft Environmental Impact Statement will be available for viewing and downloading at <http://alaska.fws.gov/nwr/yukonflats/current.htm>.

**DATES:** Public scoping meetings will be scheduled for February in Anchorage, Fairbanks, and the communities of Arctic Village, Beaver, Birch Creek, Central, Chalkyitsik, Circle, Fort Yukon, Stevens Village, and Venetie. Meeting dates, times, and locations will be announced at least 30 days prior to the meeting.

**ADDRESSES:** Address comments, questions, and requests to Cyndie Wolfe, Project Coordinator, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS-231, Anchorage, AK 99503, or [yukonflats\\_noi@fws.gov](mailto:yukonflats_noi@fws.gov).

**FOR FURTHER INFORMATION, CONTACT:** Cyndie Wolfe, Project Coordinator, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS-231, Anchorage, AK 99503, phone number 907-786-3463 or [yukonflats\\_noi@fws.gov](mailto:yukonflats_noi@fws.gov). Additional

information concerning the proposed land exchange can be found at <http://alaska.fws.gov/nwr/yukonflats/current.htm>.

**SUPPLEMENTARY INFORMATION:** Doyon, Limited (Doyon) is an Alaska Native Regional Corporation established under the Alaska Native Claims Settlement Act of 1971 (ANCSA; 43 U.S.C. 1601 *et seq.*) Under the authority of ANCSA, Congress granted to Doyon land entitlements within an area that became the Yukon Flats National Wildlife Refuge (Refuge) in 1980. Doyon has ownership interests in approximately 2.14 million acres within the boundaries of the Refuge, including the surface and subsurface estates of 1.25 million acres of land, and the subsurface estate of another 890,000 acres. An additional 56,517 acres remain to be allocated by Doyon to Village Corporations located in the Refuge; Doyon would own the subsurface to these lands. Doyon is owned by over 14,000 Alaska Natives (Native Americans) with ties to a large portion of interior Alaska. Approximately 1,000 people reside in several communities in the Yukon Flats. Most residents are Alaska Natives and many are Doyon shareholders.

The Yukon Flats Refuge is located in eastern interior Alaska. The exterior boundaries include about 11 million acres, of which about 2.14 million acres are owned by ANCSA Native corporations, including Doyon. The Refuge includes the Yukon Flats, a vast wetland basin bisected by the Yukon River. The basin is underlain by permafrost and includes a complex network of lakes, streams, and rivers. The Refuge supports the highest density of breeding ducks in Alaska, and includes one of the greatest waterfowl breeding areas in North America.

Negotiators for Doyon and the Fish and Wildlife Service (Service), Alaska Region, have agreed in principle to provide Doyon title to some Refuge lands that may hold developable oil and gas resources. In exchange, the United States (U.S.) would receive lands currently owned by Doyon within the Refuge boundary. These lands include wetlands previously identified by the Service as quality fish and wildlife habitat. In addition, both parties have agreed to exchange nearly six townships (264,000 acres) to consolidate ownerships and facilitate land management. All lands acquired by the U.S. would be managed as part of the Yukon Flats Refuge. Activities on Doyon lands are not subject to regulation by the Service.

To evaluate the exchange, the Service will prepare an Environmental Impact

Statement (EIS) in accordance with procedures for implementing the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321-4370d). Appropriate agencies will be invited to participate as cooperating or reviewing agencies. National Environmental Policy Act compliance is not legally required for land exchanges conducted under the provisions of ANCSA and the Alaska National Interest Lands Conservation Act (ANILCA; 16 U.S.C. 410hh-410hh-5, 460 mm-460mm-4, 539-539e, and 3101-3233; also 43 U.S.C. 1631-1642). However, at the request of Doyon and the public, the Department of the Interior has agreed to evaluate the proposed land exchange through the process of an EIS.

The EIS will evaluate a range of reasonable alternatives, including the following four alternatives. All these alternatives, including the "no action" alternative, could result in oil and/or gas development on Doyon-owned lands. Because access to Doyon lands would cross federally-owned lands, Doyon would be required to apply for a right-of-way permit under Title XI of ANILCA. At that time, a separate NEPA process would evaluate various transportation/pipeline corridor alternatives.

(1) Equal-value land exchange (based on fair market appraisals) as described in the Agreement in Principle (for the full text of the Agreement, see <http://alaska.fws.gov/nwr/yukonflats/current.htm>). Under Phase 1 of this agreement, Doyon would receive about 110,000 acres of Refuge lands with oil/gas potential and 97,000 acres of oil and gas interests (no surface occupancy). In exchange, the U.S. would receive from Doyon an equal-value amount of lands (tentatively estimated at 150,000 acres), with quality fish and wildlife habitats. In addition, Doyon would reallocate 56,517 acres of its remaining land entitlement outside the Refuge. Both parties would pursue additional township-level exchanges to consolidate ownerships. If Doyon discovers and produces oil or gas on the lands it acquires in the exchange, the Service would receive production payments to be used to: (1) Purchase from Doyon certain additional lands or interests therein, within the Refuge, (2) purchase land or interests therein, from other willing sellers in other national wildlife refuges in Alaska, or (3) to construct facilities in Alaska Refuges.

(2) No action. The U.S. would not enter into a land exchange with Doyon. Any oil or gas exploration/development by Doyon within the Refuge would be confined to Doyon's current land holdings. Under the provisions of

ANILCA, the Service would be required to provide Doyon with adequate and feasible access to its holdings, which could include a road and/or pipeline across Refuge lands, if warranted by production.

(3) Modified land exchange with conservation easements. The land exchange would proceed as described in Phase 1 under Alternative 1 above. In addition, at the time of the initial exchange, Doyon would donate to the U.S. conservation easements that preclude development on those Doyon lands identified in Phase II of the Agreement in Principle (whether or not oil/gas is produced from the exchange lands). If Doyon were to produce oil/gas, the U.S. would receive reduced "production payments."

(4) Modified land exchange excluding White-Crazy Mountains. The Yukon Flats Comprehensive Conservation Plan and Environmental Impact Statement recommended Wilderness designation for a 658,000 acre area in the White-Crazy Mountains. Under Alternatives 1 and 3, Doyon would receive title to about 26,270 acres of this land; under Alternative 4, these 26,270 acres would be excluded from the exchange. In Phase I of the exchange, Doyon would receive approximately 84,000 acres of Refuge lands, surface and subsurface. From Doyon, the U.S. would receive an equal-value amount of land. Doyon would receive some oil and gas rights at the northern edge of the recommended Wilderness area, but only off-site drilling would be allowed; there would be no surface occupancy by Doyon. There would be no access corridor through the Service-recommended Wilderness area. The land consolidation exchange and 12(b) reallocation provisions of Phase I would proceed as detailed in the Agreement in Principle. Phase II of the exchange, would proceed as detailed in the Agreement, however Doyon's commitment to sell the U.S. additional lands would be reduced from about 120,000 acres to about 80,000 acres.

The Fish and Wildlife Service released an Evaluation and Review of a Proposed Land Exchange and Acquisition of Native Lands on February 3, 2005, and accepted public comments until July 30, 2005. The Evaluation and Review, along with the comments received to date will be used in the scoping of a more detailed analysis through the EIS process. The Summary of Public Comments on a Proposed Land Exchange, Yukon Flats National Wildlife Refuge, 2005 is posted at <http://alaska.fws.gov/nwr/yukonflats/current.htm>. Issues of concern repeatedly identified during the public

comment period that will be addressed in the EIS may include, but are not limited to:

(1) *Refuge Purposes*. The potential conflict between the proposed land exchange and the purposes of the Refuge;

(2) *Environmental Impacts*. The potential for environmental degradation and contamination of air, water, and fish and wildlife resources;

(3) *Subsistence Impacts*. The potential for negative effects on subsistence resources and increased user conflicts;

(4) *Impacts to Special Designation Areas*. The potential for the exchange to jeopardize the wilderness character of the Service-recommended White-Crazy Mountains Wilderness Area and to degrade the "wild" quality of the Beaver Creek Wild River;

(5) *Insufficient Information*. The potential that available biological, environmental, and socio-economic data may be insufficient to analyze the impacts of the exchange;

(6) *Impacts to Rural Communities*. The potential for both positive and negative impacts on rural communities within the Yukon Flats region;

(7) *Loss of Native-owned Lands*. There is opposition to the divestiture of Native lands within the Yukon Flats region;

(8) *Socio-economic Benefits*. The potential for oil development to provide high-paying jobs to local residents and strengthen the regional economy; and

(9) *Refuge Benefits*. The proposed exchange would increase the amount of land protected in the Refuge and would facilitate management by consolidating both Refuge and private ownerships.

Dated: September 8, 2005.

**Rowan Gould,**

*Regional Director, U.S. Fish and Wildlife Service, Anchorage, Alaska.*

[FR Doc. 05-20883 Filed 10-18-05; 8:45 am]

**BILLING CODE 4310-JA-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### Notice of Revised Instructions for Preparing and Prioritizing Water Program Funding Requests

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Indian Affairs (BIA) will implement revised procedures for preparing and prioritizing funding requests in order to improve the management of two water programs with non-recurring annual appropriations. The two programs are

the Water Rights Negotiation/Litigation Program (Water Rights Program) and the Water Resources Management, Planning and Pre-development Program (Water Resources Program). These water programs support the long-term goals of assisting Indian tribes in confirming and defining water rights, resolving claims through negotiation or litigation, and promoting the prudent conservation, management and use of natural resources.

All of the BIA's water program managers and many water rights and water resources program managers employed by Indian tribes request these appropriations to support numerous Indian water rights litigation and negotiation efforts, to conduct water resources management, and to develop associated plans for tribal water resources. Typically, the BIA's Office of Trust Services receives more than 400 funding requests annually for water rights and water resources management-related activities. Funding requests are submitted by all 12 of the BIA's Regional Offices and approximately 150 to 175 Indian tribes each year.

The current system for preparing and prioritizing water program funding requests needs improvement in order to provide BIA decision makers with more clear demarcations of priority. These revised procedures will allow for more effective prioritization and thus enable BIA decision makers to distribute more efficiently the available water program funds.

**DATES:** The revised procedures for preparing and prioritizing water program funding requests will be used to distribute funding in Fiscal Year 2006.

**ADDRESSES:** Jeffery Loman, Chief, Natural Resources, Office of Trust Services, Bureau of Indian Affairs, Mail Stop 4655-MIB, Code 210, 1849 C Street, NW., Washington, DC 20240, Telephone (202) 208-7373.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Loman, (202) 208-7373.

**SUPPLEMENTARY INFORMATION:**

#### Water Rights Program

The BIA manages the Water Rights Program for the purpose of confirming and defining Indian water rights through litigation and court decree or through negotiated settlement. The first priority for program funds is to provide all documentation and other materials deemed necessary to further the United States' water rights claims on behalf of Indian tribes or individuals. These materials may include preparing hydrographic survey reports; determining surface and ground water

supplies; identifying arable lands; completing a practicably irrigable acreage (PIA) assessment; determining point(s) and means of diversion, purpose(s) and place(s) of use, and amount of water diverted or depleted; and conducting studies to determine the water needs of fish, wildlife, or other resources for which Indian tribes have reserved rights. These funds may also be used to provide similar materials as necessary to facilitate active Indian water rights negotiations undertaken by the Secretary of the Interior.

### Water Resources Program

The BIA manages the Water Resources Program for the purpose of managing, conserving and utilizing reservation water resources. The first priority for these program funds is to provide necessary technical research, studies, and other information for Indian tribes to serve as informed and prudent managers of their water resources. These efforts may occur through partnerships or through coordination and cooperation with other governmental entities to obtain information describing surface and ground water assessments, inventories, monitoring, modeling and gauging. Additionally, these funds are used for the preparation of comprehensive reservation water management and development plans, use surveys, interagency drought management planning, and necessary assessments to define and characterize tribal water resources.

### Activities Not Eligible for Funding

Examples of activities typically not eligible for funding from either water program include:

- Projects that duplicate work that the BIA has identified as necessary for its efforts, has undertaken, or has completed through its employees or contractors or through arrangements with other Federal agencies, including the U.S. Department of Justice;
- Projects to design, construct, repair or improve water facilities, including domestic water supply, waste water, and irrigation or dam infrastructure, except to the extent that PIA analyses under the Water Rights Program require such design projects;
- Development of recommendations or conditions in hydropower licensing procedures and water quality studies to initiate actions needed to address pollution problems;
- Attorney fees and related expenses for legal services; and
- Administrative overhead costs.

### Preparing Funding Requests

Funding requests should not be lengthy (2 to 3 pages maximum) and should not include endorsements or other extraneous information such as contractor proposals or contracts. The following information must be provided in funding requests:

- (1) Name and contact information (mailing address, e-mail, telephone and fax number) of person preparing the request.
- (2) Date of request.
- (3) Type of request (Congressional/Court Mandate, Water Rights Litigation Support, Active Water Rights Adjudication/Negotiation Support, Water Management, Water Planning/Pre-Development).

**Note:** Congressional/Court Mandate-based requests must include a copy of the mandate, and Water Rights Litigation requests must include case citation. Also, the requests must state clearly the ultimate goal of the project in one sentence.

(4) Copy of current tribal resolution or cover letter signed by tribal leader supporting request. (For all non-BIA generated requests.)

(5) Project manager name and contact information (mailing address, e-mail, telephone and fax number).

(6) DOI and DOJ Attorney name(s) and contact information for all water rights requests, including tribal requests. All water rights litigation/adjudication requests must be prepared in consultation with the Federal attorney(s), and consensus must be reached on the amount of funds requested for litigation support. Where consensus cannot be reached, an explanation should be included describing the position of the BIA Project Manager and the federal attorney(s).

(7) Name and contact information of Federal Indian Water Rights Negotiation Team Chair for all water rights negotiation requests.

(8) Project purpose and description, including: Summary of past accomplishments, if applicable; list of all outstanding activities yet to be completed or finalized; status of litigation, if applicable; and, status of negotiations, if applicable, including a list of primary participating parties.

(9) Scope of Work, including project deliverables, method, and timeline to accomplish work.

(10) Amount requested and budget justification, including a breakdown of labor/equipment costs per project task, a clear articulation of individual task priorities (as funding may not be available to support all requested activities), and total amount requested.

**Note:** The request should be limited to the amount necessary to accomplish the proposed work in accordance with industry standards and to meet critical project objectives during the fiscal year for which funds are being requested.

(11) History of funding received during the past 3 years from the Water Rights or Water Resources Programs, including a description of past accomplishments and an explanation of any amount(s) unexpended.

Funding requests do not need to identify the specific water program from which funds are being requested. The BIA will determine the appropriate program(s) based on the information provided in the requests.

### Prioritizing Water Program Funding Requests

The Deputy Director, Office of Trust Services, will make final decisions for the distribution of funding from the Water Rights and Water Resources Programs. In order to receive funding from these programs, all funding requests must be in strict accordance with the directions provided above. All funding requests, including those from Indian tribes, must be submitted by the Regional Water Programs Coordinator to the Office of Trust Services, Division of Natural Resources, Water Programs Branch, on or before September 15 of each year. Therefore, the Regional Water Programs Coordinators must set the deadline by which the Indian tribes in their respective regions must submit their requests to the Regional Office, and the Coordinators must communicate this information to the Indian tribes they service annually. Any additional requests or requests for changes or additions to previously submitted requests forwarded after September 15 of each year must be accompanied by a memorandum from the respective Regional Director providing justification for any post-deadline submissions.

The BIA will complete the funding allocation decision process for these programs by October 31 of each year, unless Congress has not yet completed the appropriations process for the Interior Department and related agencies. The BIA also cannot distribute funds until Congress completes the appropriations process for the BIA.

### Water Programs Coordinator

Each Regional Director will identify a Water Programs Coordinator(s). The Coordinator(s) will be responsible for forwarding the instructions set forth in this notice to all Indian tribes and appropriate Bureau field offices serviced by each respective Regional Office. The

Coordinator(s) will also be responsible for collecting the requests, reviewing each request to determine that funding is being requested for eligible activities, and determining whether the amount of funds being requested is in accordance with industry standards or is otherwise reasonable. After reviewing each request, the Coordinator(s) and other BIA staff may make suggestions for improvement or corrections as necessary. Once the reviews are completed, the Water Programs Coordinators will prepare a summary of all funding requests for their respective regions, listing the projects in order of priority, and send a copy of the requests and summary to the Office of Trust Services, Water Programs Branch, Mail Stop 4600-MIB, 1849 C Street, NW., Washington, DC 20240, on or before September 15 of each year.

#### Water Funding Prioritization Team

The Office of Trust Services' Water Programs Branch staff will assemble all BIA funding requests, including Central Office requests, and prepare a master summary with the original Regional Office delineation of priorities intact. A Water Funding Prioritization Team shall be established, with BIA members being appointed by the Deputy Director, Office of Trust Services, and shall consist of one representative from the Office of Trust Services, three representatives from any of the BIA's Regional Offices, one representative from the Secretary of the Interior's Indian Water Rights Office, and one representative from the Office of the Solicitor, Division of Indian Affairs. The Regional Office Team members will be selected at random and rotated each year so that every Regional Office participates on an equal basis. The Team will be provided a copy of each request and the master summary. The Team will prioritize each request in accordance with the following criteria:

#### *Water Rights Program (34420)*

##### (1) Congressional and Court Mandates:

Assign 100 points to each request for activities essential for supporting compliance with a Congressional or Court mandate that the BIA must fulfill. No further ranking is necessary.

##### (2) Indian Water Rights Litigation/Adjudication with Time Sensitivity:

Assign 60 to 70 points to each request for activities essential for supporting active Indian water rights litigation/adjudication with court-mandated deadline(s) for which work must commence or continue to meet those deadline(s).

##### (3) Indian Water Rights Litigation/Adjudication without Time Sensitivity:

Assign 50 to 60 points to each request for activities essential for supporting an active Indian water rights litigation/adjudication for which no specific court-mandated deadline is evident.

##### (4) Indian Water Rights Negotiations with Time Sensitivity:

Assign 50 to 60 points to each request for activities essential for supporting active Indian water rights negotiations or settlement implementation for which the activities are required to meet a specific schedule recognized by the Secretary of the Interior's Indian Water Rights Office.

##### (5) Indian Water Rights Negotiations without Time Sensitivity:

Assign 30 to 40 points to each request for activities essential for supporting active Indian water rights negotiations or settlement implementation for which no specific time requirement has been indicated. As with the previous category, these situations typically involve a Secretarial priority and/or have a Federal negotiation team assigned.

##### (6) Indian Water Rights Litigation/Adjudication/Negotiation Feasibility:

Assign 20 to 30 points to each request for activities essential for supporting the development of Indian water rights claims for the purpose of establishing the feasibility of future negotiations, adjudication or litigation but for which no current negotiation or litigation is taking place.

#### *Water Resources Program (34020)*

##### (1) Water Management—Indian Water and Associated Reserved Resources:

Assign 50 to 60 points to each request for activities essential for supporting water management activities necessary for the use of tribal water resources or to protect against the encroachment on or management of tribal water and associated reserved resources.

##### (2) Water Management—Coordination/Cooperation/Consultation/Conservation:

Assign 30 to 40 points to each request for activities essential for supporting water management activities necessary for intergovernmental cooperation, consultation, and coordination designed to conserve water and associated reserved resources.

##### (3) Water Management—Other:

Assign 20 to 30 points to each request for activities essential for supporting other water management activities not previously listed.

##### (4) Water Planning and Pre-Development—Indian Water:

Assign 30 to 40 points to each request for activities essential for the planning

or pre-development of tribal water rights.

##### (5) Water Planning and Pre-Development—Other:

Assign 20 to 30 points to each request for activities essential for the planning or development of multi-jurisdictional waters.

##### (6) All Water Program Funding—Cost Effectiveness:

Assign an additional 1 to 10 points to each request based on the degree of overall cost effectiveness, where the estimated cost of each activity is appropriate for the objectives to be accomplished and the amount requested comports with industry standards and is otherwise reasonable. Examples of cost effectiveness include requests that demonstrate benefits to be gained through leveraging funding from multiple agencies and those that will complete projects more efficiently within the current funding cycle.

##### (7) All Water Program/Project Funding—Compliance with Requesting Guidelines:

Assign an additional 1 to 10 points to each request based on the degree of adherence to the instructions set forth in this notice.

##### (8) All Water Program/Project Funding—Efficiency and Accomplishment:

Assign an additional 1 to 10 points to each request based on the degree of accomplishment in utilizing funds previously provided or anticipated efficiency in utilizing funds in the future.

#### Instructions for Water Funding Prioritization Team

In assigning points to each funding request, Water Funding Prioritization Team members will consider the degree to which requested funds will support the establishment of title to Indian water. Team members will also take into account any urgency with respect to the need to complete activities or how the activities will promote and support coordination, cooperation, consultation and conservation in water management and planning. A request involving multiple categories of activities should be carefully evaluated. Team members must also take into account the need to support the trust responsibility of the United States.

The Team will compile the scores of each member on a master list and obtain an average score by dividing the total of each member's score for each request by the number of team members. The Team will enter the average score for each request on the master summary and provide the master summary to the Deputy Director, Office of Trust

Services, on or before October 15 of each year. Although a single ranking is conducted, the BIA will utilize the scores to make funding decisions for projects supporting both the Water Rights Program and the Water Resources Program. Funding for all requests will be provided from the appropriate program consistent with the intent of Congress.

### Distribution Decision Making and Reserved Funds

When the total amount of appropriations for each program is insufficient to fund all requests, the Deputy Director, Office of Trust Services, will determine the appropriate cut-off for funding the requests received and will reserve 3 percent to 5 percent of the total amount from each program to fulfill unforeseen high priority contingencies (e.g., court-ordered activities or other emergencies). This determination may include a decision not to fund lower-ranking requests and/or to conduct across the board funding reductions, beginning first, and in magnitude, with water planning and pre-development activities, followed by water management, water rights negotiation, water rights adjudication and finally, and only when absolutely necessary and while maintaining efficiency and effective prosecution of each legal requirement, active water rights litigation support.

**Authority:** This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Principal Deputy Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

Dated: October 3, 2005.

**Michael D. Olsen,**

*Acting Principal Deputy Assistant Secretary—Indian Affairs.*

[FR Doc. 05-20919 Filed 10-18-05; 8:45 am]

BILLING CODE 4310-W7-P

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 60-Day Notice of Intention To Request Clearance of Collection of Information: Opportunity for Public Comment

**AGENCY:** Department of the Interior, National Park Service.

**ACTION:** Notice and request for comments.

**SUMMARY:** The National Park Service (NPS) Office of International Affairs (OIA) proposes to collect information from property owners who volunteer for their properties to be included in a list of sites (Tentative List) that will be

considered for nomination by the United States to the World Heritage List.

In order to manage the U.S. World Heritage Program (37 CFR 73) effectively and in a timely manner NPS must prepare and submit through the Secretary of the Interior and the Secretary of State to the World Heritage Centre by February 1, 2007, a Tentative List of properties that appear to meet the criteria for nomination to the World Heritage List and which the United States intends to nominate during the ensuing decade (2007–2017).

Only sites that have been found to be of national significance and that have such legal protections as are necessary to ensure the preservation of the properties and their environment may be considered for nomination by the United States. By law, all property owners must also concur in any World Heritage nomination.

In order to gather the required information for the preparation of the Tentative List, it is proposed that an expanded and annotated version of the “World Heritage Nomination Format” (or form, hereinafter referred to as the “Application”) be made available to owners who wish to apply for inclusion in the U.S. Tentative List. It would be made available on the Internet at <http://www.nps.gov/oia> and <http://www.georgewright.org>.

Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR part 1320, Reporting and Recordkeeping Requirements, the NPS invites comments on the need for and proposed manner of gathering the information in the study. Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection to respondents, including the use of automated information collection techniques or other forms of information technology.

**DATES:** Public comments will be accepted on or before sixty days from the date of publication in the **Federal Register**.

**Send Comments to:** Send comments and requests for copies of a draft of the proposed Application and the accompanying Guidebook to the U.S. World Heritage Program to James H. Charleton, Office of International Affairs, National Park Service, 1201 I Street NW. (0050). E-mail: [james\\_charleton@contractor.nps.gov](mailto:james_charleton@contractor.nps.gov). Phone: (202) 354-1802. Fax (202) 371-1446.

**FOR FURTHER INFORMATION CONTACT:** James H. Charleton, (202) 354-1802 or April Brooks, (202) 354-1808.

#### SUPPLEMENTARY INFORMATION:

**Title:** Instructions for Preparing U.S. World Heritage Nominations.

**Form:** Format for the Nomination of Properties for Inscription on the World Heritage List.

**OMB Number:** To be requested.

**Expiration Date:** To be requested.

**Type of Request:** Request for new clearance.

**Description of Need:** The primary purpose of the proposed Collection of Information is to gather the information necessary to evaluate the potential of properties for nomination by the United States to the World Heritage List and to use the information for preparing a Tentative List of candidate sites. The World Heritage List is an international list of cultural and natural properties nominated by the signatories of the World Heritage Convention (1972). The following year, the United States was the first nation to ratify the treaty. U.S. participation and the roles of the Department of the Interior and the National Park Service are authorized by Title IV of the Historic Preservation Act Amendments of 1980 and conducted in accord with 36 CFR 73—World Heritage Convention.

A Tentative List is a national list of natural and cultural properties appearing to meet the eligibility criteria for nomination to the World Heritage List. It is an annotated list of candidate sites which a country intends to nominate within a given time period.

The World Heritage Committee has issued Operational Guidelines asking participating nations to provide Tentative Lists, which aid in evaluating properties for the World Heritage List on a comparative international basis and help the Committee to schedule its work over the long term. The Guidelines recommend that a nation review its Tentative List at least once every decade. The current U.S. Tentative List (formerly Indicative Inventory) dates to 1982.

The U.S. Tentative List will serve as a guide for at least the next decade (2007–2017) of U.S. nominations to the World Heritage List. The Tentative List will be structured so as to meet the World Heritage Committee’s December 2004 request that the Tentative List allow for the nomination of no more than two sites per year by any one nation, at least one of which must be a natural site (excluding potential emergency nominations not at present foreseen).

The National Park Service Office of International Affairs (NPS-OIA) and the

George Wright Society (GWS) are working cooperatively to prepare a new U.S. Tentative List. After various reviews and approvals, NPS-OIA will forward a recommended list to the Secretary of the Interior for consideration and then to the U.S. Department of State for submittal to the World Heritage Committee.

The proposed Application that is the subject of this Notice will document properties that are owner-nominated for inclusion in the Tentative List and for subsequent nomination by the United States to the World Heritage List. The information proposed to be collected will be used to determine whether the properties meet the criteria established for inclusion. The documentation also will be used to assist in preserving and protecting the properties and for heritage education and interpretation.

Automated data collection: The proposal is to have the Application available from the Internet and for it to be submitted electronically by e-mail to the cooperator in the Office of International Affairs who is preparing the draft Tentative List. Those without access to electronic means will be able to obtain copies of the Application via a telephone, fax, or mail request and return them by mail.

*Description of respondents:* Individual private property owners, groups of private and/or public property owners and Federal land managers. Participation would be strictly voluntary and only respondent owners who submit, or who authorize to be submitted on their behalf, a completed Application would have their sites considered for inclusion in the U.S. Tentative List.

*Estimated Annual Reporting Burden:* 3200 hours. The expected range is 2000–6000 total hours, depending on the balance between less complex sites and more complex ones. If 50 individual Applications are received, of which 35 are of single buildings and 15 are of more complex sites, the total burden hours would be 3200.

*Estimated Average Burden Hours per Response:* 64.

Depending on the complexity of the site for which an Application for inclusion in the Tentative List is being prepared, the average burden hours per response would vary considerably because of many complex factors. In

general, to fulfill minimum proposed program requirements describing the property and demonstrating its eligibility under the World Heritage criteria, the average burden hours likely would range from 40 hours for a single building Application to upward of 120 hours for a more complex group of buildings or a natural area Application, such as a major national or state park unit or wildlife refuge. The proposed Application is structured electronically so as to be used without continuation sheets, with space being inserted between sections as needed. The calculations of average burden hours provided here rest upon review of sample nominations of average length.

*Estimated Average Number of Respondents:* 50.

*Frequency of Response:* 1 time per respondent.

**Doris Lowery,**

*Acting National Park Service Information and Collection Clearance Officer.*

[FR Doc. 05–20912 Filed 10–18–05; 8:45 am]

**BILLING CODE 4312–52–P**

under authority of the 1935 Historic Sites Act (45 Stat 666, 16 U.S.C. 461 *et seq.*). Sections 7(c)(i) and 7(c)(ii) of the Land and Water Conservation Fund Act, as amended by the Act of June 10, 1977 (Pub. L. 95–42, 91 Stat. 210), and the Act of March 10, 1980 (Pub. L. 103–333, 110 Stat. 4194), further authorized the Secretary of the Interior to make minor revisions in the boundaries whenever the Secretary determines that it is necessary for the preservation, protection, interpretation or management of an area.

The map is on file and available for inspection in the Land Resources Program Center, Southeast Regional Office, 100 Alabama Street, SW., Atlanta, Georgia 30303, and in the Offices of the National Park Service, Department of the Interior, Washington DC 20013–7127.

Dated: August 19, 2005.

**Patricia A. Hooks,**

*Regional Director, Southeast Region.*

[FR Doc. 05–20918 Filed 10–18–05; 8:45 am]

**BILLING CODE 4312–52–P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**Minor Boundary Revision at Fort Moultrie Unit of Fort Sumter National Monument**

**AGENCY:** National Park Service, Interior.

**ACTION:** Announcement of park boundary revision.

**SUMMARY:** Notice is given that the boundary of the Fort Moultrie Unit of Fort Sumter National Monument has been revised pursuant to the Acts specified below to encompass lands depicted on drawing 392/92,002A of Fort Sumter National Monument (which includes Fort Moultrie) prepared by the National Park Service. The revision to the boundary includes tract 01–109, as depicted on the map.

**FOR FURTHER INFORMATION CONTACT:** Superintendent; Fort Sumter National Monument; 1214 Middle Street; Sullivan’s Island, South Carolina 29482

**SUPPLEMENTARY INFORMATION:** The Joint Resolution of April 28, 1948, (Pub. L. 80–504, 62 Stat. 204) authorized the establishment of Fort Sumter National Monument. Fort Moultrie was acquired

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**Public Notice**

**AGENCY:** National Park Service, Interior.

**SUMMARY:** Pursuant to 36 CFR 51.23, public notice is hereby given that the National Park Service proposes to extend the following expiring concession contracts for a period of up to one year, or until such time as a new contract is executed, whichever occurs sooner.

**SUPPLEMENTARY INFORMATION:** All of the listed concession authorizations will expire by their terms on or before September 30, 2005. The National Park Service has determined that the proposed short-term extensions are necessary in order to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption. These extensions will allow the National Park Service to complete and issue prospectuses leading to the competitive selection of concessioners for new long-term concession contracts covering these operations.

Concid ID No.	Concessioner name	Park
GATE019–01 .....	Dover Gourmet Corporation .....	Gateway National Recreation Area.
STLI–003–89 .....	ARAMARK Sports and Entertainment Services, Inc.	Statue of Liberty National Monument.

**DATES:** *Effective Date:* October 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone 202/513-7156.

Dated: September 7, 2005.

**Jo A. Pendry**

*Acting Assistant Director, Business Services.*  
[FR Doc. 05-20915 Filed 10-18-05; 8:45 am]

**BILLING CODE 4312-53-M**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**Public Notice**

**AGENCY:** National Park Service, Interior.

**SUMMARY:** Pursuant to the terms of existing concession contracts, public notice is hereby given that the National Park Service intends to request a continuation of visitor services for a period not-to-exceed 1 year from the date of contract expiration.

**SUPPLEMENTARY INFORMATION:** The contracts listed below have been

extended to maximum allowable under 36 CFR 51.23. Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for a period not-to-exceed 1 year under the terms and conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

Concid#	Concessioner name	Park
BIBE002-82 .....	Forever Resorts, LLC .....	Big Bend National Park.
BLR1007-82 .....	Forever Resorts, LLC .....	Blue Ridge Parkway.
ISRO002-82 .....	Forever Resorts, LLC .....	Isle Royale National Park.
MACA002-82 .....	Forever Resorts, LLC .....	Mammoth Cave National Park.
OLYM003-82 .....	Forever Resorts, LLC .....	Olympic National Park.

**DATES:** *Effective Date:* October 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone, (202) 512-7156.

Dated: September 7, 2005.

**Jo A. Pendry,**

*Acting Assistant Director, Business Services.*  
[FR Doc. 05-20916 Filed 10-18-05; 8:45 am]

**BILLING CODE 4312-53-M**

will be announced through the local media and on the park Web site at: <http://www.nps.gov/badl>.

**ADDRESSES:** Copies of the GMP/EIS are available by request by writing to the Superintendent at Badlands National Park, P.O. Box 6, Interior, SD 57750. The document is also available to be reviewed in person at park headquarters with an appointment, which can be scheduled at 605/433-5281. Finally, the document can be found on the Internet at: <http://parkplanning.nps.gov/>. This Web site allows the public to review and comment directly on this document.

**FOR FURTHER INFORMATION CONTACT:**

Superintendent, Badlands National Park, P.O. Box 6, Interior, SD 57750.

**SUPPLEMENTARY INFORMATION:** The BADL is a unit of the national park system. The BADL was established due to the area's outstanding scenic values, its importance to the science of paleontology, and its mixed grass prairie and associated natural resources, including wildlife. Over half of the North Unit is designated wilderness.

The draft GMP/EIS describes and analyzes the environmental impacts of the proposed management action (preferred alternative) and two other action alternatives for the future management direction of the park, including the impacts of the boundary modifications. A no-action management alternative also is evaluated.

Persons wishing to comment may do so by any one of several methods. They may attend the public hearing or open houses noted above. They may mail comments to Badlands Planning Team, National Park Service, Denver Service

Center, P.O. Box 25287, Denver, CO 80225. They also may comment via the Internet at <http://parkplanning.nps.gov/>. Finally, they may hand-deliver comments to the Badlands National Park headquarters at Cedar Pass in Interior, South Dakota.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There may also be circumstances where we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

The responsible official is Mr. Ernest Quintana, Regional Director, Midwest Region.

Dated: August 26, 2005.

**David N. Given,**

*Acting Regional Director, Midwest Region.*

[FR Doc. 05-20910 Filed 10-18-05; 8:45 am]

**BILLING CODE 4312-AO-P**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**Environmental Statements; Availability, etc.; Badlands National Park, SD**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of Availability of the Draft General Management Plan and Draft Environmental Impact Statement for the North Unit of Badlands National Park, South Dakota.

**SUMMARY:** Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of the draft General management plan and environmental impact statement (GMP/EIS) for the North Unit of Badlands National Park (BADL).

**DATES:** The GMP/EIS will remain available for public review for 60 days following the publishing of the notice of availability in the **Federal Register** by the Environmental Protection Agency. Public meetings will be held in the cities of Rapid City, Wall, and Pierre, South Dakota. Meeting places and times

## DEPARTMENT OF THE INTERIOR

## National Park Service

**Final Environmental Impact Statement and General Management Plan for Crater Lake National Park, Douglas, Jackson & Klamath Counties, Oregon; Notice of Approval of Record of Decision**

*Summary:* Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91-190, as amended) and the regulations promulgated by the Council on Environmental Quality (40 CFR 1505.2), the Department of the Interior, National Park Service has prepared and approved a Record of Decision for the *Final Environmental Impact Statement and General Management Plan*, Crater Lake National Park. The new GMP replaces the 1977 Master Plan, and will serve as a blueprint for guiding operations, resource protection, and visitor services in the park for the next 10-15 years. The requisite no-action "wait period" was initiated June 10, 2005, with the Environmental Protection Agency's **Federal Register** notification of the filing of the Final Environmental Impact Statement (FEIS).

*Decision:* As soon as practical the National Park Service will begin to implement the actions and programs identified and analyzed as the Preferred Alternative (Alternative 2) contained in the FEIS. This alternative was deemed to be the "environmentally preferred" alternative. This course of action and three alternatives (including no-action) were identified and analyzed in the Final and Draft Environmental Impact Statements (the opportunity for public review of the latter was announced in the **Federal Register** on August 3, 2004). The full range of foreseeable environmental consequences was assessed, and appropriate mitigation measures have been identified.

*Copies:* Interested parties desiring to review the Record of Decision may obtain a copy by contacting the Superintendent, Crater Lake National Park, P.O. Box 7, Crater Lake, Oregon 97604; or via telephone request at (541) 594-2211.

Dated: August 31, 2005.

**Jonathan B. Jarvis,**

*Regional Director, Pacific West Region.*

[FR Doc. 05-20923 Filed 10-18-05; 8:45 am]

BILLING CODE 4312-52-M

## DEPARTMENT OF THE INTERIOR

## National Park Service

**Notice of Availability of Draft National Park Service Management Policies**

**AGENCY:** National Park Service, Interior.  
**ACTION:** Notice of availability.

**SUMMARY:** The National Park Service (NPS) is proposing to update the policies that guide the management of the national park system. The policies are being updated to improve their clarity and to keep pace with changes in laws, regulations, socio-economic factors and technology. The revised policies will also improve understandings among NPS managers, and between NPS managers and the public, regarding how decisions are made in protecting park resources and providing opportunities for public enjoyment of the parks. Public comment is invited for a 90-day period, which closes January 19, 2006.

**DATES:** Written comments will be accepted until January 19, 2006.

**ADDRESSES:** The draft Management Policies document is available on the Internet at <http://parkplanning.nps.gov/waso>. Hard copies may be reviewed in the Department of the Interior library (at the C Street entrance of the Main Interior Building, Washington, DC) and at NPS regional offices in Philadelphia, PA; Oakland, CA; Washington, DC; Atlanta, GA; Denver, CO; Omaha, NE; and Anchorage, AK. A limited number of single hard copies of the draft may be obtained by calling 202-208-7456. Comments can be submitted in the following ways:

1. Via the Web page at <http://parkplanning.nps.gov/waso>. This is the preferred way.

2. Via e-mail to [waso\\_policy@nps.gov](mailto:waso_policy@nps.gov).

3. Via surface mail to Bernard Fagan, National Park Service, Office of Policy, Room 7252, Main Interior Building, 1849 C Street, NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:**

Bernard Fagan at (202) 208-7456, or via e-mail at [waso\\_policy@nps.gov](mailto:waso_policy@nps.gov).

**SUPPLEMENTARY INFORMATION:** The NPS has completed a comprehensive review and revision of the policies that currently guide the management of the national park system. The policies are compiled in a book called Management Policies, last published in 2001. Park superintendents, planners, and other NPS employees use management policies as a reference source when making decisions that will affect units of the national park system.

Management Policies includes the National Park Service's interpretation of the key legislation that underlies the policies, and chapters that address: park planning; park protection; interpretation and education; use of the parks; park facilities; commercial visitor services; and the management of natural resources, cultural resources, and wilderness.

The policies are being updated to improve their clarity and to keep pace with changes in laws, regulations, socio-economic factors and technology. The new policies will also improve understandings among NPS managers, and between NPS managers and the public, regarding how decisions are made in protecting park resources and providing opportunities for public enjoyment of the parks.

Among other things, the draft policy document:

- More clearly defines important terms and concepts, enabling park managers to better anticipate and articulate how impairment of park resources can be prevented.
- More accurately reflects the NPS's commitment to tourism and public enjoyment.
- Emphasizes employee development and safety.
- Provides guidance in response to changing recreation uses and technology.
- Encourages management excellence by using better baseline scientific data, cooperative conservation, civic engagement, and good business practices.
- Recognizes new challenges facing the NPS, such as Homeland Security.
- Retains key authorities and decision making as the responsibility of the NPS.

The NPS hereby invites comments on the draft policies from any and all who may be interested. Comments will be accepted during a 90-day period which ends January 19, 2006. Comments should be specific as to how a policy might be changed or strengthened.

All comments will be reviewed, and appropriate suggestions will be incorporated into the revised final version of Management Policies. The final document will be available for public review via the Internet and in printed form. A notice of availability of the final document, and an explanation of how comments were addressed, will appear in the **Federal Register**.

Dated: October 14, 2005.

**Loran Fraser,**

*Chief, Office of Policy.*

[FR Doc. 05-20917 Filed 10-18-05; 8:45 am]

BILLING CODE 4312-52-P

**DEPARTMENT OF JUSTICE****Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act**

In accordance with Departmental policy, 38 CFR 50.7, and Section 122(d)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9622(d)(2), notice is hereby given that on September 29, 2005, a proposed Consent Decree ("Decree") in *United States v. Allied Oil & Supply Company et al*, Civil Action No. 05-2419 was lodged with the United States District Court for the District of Kansas.

The Decree resolves claims of the United States against Allied Oil & Supply Co., Baker Petrolite Corp., Citgo Petroleum Corp., Chevron Environmental Management Co., Conocophillips Co., Cook Composites and Polymers Comp., Curran Paint and Varnish Company, Elementis Chemicals Inc., Harcros Chemicals Inc., Exxon Mobil Corp., Heathwood Oil Co., Inc., Mallinckrodt Inc., Pam Oil Inc., and 3M Co. ("Settling Defendants") under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for recovery of response costs incurred by the United States Environmental Protection Agency ("EPA") at the Container Recycling Superfund Site located in Kansas City, Kansas ("Site"). The Decree requires the Settling Defendants pay \$1,127,000 in reimbursement of EPA's past response costs. EPA does not plan further response action at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. Allied Oil & Supply Co.*, Civil Action No. 05-2419 (D. Kansas), D.J. Ref. No. 90-11-2-1322/4.

The Decree may be examined at the Office of the United States Attorney, District of Kansas, and at U.S. EPA Region VII, 901 N. 5th Street, Kansas City, Kansas 66101. During the public comment period, the Decree, may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia

Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$7.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Robert E. Maher, Jr.,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-20934 Filed 10-18-05; 8:45 am]

**BILLING CODE 4410-15-M**

**DEPARTMENT OF JUSTICE****Notice of Lodging of Consent Decree Under the Clean Air Act**

Under 28 CFR 50.7, notice is hereby given that on October 11, 2005, a Consent Decree in *United States and the State of Louisiana v. Chalmette Refining, L.L.C.*, Civil Action No. 05-4662, was lodged with the United States District Court for the Eastern District of Louisiana.

In a complaint that was filed simultaneously with the Consent Decree, the United States and the State of Louisiana sought injunctive relief and penalties against Chalmette Refining, L.L.C. ("CRLLC") pursuant to Sections 113(b) and 304(a) of the Clean Air Act, 42 U.S.C. 7413(b) and 7604(a), for alleged Clean Air Act violations and violations of the corollary provisions in state law at a petroleum refinery in Chalmette, Louisiana owned by CRLLC. The complaint also alleged violations of release reporting requirements under Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9603, and Section 304 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11004.

Under the settlement, CRLLC will implement innovative pollution control technologies to reduce emissions of nitrogen oxides, sulfur dioxide, and particulate matter from refinery process units. CRLLC also will adopt facility-wide enhanced benzene waste monitoring and fugitive emission control programs. In addition, CRLLC will pay a \$1 million civil penalty for settlement of the claims in the complaint. Finally, CRLLC will undertake \$3 million in Federal and State environmentally-beneficial projects, including spending at least \$1 million to retrofit or replace an existing gas-fired compressor to reduce emission of nitrogen oxides and providing \$2 million for acquisition and protection of coastal lands in the State of Louisiana.

The Department of Justice will receive comments relating to the Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, D.C. 20044-7611, and should refer to *United States and the State of Louisiana v. Chalmette Refining, L.L.C.*, D.J. Ref. No. 90-5-2-1-07030/2.

The Consent Decree may be examined at the Offices of the U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas Texas. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax number (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$40.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Robert D. Brook,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-20936 Filed 10-18-05; 8:45 am]

**BILLING CODE 4410-15-M**

**DEPARTMENT OF JUSTICE****Notice of Lodging of Consent Decree Under the Clean Air Act**

Under 28 CFR 50.7, notice is hereby given that on October 11, 2005, a Consent Decree in *United States et al. v. Exxon Mobil Corporation and ExxonMobil Oil Corporation*, Civil Action No. 05-C-5809, was lodged with the United States District Court for the Northern District of Illinois.

In a complaint that was filed simultaneously with the Consent Decree, the United States, the State of Illinois, the State of Louisiana, and the State of Montana sought injunctive relief and penalties against Exxon Mobil Corporation and ExxonMobil Oil Corporation ("ExxonMobil") pursuant to Sections 113(b) and 304(a) of the Clean Air Act, 42 U.S.C. 7413(b) and 7604(a), for alleged Clean Air Act violations and violations of the corollary provisions in state laws at ExxonMobil petroleum refineries in Baton Rouge,

Louisiana; Baytown, Texas; Beaumont, Texas; Billings, Montana; Joliet, Illinois, and Torrance, California. The complaint also asserted claims for violation of certain other environmental laws at some of the refineries, including: (1) Claims under Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. 6928, and Section 309 of the Clean Water Act, 33 U.S.C. 1319, at the Billings and Joliet Refineries; and (2) claims for violation of release reporting requirements under Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11004.

Under the settlement, ExxonMobil will implement innovative pollution control technologies to reduce emissions of nitrogen oxides, sulfur dioxide, and particulate matter from refinery process units. ExxonMobil also will adopt facility-wide enhanced benzene waste monitoring and fugitive emission control programs. In addition, ExxonMobil will pay a \$7.7 million civil penalty for settlement of the claims in the complaint. Finally, ExxonMobil will undertake \$6.7 million in federal and state environmentally-beneficial projects, including: (1) Retrofitting or replacing municipal bus fleets in communities near the Baytown, Beaumont, Billings, Joliet, and Torrance Refineries to reduce air emissions from those vehicles, at a cost of at least \$1,300,000; (2) donating land containing unique prairie habitat and performing habitat restoration benefitting the Midewin Tallgrass Prairie near the Joliet Refinery, at a cost of at least \$1,050,000; (3) providing emergency response equipment to the Will County Emergency Management Agency, which serves the area near the Joliet Refinery, at a cost of at least \$100,000; (4) performing three different emission reduction projects at the Baytown, Billings, and Joliet Refineries, at a total cost of at least \$2,550,000; and (5) providing \$1,700,000 for acquisition and protection of coastal lands in the State of Louisiana.

The Department of Justice will receive comments relating to the Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States et al. v. Exxon Mobil Corporation and ExxonMobil Oil Corporation*, D.J. Ref. No. 90-5-2-1-07030.

The Consent Decree may be examined at the Office of the U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, Illinois. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax number (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$69.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Robert D. Brook,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-20935 Filed 10-18-05; 8:45 am]

**BILLING CODE 4410-15-M**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Water Act

Pursuant to 28 CFR 50.7, notice is hereby given that on October 7, 2005, a proposed consent decree in *United States v. Sanitation District No. 1 of Northern Kentucky*, Civil No. 05-199-WOB, was lodged with the United States District Court for the Eastern District of Kentucky.

This Consent Decree will address claims asserted by the United States in a complaint filed contemporaneously with the Consent Decree against Sanitation District No. 1 of Northern Kentucky ("the District") for civil penalties and injunctive relief under section 309 of the Clean Water Act ("the Act"), 33 U.S.C. 1319, for discharges of pollutants in violation of section 301 of the Act, 33 U.S.C. 1311, including violation of conditions established in the National Pollutant Discharge Elimination System ("NPDES") permits issued to the District by the Kentucky Department of Environmental Protection ("KDEP"), pursuant to authority delegated to it by EPA under section 402(b) of the Act, 33 U.S.C. 1342(b), and for discharges of pollutants without an NPDES permit.

The remedial measures prescribed under the proposed Consent Decree are divided into two primary parts: Initial watershed program projects and submittals, and development and

implementation of long-term watershed plans for each of the four watersheds in The District's service area. The initial watershed program projects and submittals, which are to occur within one year of entry of the Consent Decree, include documentation demonstrating the status of the District's compliance with the Nine Minimum Controls required under EPA's Combined Sewer System policy; a self-assessment of the District's Capacity, Management, Operation and Maintenance (CMOM) Programs, including the submittal of three specific programs: Gravity line prevention maintenance, grease control, and a Sewer Overflow Response Plan; an initial watershed program projects list; and a pump station plan to address high volume and chronic unpermitted discharges at pump stations. This long-term watershed plan development portion of the Consent Decree requires submission of a framework for developing watershed plans within six months of entry of the Consent Decree; submission by December 2008 of a watershed plan for each of the four watersheds, including a Long Term Control Plan and a Sanitary Sewer Overflow Plan; and submission every five years thereafter of updated watershed plans, through December 2025, at which time the Consent Decree requires full compliance with Combined Sewer Overflow water quality standards criteria and the elimination of all unpermitted discharges. The District will pay a civil penalty of \$476,000, with \$338,200 going to Kentucky and \$138,000 going to the United States. The District is also required to perform supplemental environmental projects valued at not less than \$636,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. Sanitation District No. 1 of Northern Kentucky*, D.J. Ref. #90-5-1-1-08591.

The consent decree may be examined at the Office of the United States Attorney for the Eastern District of Kentucky, 110 West Vine Street, Lexington, KY 40507, and at U.S. EPA Region 4, Office of Regional Counsel, 61 Forsyth Street, Atlanta, GA 30303. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: <http://www.usdoj.gov/enrd/open.html>. A copy of the consent decree

may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$18.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Ellen M. Mahan,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-20933 Filed 10-18-05; 8:45 am]

**BILLING CODE 4410-15-M**

**DEPARTMENT OF LABOR**

**Employment Standards Administration**

**Proposed Collection; Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Office of Federal Contract Compliance Programs (OFCCP), Equal Opportunity Survey. A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before December 19, 2005.

**ADDRESSES:** Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S-3201, Washington, DC 20210, telephone (202) 693-0418, fax (202) 693-1451, E-mail [bell.hazel@dol.gov](mailto:bell.hazel@dol.gov). Please use only one

method of transmission for comments (mail, fax, or E-mail).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Government contractors provide information on their personnel activities and the results of their affirmative action efforts to employ and promote minorities and women. This information is used to select specifically identified contractors for compliance evaluations and compliance assistance. These requirements have been established under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act, as amended, 38 U.S.C. 4212. Implementing regulations are at 41 CFR Chapter 60. The regulations at 41 CFR part 60-2.18 authorize the collection of data by OFCCP through the use of the EO Survey. In addition, the regulations at 41 CFR part 60-1.12 require contractors to collect and retain employment and other related records. The EO Survey is a request for some of those data. With these data, the Survey is intended to improve the selection of contractors for compliance evaluations which are used to determine compliance with the non-discrimination and equal employment opportunity (EEO) regulations. This information collection is currently approved for use through December 31, 2005.

**II. Review Focus**

The Department of Labor 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 submissions of responses.

**III. Current Actions**

The Department of Labor seeks a three year extension of approval to collect this information in order to permit OFCCP the time to continue its assessment and evaluation of the EO Survey. During this period, OFCCP will conduct a cost benefit analysis to examine the effectiveness of the EO Survey; as a useful tool in the selection of contractors that are not in compliance with their Equal Employment Opportunity and non-discrimination obligations. The OFCCP seeks a three year extension to the approval of the Equal Opportunity Survey. There is no change in the substance or method of collection since the last OMB approval.

*Type of Review:* Extension.

*Agency:* Employment Standards Administration.

*Titles:* Equal Opportunity Survey.

*OMB Number:* 1215-0196.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Total Respondents:* 10,000.

*Total Annual Responses:* 10,000.

*Estimated Total Burden Hours:* 210,000.

*Estimated Time per Response:* 21 hours.

*Frequency:* Annually.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$30,000.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 14, 2005.

**Bruce Bohanon,**

*Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.*

[FR Doc. 05-20925 Filed 10-18-05; 8:45 am]

**BILLING CODE 4510-CM-P**

**DEPARTMENT OF LABOR**

**Employment Standards Administration**

**Proposed Collection; Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed

and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Optional Use Payroll Form Under The Davis-Bacon Act (WH-347). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before December 19, 2005.

**ADDRESSES:** Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S-3201, Washington, DC 20210, telephone (202) 693-0418, fax (202) 693-1451, *Email* [bell.hazel@dol.gov](mailto:bell.hazel@dol.gov). Please use only one method of transmission for comments (mail, fax, or Email).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Copeland Act (40 U.S.C. 3145) requires contractors and subcontractors performing work on Federally financed or assisted construction contracts to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." Regulations 29 CFR 5.5(a)(3)(ii) requires contractors weekly to submit a copy of all payrolls to the Federal agency contracting for or financing the construction project. A signed "Statement of Compliance" indicating the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon Act (DBA) prevailing wage rate for the work performed must accompany the payroll. Regulations 29 CFR 3.3(b) requires each contractor to furnish such weekly "Statements of Compliance". Regulations 29 CFR 5.5(a)(3)(i) requires the Social Security Number of each employee on such payrolls. Regulations 29 CFR 3.4 and 5.5(a)(3)(i) require contractors to maintain these records for three years after completion of the work. Contractors and subcontractors must certify their payrolls by attesting that persons performing work on Davis-Bacon and Related Acts (DBRA) covered

contracts have received the proper payment of wages and fringe benefits. Contracting officials and Wage and Hour Division staff use these certified payrolls to verify that contractors pay the required rates and as an aid in determining whether the contractors have properly classified the workers for the work they perform. The DOL has developed the optional use Form WH-347, Payroll Form, which contractors may use to meet the payroll reporting requirements. The form contains the basic payroll information that contractors must furnish each week they perform any work subject to the DBRA. This information collection is currently approved for use through March 31, 2006.

**II. Review Focus**

The Department of Labor 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 submissions of responses.

**III. Current Actions**

The Department of Labor seeks the approval of the extension of this information collection to carry out its responsibility to determine a contractor's compliance with provisions of the Davis-Bacon and Related Acts and the Copeland Act.

*Type of Review:* Extension.  
*Agency:* Employment Standards Administration.  
*Titles:* Optional Use Payroll Form under the Davis-Bacon Act.  
*OMB Number:* 1215-0149.  
*Agency Numbers:* WH-347.  
*Affected Public:* Business or other for-profit; Federal Government; State, Local or Tribal Government.  
*Total Respondents:* 54,620.  
*Total Annual Responses:* 5,025,040.  
*Estimated Total Burden Hours:* 4,700,000.

*Estimated Time Per Response:* 56 minutes.

*Frequency:* Weekly.  
*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$201,000.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 13, 2005.

**Bruce Bohanon,**

*Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.*

[FR Doc. 05-20926 Filed 10-18-05; 8:45 am]

**BILLING CODE 4510-27-P**

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

[Docket No. ICR-1218-0085 (2005)]

**13 Carcinogens Standard; Extension of the Office of Management and Budget's Approval of Information Collection Requirements**

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Request for public comment.

**SUMMARY:** OSHA solicits public comment concerning its request for an extension of the information collection (paperwork) requirements contained in the 13 Carcinogens Standard (29 CFR 1910.1003).

**DATES:** Comments must be submitted by the following dates:

Hard Copy: Your comments must be submitted (postmarked or received ) by December 19, 2005.

Facsimile and electronic transmission: Your comments must be received by December 19, 2005.

**ADDRESSES:**

You may submit comments, identified by OSHA Docket No. [ICR-1218-0085 (2005)], by any of the following methods:

*Regular mail, express delivery, hand delivery, and messenger service:* Submit your comments and attachments to the OSHA Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). OSHA Docket Office and Department of Labor hours are 8:15 a.m. to 4:45 p.m., ET.

**Facsimile:** If your comments are 10 or fewer pages, including attachments, you may fax them to OSHA Docket Office at (202) 693-1648.

**Electronic:** You may submit comments through the Internet at <http://comments.osha.gov>. Follow instructions on the OSHA Web page for submitting comments.

**Docket:** For access to the docket to read or download comments or background materials, such as the complete Information Collection Request (ICR) (containing the Supporting Statement, OMB-83-I Form, and attachments), go to OSHA's Web page at <http://www.OSHA.gov>. In addition, the ICR, comments and submissions are available for inspection and copying at the OSHA Docket Office at the address above. You may also contact Todd Owen at the address below to obtain a copy of the ICR. For additional information on submitting comments, please see the "Public Participation" heading in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Todd Owen, Directorate of Standards and Guidance, OSHA, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210, telephone: (202) 693-2222.

#### **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The 13 Carcinogens Standard covers the following carcinogens: 4-Nitrobiphenyl (§ 1910.1003), alpha-Naphthylamine (§ 1910.1004), Methyl chloromethyl ether (§ 1910.1006), 3,3'-

Dichlorobenzidine (and its salts) (§ 1910.1007), bis-Chloromethyl ether (§ 1910.1008), beta-Naphthylamine (§ 1910.1009), Benzidine (§ 1910.1010), 4-Aminodiphenyl (§ 1910.1011), Ethyleneimine (§ 1910.1012), beta-Propiolactone (§ 1910.1013), 2-Acetylaminofluorene (§ 1910.1014), 4-Dimethylaminoazobenzene (§ 1910.1015), and N-Nitrosodimethylamine (§ 1910.1016). For purposes of this ICR, reference to 29 CFR 1910.1003 also incorporates the 13 Carcinogens Standard for Shipyards (29 CFR 1915.1003-.1016) and Construction (29 CFR 1926.1103-1116), whose requirements are identical to those contained in § 1910.1003.

The information collection requirements specified in the 13 Carcinogens Standard protect employees from the adverse health effects that may result from exposure to any of the 13 carcinogens. The major information collection requirements of the 13 Carcinogens Standard include: establishing and implementing respiratory protection and medical surveillance programs for employees assigned to or being considered for assignment to regulated areas; maintaining complete and accurate records of the respiratory protection programs and medical surveillance; providing employees with records of all medical examination results; and posting warning signs and information. In addition, employers must retain employee medical records for specified time periods, provide these records to OSHA and the National Institute for Occupational Safety and Health (NIOSH) upon request, and transfer them to NIOSH under certain circumstances.

In 1998, the Standard's respiratory protection program requirements were revised as part of the Respiratory Protection rulemaking (63 FR 1286 (1/8/1998)). The information collection requirements pertaining to the respiratory protection requirements in the 13 Carcinogens Standard and the burden associated with those requirements were included in the Respiratory Protection final rule (63 FR 1152-54) (OMB Control Number 1218-0099 (2001 and 2004)). Accordingly, they are not included in this ICR.

Also, this ICR does not include collection of information requirements or burden hours and costs for providing operation and incident reports to OSHA. OSHA deleted these requirements in the Standards Improvement Project—Phase II final (70 FR 1112 (1/5/2005)).

### **II. Special Issues for Comment**

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

### **III. Proposed Actions**

OSHA proposes to extend the Office of Management and Budget's (OMB) approval of the information collection requirements necessitated by the 13 Carcinogens Standard. In its extension request, OSA also is proposing to increase the total burden hours for these requirements from 1,634 to 1,657 hours, a total increase of 23 hours. The burden hour increase results from increasing the estimated number of employees who will request access to their medical records. The Agency will summarize the public comments submitted in response to this notice and will include this summary in its request to OMB to extend the approval of these information collection requirements.

**Type of Review:** Extension of currently approved information collection requirements.

**Title:** 13 Carcinogens Standard.

**OMB Number:** 1218-0085.

**Affected Public:** Business or other for-profits; Federal Government; State, Local or Tribal Government; not-for-profit institutions.

**Frequency:** On occasion, annually.

**Average Time Per Response:** Time per response ranges from approximately 5 minutes (for employers to maintain records) to 2 hours for employees to receive a medical examination.

**Estimated Total Burden Hours:** 1,657.

**Estimated Cost (Operation and Maintenance):** \$86,226.

### **IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions**

You may submit comments and supporting materials in response to this notice by (1) hard copy, (2) FAX transmission (facsimile), or (3) electronically through the OSHA Web page. Because of security-related

problems, there may be a significant delay in the receipt of comments sent by regular mail. Please contact the OSHA Docket Office at (202) 693-2350 (TTY (877) 889-5627) for information about security procedures concerning the delivery of submissions by express delivery, hard delivery and courier service.

All comments, submissions and background documents are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions posted on OSHA's Web page are available at <http://www.OSHA.gov>. Contact the OSHA docket Office for information about materials not available through the OSHA Web page and for assistance using the Web page to locate docket submissions.

Electronic copies of this **Federal Register** notice as well as other relevant documents are available on OSHA's Web page. Because submissions become public, private information such as social security numbers should not be submitted.

#### V. Authority and Signature

Jonathan L. Snare, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*), and Secretary of Labor's Order No. 5-2002 (67 FR 65008).

Dated: Signed at Washington, DC, on October 12, 2005.

**Jonathan L. Snare,**

*Acting Assistant Secretary of Labor.*

[FR Doc. 05-20868 Filed 10-18-05; 8:45 am]

**BILLING CODE 4510-26-M**

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#### NATIONAL INSTITUTE FOR LITERACY

##### National Institute for Literacy Advisory Board

**AGENCY:** National Institute for Literacy.

**ACTION:** Notice of a partially closed meeting.

**SUMMARY:** This notice sets forth the schedule and a summary of the agenda for an upcoming meeting of the National Institute for Literacy Advisory Board (Board). The notice also describes the functions of the Board. Notice of this meeting is required by section 10 (a) (2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend the meeting. Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistive

listening devices, or materials in alternative format) should notify Liz Hollis at telephone number (202) 233-2072 no later than October 25, 2005. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

*Date and Time: Open sessions—*November 2, 2005, from 8 a.m. to 2 p.m. and from 3 p.m. to 6:15 p.m.; and November 3, 2005, from 8:30 a.m. to 1:30 p.m. *Closed session—*November 2, 2005, from 2 p.m. to 3 p.m.

**ADDRESSES:** University Center Club, Building B, Florida State University, Doak Campbell Stadium.

**FOR FURTHER INFORMATION CONTACT:** Liz Hollis, Special Assistant to the Director; National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006; telephone number: (202) 233-2072; e-mail: [ehollis@nifl.gov](mailto:ehollis@nifl.gov).

**SUPPLEMENTARY INFORMATION:** The Board is established under section 242 of the Workforce Investment Act of 1998, Pub. L. 105-220 (20 U.S.C. 9252). The Board consists of ten individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group that administers the Institute. The Interagency Group is composed of the Secretaries of Education, Labor, and Health and Human Services. The Interagency Group considers the Board's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The National Institute for Literacy Advisory Board will meet November 2-3, 2005. On November 2, 2005 from 8 a.m. to 2 p.m. and from 3 p.m. to 6:15 p.m.; and November 3, 2005 from 8:30 a.m. to 1:30 p.m., the Board will meet in open session to discuss the Institute's program priorities; status of on-going Institute work; and other Board business as necessary. On November 2, 2005 from 2 p.m. to 3 p.m., the Board meeting will meet in closed session in order to discuss personnel issues. This discussion relates to the internal personnel rules and practices of the Institute and is likely to disclose information of personal nature where disclosure would constitute a clearly unwarranted invasion of personnel

privacy. The discussion must therefore be held in closed session under exemptions 2 and 6 of the Government in the Sunshine Act, 5 U.S.C. 552b (c) (2) and (6). A summary of the activities at the closed session and related matters that are informative to the public and consistent with the policy of 5 U.S.C. 552b will be available to the public within 14 days of the meeting.

The National Institute for Literacy Advisory Board meeting on November 2-3, 2005, will focus on future and current program activities, presentations by education researchers, and other relevant literacy activities and issues.

Records are kept of all Advisory Board proceedings and are available for public inspection at the National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006, from 8:30 a.m. to 5 p.m.

Dated: October 14, 2005.

**Sandra L. Baxter,**

*Director.*

[FR Doc. 05-20941 Filed 10-18-05; 8:45 am]

**BILLING CODE 6055-01-P**

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#### NUCLEAR REGULATORY COMMISSION

[Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML]

##### Pa'ina Hawaii, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

##### Pa'ina Hawaii, LLC (Honolulu, Hawaii Irradiator Facility)

A Licensing Board is being established pursuant to a July 26, 2005 notice of opportunity for hearing, 70 FR 44,396 (Aug. 2, 2005), regarding the June 27, 2005 application of Pa'ina Hawaii, LLC, for authorization to build and operate a commercial pool-type industrial irradiator in Honolulu, Hawaii, near the Honolulu International Airport. This proceeding concerns an October 3, 2005 request for hearing regarding the application submitted by the Concerned Citizens of Honolulu.

The Board is comprised of the following administrative judges:

Thomas S. Moore, Chair, Atomic Safety and Licensing Board Panel, U.S.

Nuclear Regulatory Commission, Washington, DC 20555-0001.

Dr. Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302.

Issued at Rockville, Maryland, this 13th day of October 2005.

**G. Paul Bollwerk, III,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. E5-5751 Filed 10-18-05; 8:45 am]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

### Proposed Generic Communication; Post-Fire Safe-Shutdown Circuit Analysis Spurious Actuations

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of opportunity for public comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is proposing to issue a generic letter (GL) to:

(1) Request addressees to review their fire protection program to confirm compliance with existing applicable regulatory requirements regarding their assumptions of the phrase "one-at-a-time" in light of the information provided in this GL and, if appropriate, take additional actions to return to compliance. Specifically, although some licensees have performed their post-fire, safe-shutdown circuit analyses based on an assumption of only a single spurious actuation per fire event or that spurious actuations will occur "one-at-a-time," recent industry cable fire test results demonstrated that these assumptions are not valid.

(2) Require addressees to submit a written response to the NRC in accordance with NRC regulations in Title 10 of the Code of Federal Regulations, Section 50.54(f) (10 CFR 50.54(f)).

This **Federal Register** notice is available through the NRC's Agencywide Documents Access and Management System (ADAMS) under accession number ML051650017.

**DATES:** Comment period expires [60 days after FRN is published]. Comments submitted after this date will be

considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

**ADDRESSES:** Submit written comments to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Mail Stop T6-D59, Washington, DC 20555-0001, and cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to NRC Headquarters, 11545 Rockville Pike (Room T-6D59), Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

**FOR FURTHER INFORMATION, CONTACT:** Robert Wolfgang at 301-415-1624 or by e-mail [rjw1@nrc.gov](mailto:rjw1@nrc.gov) or Chandu Patel at 301-415-3025 or by e-mail at [cpp@nrc.gov](mailto:cpp@nrc.gov).

**SUPPLEMENTARY INFORMATION:** NRC Generic Letter 2005-Xx; Post-Fire Safe-Shutdown Circuit Analysis Spurious Actuations.

#### Addresses

All holders of operating licenses for nuclear power reactors, except those who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

#### Purpose

The U.S. Nuclear Regulatory Commission (NRC) is issuing this generic letter (GL) to:

(1) Request addressees to review their fire protection program to confirm compliance with existing applicable regulatory requirements regarding their assumptions of the phrase "one-at-a-time" in light of the information provided in this GL and, if appropriate, take additional actions to return to compliance. Specifically, although some licensees have performed their post-fire, safe-shutdown circuit analyses based on an assumption of only a single spurious actuation per fire event or that spurious actuations will occur "one-at-a-time," recent industry cable fire test results demonstrated that these assumptions are not valid.

(2) Require addressees to submit a written response to the NRC in accordance with NRC regulations in Title 10 of the Code of Federal Regulations, Section 50.54(f) (10 CFR 50.54(f)).

The reason for this request is that the results from the Electric Power Research Institute (EPRI)/Nuclear Energy Institute (NEI) cable fire tests showed a relatively high probability of multiple spurious actuations occurring simultaneously or

in rapid succession during or after a fire (ref. EPRI Report No. 1006961, "Spurious Actuation of Electrical Circuits Due to Cable Fires: Results of an Expert Elicitation," dated May 2002 and NUREG/CR-6776, "Cable Insulation Resistance Measurements Made During Cable Fire Tests," dated June 2002). Some licensees have assumed only a single spurious actuation, and others have assumed that multiple spurious actuations can only occur "one-at-a-time," with sufficient delay between actuations to allow for mitigation. The EPRI/NEI test data clearly show that the use of "one-at-a-time" spurious actuations assumption is not credible. If multiple spurious actuations occurring simultaneously or in rapid succession during or after a fire have not been considered by licensees in their post-fire safe-shutdown circuit analysis, it is possible that they are not in compliance with 10 CFR 50.48 and 10 CFR Part 50, General Design Criterion (GDC) 3. The licensees who conclude that they are no longer in compliance with 10 CFR 50.48 and 10 CFR Part 50, GDC 3, based on the information provided in this GL, are expected to come into compliance with 10 CFR 50.48 and 10 CFR Part 50, GDC 3, using risk-informed or deterministic methods as appropriate to their licensing basis.

#### Background

The regulatory requirements for post-fire safe shutdown are given in 10 CFR 50.48 and 10 CFR Part 50, Appendix A, GDC 3. Additionally, all nuclear power plants (NPPs) licensed to operate before January 1, 1979, are required to comply with 10 CFR Part 50, Appendix R, Section III.G, "Fire Protection of Safe Shutdown Capability." All NPPs licensed to operate after January 1, 1979, were evaluated against Section 9.5.1 of NUREG-0800, Standard Review Plan (SRP). The fire protection plan (FPP) and the associated safety evaluation report (SER) are specifically incorporated into those plants' licensing bases. All NPP licensees are responsible for meeting fire protection commitments and license conditions made during the establishment of their fire protection program.

The objective of the fire protection requirements and guidance is to provide reasonable assurance that one train of systems necessary to achieve and maintain hot shutdown is free of fire damage. This includes protecting circuits whose fire-induced failure could prevent the operation, or cause maloperation, of equipment necessary to achieve and maintain post-fire safe shutdown. As part of its fire protection program, each licensee performs a

circuit analysis to identify these circuits and to provide adequate protection against fire-induced failures.

Beginning in 1997, the NRC staff noticed that a series of licensee event reports (LERs) identified plant-specific problems related to potential fire-induced electrical circuit failures that could prevent operation, or cause maloperation, of equipment necessary to achieve and maintain hot shutdown. The staff documented these problems in Information Notice 99-17, "Problems Associated With Post-Fire Safe-Shutdown Circuit Analysis." Based on the number of similar LERs, the NRC treated the issue generically. In 1998 the NRC staff started to interact with interested stakeholders in an attempt to understand the problem and develop an effective risk-informed solution to the circuit analysis issue. NRC also issued Enforcement Guidance Memorandum (EGM) 98-002, Rev. 2 (ADAMS Accession No. ML003710123), to provide a process for treating inspection findings while the issues were being clarified. Due to the number of different stakeholder interpretations of the regulations, the NRC decided to temporarily suspend the associated circuit part of fire protection inspections. This decision is documented in an NRC memorandum from John Hannon (Chief, Plant Systems Branch, Office of Nuclear Reactor Regulation (NRR)) to Gary Holahan (Director, DSSA, NRR) dated November 29, 2000 (ADAMS Accession No. ML003773142). In 2001 EPRI and NEI did a series of cable functionality fire tests to further the nuclear industry's understanding of fire-induced circuit failures, particularly spurious equipment actuations initiated by hot shorts. EPRI coordinated this effort and issued the final report (EPRI Report No. 1006961). Additional analysis of the EPRI/NEI test results can be found in NUREG/CR-6776. Based on the test results, the NRC staff and NEI concluded that the probability of fire-induced circuit failures can be relatively high and that there can be a relatively high probability of multiple spurious actuations occurring simultaneously or in rapid succession.

### Discussion

Although both the NRC and the industry have used the phrase "one-at-a-time" in connection with post-fire spurious actuations caused by hot shorts, it is not defined in 10 CFR 50 regulations or guidance documents for fire protection. The phrase has been interpreted in at least two different ways. Some licensees have interpreted "one-at-a-time" to mean that only one

spurious actuation need be postulated for any single fire event. Other licensees have interpreted the term to mean that multiple spurious actuations do not occur simultaneously, and that there would be sufficient time between spurious actuations to allow operators to take corrective actions. NRC has issued SERs that accepted both interpretations for specific situations in specific plants (e.g., NUREG-0876, Supplement No. 6, "Safety Evaluation Report related to the operation of Byron Station, Units 1 and 2," ADAMS Accession No. 8411200507). However, current NRC regulations only allow these interpretations with respect to the design of alternate shutdown capability. The EPRI/NEI cable fire testing conducted in 2001 demonstrated that neither interpretation conforms with the likely effects of a fire in an area containing safe-shutdown cables. Therefore, these interpretations do not ensure safe shutdown.

In a S.J. Collins (NRC) letter to R.E. Beedle (NEI) dated March 11, 1997 (ADAMS Accession No. ML003716454), the NRC reiterated its position that multiple spurious actuations must be considered and evaluated. Subsequent to the Collins letter, the 2001 EPRI/NEI fire testing demonstrated that multiple spurious actuations can occur with a relatively high likelihood and that they can occur simultaneously or in rapid succession without sufficient time for mitigation between actuations.

One of the key observations of the test report was that, "given that a hot short occurs in a multi-conductor cable, it is highly probable (over 80 percent) that multiple target conductors will be affected (i.e., multiple simultaneous dependent hot shorts)." The testing covered most of the types of cable insulation and jacketing materials and types of raceways commonly used in nuclear power plants. During the testing, numerous variables were introduced to investigate the impact of various factors on cable performance and failure characteristics.

While the staff has maintained that post-fire multiple spurious actuations should be considered, the number of actuations that must be considered has not been defined. Since the deterministic approach to post-fire safe-shutdown analyses assumes that all cables in a fire area are damaged by the fire (except where protection is provided in accordance with Section III.G.2 of 10 CFR part 50, Appendix R), it follows that all possible spurious actuations, as well as the cumulative effect of the actuations, should be considered.

The SERs incorporated into the licensing bases of some plants (for example, Byron and Braidwood) specifically allow a design assumption of a single spurious actuation per fire event when performing the post-fire safe-shutdown circuit analysis. However, most plants postulated in their licensing basis that multiple spurious actuations occur one-at-a-time. All plants must review their circuits analysis, assuming possible multiple spurious actuations occurring simultaneously from a fire. Depending on the results of this review, licensees may conclude that they are no longer in compliance with the fire protection regulations. Those licensees who determine that they are no longer in compliance will either have to make plant modifications to protect against possible multiple spurious actuations or request an exemption (or license amendment, as applicable) as described in the "METHODS OF COMPLIANCE" section of this GL.

An NEI letter dated May 30, 1997, presents the industry's position on the phrase "one-at-a-time." The industry's position is that "possible functional failure states from a single hot short in the component's control circuitry should be analyzed one-at-a-time (not sequentially nor with cumulative consequences) for a fire in a certain fire area." As one basis for this position, the letter references the Response to Question 5.3.10 in GL 86-10, "Implementation of Fire Protection Requirements." Although this response states that "the safe shutdown capability should not be adversely affected by any one spurious actuation or signal resulting from a fire in any plant area," per Question 5.3.10, the response applies only to Appendix R, Section III.L, "Alternative and Dedicated Shutdown Capability." The NRC emphasized this position in a letter from Dennis M. Crutchfield (Chief, Operating Reactors Branch #5, Division of Licensing) to P.B. Fiedler (Vice President & Director—Oyster Creek) dated April 30, 1982 (ADAMS Accession No. ML011150521) by stating that "it is essential to remember that these alternative requirements (i.e., III.G.3 and III.L) are not deemed to be equivalent" to III.G.2 protection.

As noted in the attachment to a February 6, 1997, memorandum from L.B. Marsh (Chief, Plant Systems Branch, NRR) to J.F. Stolz (Director, Project Directorate I-2) regarding the NRC policy on the interpretation of NRC GL 86-10 guidance on spurious valve actuation, the reference to "any one spurious actuation" in the response to Question 5.3.10 is intended to provide

a design basis for determining the capacity and capability of the alternative or dedicated shutdown train (e.g., size of the pump and the support systems needed to maintain reactor coolant inventory, the scope of onsite electrical power distribution and power needs, and an operational baseline and set of plant conditions to define the scope of initial manual actions to restore systems necessary to accomplish the required reactor performance goals). Again, these alternative requirements do not provide the same level of protection as III.G.2. NEI also stated in the May 30, 1997, letter that "any other interpretation leads to complex and costly analysis which is not justified for the very small safety benefit." The NEI letter offered no assessment of the safety significance of multiple sequential and cumulative failures. It is important to note that the NEI letter of May 30, 1997, preceded the 2001 EPRI/NEI fire testing, and that before the testing, the industry had long claimed that spurious actuations were not credible. As noted above, the cable functionality fire testing demonstrated that multiple spurious actuations can occur and that they can occur in rapid succession without sufficient time for mitigation. Therefore, if a licensee does not account for multiple spurious actuations in their circuits analysis, they are not in compliance with 10 CFR 50.48 and 10 CFR part 50, GDC 3, which require that a licensee is to provide reasonable assurance that one train of systems necessary to achieve and maintain hot shutdown is free of fire damage.

#### Methods of Compliance

Based on the information provided in this GL, if a licensee concludes that they are no longer in compliance with the fire protection regulations, there are several acceptable methods for them to re-establish full regulatory compliance. One way is to re-perform the post-fire safe-shutdown circuit analysis based on guidance provided in this GL and make modifications necessary to come into compliance. Another method to address this issue is to perform either a risk-informed evaluation that considers defense-in-depth and safety margins or a deterministic evaluation:

- If a licensee proposes to use a risk-informed approach to justify an exemption in accordance with 10 CFR 50.12, then this approach should follow the guidance of RG 1.174, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis."
- For those licensees who have adopted the standard fire protection

license condition as promulgated in GL 86-10, changes to the approved fire protection program can be made without prior staff approval if those changes would not adversely affect the ability to achieve and maintain safe shutdown in the event of a fire. GL 86-10, "Implementation of Fire Protection Requirements," provides guidance on performing and documenting these changes. Plants licensed after January 1, 1979, that use a risk-informed approach must submit a license amendment in accordance with 10 CFR 50.90. The exception to 10 CFR 50.90, provided in the standard license condition and in 10 CFR 50.48(f)(3), does not apply because the risk assessment approaches used by plants deviate from the approved deterministic approaches used in their licensing basis. Furthermore, the licensees' risk assessment tools have not been reviewed or inspected against quality standards found acceptable to the NRC staff. Consequently, the staff believes that the use of risk informed approaches without prior NRC approval may result in changes that could adversely affect safe shutdown.

Fire modeling and risk techniques acceptable to the staff should be used when performing risk-informed evaluations.

An additional method to achieve compliance is the adoption of a performance-based fire protection program in accordance with 10 CFR 50.48(c), "National Fire Protection Association Standard NFPA 805." The Draft Regulatory Guide DG-1139, "Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants," dated September 2004 (ADAMS Accession No. ML042740308) and NEI 04-02, "Guidance for Implementing a Risk-Informed, Performance-Based Fire Protection Program Under 10 CFR 50.48(c)," Rev. 0, dated May 2005 (ADAMS Accession No. ML051440805), provide additional guidance to licensees who plan to use this option.

#### Applicable Regulatory Requirements

NRC regulations in 10 CFR 50.48 and 10 CFR Part 50, Appendix A, GDC 3, require each operating NPP (licensed before or after issuance of GDC 3) to have a FPP providing post-fire safe shutdown capability. That is, a means must be provided of ensuring that one of the redundant trains of safe shutdown structures, systems, and components must be protected so that it remains free of fire damage, allowing safe shutdown of the plant. The regulation in 10 CFR 50.90 requires a licensee who desires to amend their license, to submit an amendment request to the NRC. A NPP

licensed to operate before January 1, 1979, may submit an exemption request in accordance with 10 CFR 50.12.

All NPPs licensed to operate before January 1, 1979 (pre-1979 plants), are required to comply with 10 CFR Part 50, Appendix R, paragraph III.G, "Fire Protection of Safe Shutdown Capability." Paragraph III.G states, in part, that "one train of systems necessary to achieve and maintain hot shutdown conditions from either the control room or emergency control station(s) is free of fire damage." Paragraph III.G.2 states, in part, "where cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions are located within the same fire area outside of primary containment, one of the following means of ensuring that one of the redundant trains is free of fire damage shall be provided:" All NPPs licensed to operate after January 1, 1979, are required to comply with 10 CFR 50.48(a), which requires that each operating NPP have a FPP that satisfies GDC 3. The FPP is incorporated into the operating license for post-1979 plants as a license condition. This license condition specifically cites the staff SER in the licensee's FPP, to demonstrate that the license condition has been met (although licensees may modify their FPP as long as there is no adverse effect on safe shutdown).

Based on the new information provided by the EPRI/NEI cable fire tests, approved fire protection programs that do not include protection against possible multiple spurious actuations occurring simultaneously (including programs for plants with SERs that specifically approve an assumption of one-only spurious actuation per fire event) may not comply with these regulatory requirements.

#### Applicable Regulatory Guidance

Fire-induced hot shorts that cause spurious actuations can prevent a train from performing its post-fire safe-shutdown function. NRC regulations, while noting that spurious actuations must be considered, do not set a limit on the number of spurious actuations that can occur. In addition, NRC regulations do not state whether multiple spurious actuations should be assumed to occur simultaneously or sequentially.

Any limits or assumptions used by the licensee in performing the post-fire safe-shutdown circuit analysis should be adequately justified.

In order to demonstrate compliance with the regulatory requirement that one safe shutdown train remain free of fire damage, licensees must address the potential for multiple, concurrent spurious actuations by analyzing for these failures and providing adequate protection where required. Fire modeling techniques and risk analysis techniques which the staff has found acceptable are provided in Section 4.0 of Draft Regulatory Guide DG-1139, "Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants," dated September 2004 (ADAMS Accession No. ML042740308) and may be used in the evaluations.

The deterministic methodology in NEI 00-01, Rev. 1 (January 2005), "Guidance for Post-Fire Safe Shutdown Circuit Analysis," Chapter 3, for analysis of post-fire safe-shutdown circuits, in conjunction with the guidance provided in this GL, is one acceptable approach to achieving regulatory compliance with post-fire safe-shutdown circuit protection requirements for multiple spurious actuations. Licensees should assume that the fire may affect all unprotected cables and equipment within the fire area and address all cable and equipment impacts affecting the required safe shutdown path in the fire area. All potential impacts within the fire area must be addressed.

The risk significance analysis methodology provided in Chapter 4 of NEI 00-01 should not be applied as a basis for regulatory compliance, except where a National Fire Protection Association (NFPA) 805 licensing basis has been adopted in accordance with 10 CFR 50.48(c). Risk-informed or performance-based methodologies that use the methods and information provided in NEI 00-01 (e.g., Chapter 4 and Appendix B-1) may be used to support exemption requests for plants that have not adopted an NFPA licensing basis. Furthermore, regardless of the plant licensing basis, the NRC agrees with the NEI 00-01 guidance that "all failures deemed to be risk significant, whether they are clearly compliance issues or not, should be placed in the Corrective Action Program with an appropriate priority for action." The remaining sections of NEI 00-01 provide acceptable circuit analysis guidance on both the deterministic approach and the risk-informed, performance-based approach.

#### Requested Actions

Within 90 days of the date of this letter, all addressees are requested to take the following actions:

(1) Assess plant post-fire safe-shutdown circuit analyses for regulatory compliance in accordance with the information contained in this GL. The NRC informed licensees of these compliance expectations in a public meeting in October 2004 (ADAMS Accession No. ML043290020).

(2) Take appropriate compensatory measures in accordance with plant fire protection programs if the addressees' interpretation and use of multiple spurious actuations in their circuits analysis leads to the conclusion that the addressee is no longer in compliance with the fire protection regulations.

(3) Submit licensee's plans for plant modifications, license amendments or exemption requests that the above evaluation identifies as necessary to re-establish compliance with regulatory requirements and the plant's licensing basis in accordance with the information contained in this GL.

#### Requested Information

All addressees are requested to provide the following information:

(1) Within 90 days of the date of this GL, provide a statement on whether or not you conclude you are in compliance with the regulatory requirements as described in the Applicable Regulatory Requirements section of this GL. Addressees who conclude that they continue to be in compliance with the regulatory requirements in light of the information provided in this GL should state the basis for their conclusion.

(2) Addressees who conclude that they are not in compliance with the regulatory requirements as described in the Applicable Regulatory Requirements section of this GL, provide the following information:

a. An assessment of the functionality of affected structures, systems, and components that addresses the ability to achieve and maintain safe shutdown in light of multiple spurious hot shorts as a result of a fire. An acceptable assessment would be consistent with an evaluation performed for GL 91-18, Rev. 1.

b. A detailed description of the compensatory measures in place to maintain the safe shutdown function of affected areas of the plant, and an explanation of how the compensatory measures provide adequate protection.

c. A general description and planned schedule for any plant modifications made to ensure compliance with the regulatory requirements listed in the Applicable Regulatory Requirements section of this GL.

d. A general description and planned schedule for any changes to the plant licensing bases resulting from any

evaluation performed to ensure compliance with the regulatory requirements listed in the Applicable Regulatory Requirements section of this GL. Include a discussion and schedule for any license amendment or exemption requests needed to support changes to the plant licensing basis.

e. Where the licensee plans no action under (a) or (b) or (c) or (d), provide a justification for not assessing safety significance or taking compensatory and corrective actions.

#### Required Response

In accordance with 10 CFR 50.54(f), in order to determine whether a facility license should be modified, suspended, or revoked, or whether other action should be taken, an addressee is required to respond as described below.

Within 30 days of the date of this GL, an addressee is required to submit a written response if it is unable to provide the information or it cannot meet the requested completion date. The addressee must address in its response any alternative course of action that it proposes to take, including the basis for the acceptability of the proposed alternative course of action.

The required written responses should be addressed to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, 11555 Rockville Pike, Rockville, Maryland 20852, under oath or affirmation under the provisions of Section 182a of the Atomic Energy Act of 1954, as amended, and 10 CFR 50.54(f). In addition, submit a copy of the response to the appropriate regional administrator.

#### Reason for Information Request

As discussed above, EPRI/NEI-performed cable fire testing in 2001 demonstrated that multiple spurious actuations can occur with relatively high likelihood and that they can occur simultaneously or in rapid succession without sufficient time for mitigation between actuations.

However, many licensees' circuits analysis and/or safe-shutdown analysis did not consider this relatively high probability.

The NRC staff will review the responses to this GL and will notify affected addressees if concerns are identified regarding compliance with NRC regulations. The staff may also conduct inspections to determine addressees' effectiveness in addressing the GL.

#### Related Generic Communications

GL 86-10, "Implementation of Fire Protection Requirements," April 24, 1986.

GL 91-18 Rev. 1, "Information to Licensees Regarding NRC Inspection Manual Section on Resolution of Degraded and Nonconforming Conditions," October 8, 1997.

Information Notice (IN) 92-18, "Potential for Loss of Remote Shutdown Capability During a Control Room Fire," February 28, 1992.

RIS 2004-03, "Risk-Informed Approach for Post-Fire Safe-Shutdown Associated Circuit Inspections," March 2, 2004.

RIS 2004-03 Rev. 1, "Risk-Informed Approach for Post-Fire Safe Shutdown Circuit Inspections," December 29, 2004.

RIS 2005-XXX, "Clarification of Post-Fire Safe-Shutdown Circuit Regulatory Requirements" (Draft issued for public comment on May 13, 2005).

### Backfit Discussion

Under the provisions of Section 182a of the Atomic Energy Act of 1954, as amended, 10 CFR 50.109(a)(4)(I), and 10 CFR 50.54(f), this GL requests addressees to evaluate their facilities to confirm compliance with the existing applicable regulatory requirements as discussed in this GL. The fundamental regulatory requirement is that at least one safe-shutdown path be maintained free of fire damage in the event of fire. The NRC's position concerning this regulatory requirement has not changed. All NPPs licensed to operate before January 1, 1979, (pre-1979 plants) are required to comply with 10 CFR Part 50, Appendix R, paragraph III.G, "Fire Protection of Safe Shutdown Capability," including Paragraph III.G.2. Paragraph III.G states, in part, that "one train of systems necessary to achieve and maintain hot shutdown conditions from either the control room or emergency control station(s) is free of fire damage." Paragraph III.G.2 states, in part, "where cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions are located within the same fire area outside of primary containment, one of the following means of ensuring that one of the redundant trains is free of fire damage shall be provided:"

All NPPs licensed to operate after January 1, 1979, are required to comply with 10 CFR 50.48(a), which requires that each operating nuclear power plant have a FPP that satisfies GDC 3. The fire protection plan is incorporated into the operating license for post-1979 plant as a license condition. This license

condition specifically cites the staff SER on the licensee's FPP, to demonstrate that the license condition has been met (although licensees may modify their FPP as long as there is no adverse effect on safe shutdown). All NPP licensees are required to implement their approved fire protection program, considering multiple spurious actuations, in accordance with the applicable regulatory requirements.

Fire-induced hot shorts that cause spurious actuations can prevent a train from performing its post-fire safe shutdown function. The regulations note that spurious actuations must be considered. Prior to the EPRI/NEI cable fire tests in 2001, very little data was available to provide a basis for predicting the extent or behavior of spurious actuations during a fire. Based on the available data and expert opinion, the industry assumed and, in some specific cases, the NRC accepted that spurious actuations that could prevent safe shutdown were highly improbable. Consequently, some licensees assumed only a single spurious actuation per fire event. Others assumed multiple spurious actuations, but assumed that they would only occur "one-at-a-time" with time between actuations to take corrective actions. These assumptions were never included in the regulations or generally adopted by the NRC.

The 2001 EPRI/NEI fire test program demonstrated that the previous assumptions regarding spurious actuations do not adequately address the potential risk to safe shutdown. The EPRI/NEI cable fire tests clearly showed, during and after a fire, a relatively high probability that multiple spurious actuations will occur simultaneously or in rapid succession. Consequently, to demonstrate compliance with the regulatory requirement that one safe shutdown train remain free of fire damage (which has always been the NRC's position), and with licensees' licensing bases, licensees must address the potential for multiple concurrent spurious actuations by analyzing these failures and providing adequate protection where required.

The information requested by this GL is therefore considered a compliance exception to the rule in accordance with 10 CFR 50.109(a)(4)(I), as the staff's position set out in this GL regarding the term "one-at-a-time" is necessary for compliance with 10 CFR 50, Appendix R, Paragraph III.G (with respect to pre-1979 plants) and, with respect to post-1979 plants, is necessary for compliance with the plants' license conditions regarding fire protection.

With regard to plants for which the NRC had in the past specifically accepted the assumption that only a single spurious actuation would occur per fire event, or that multiple spurious actuations would occur "one-at-a-time" with time between actuations to take corrective actions, this GL is considered a compliance exception to the backfit rule, in accordance with 10 CFR 50.109(a)(4)(I). New information from the 2001 EPRI/NEI cable fire tests has shown that multiple, simultaneous spurious actuations must be considered for these licensees to be in compliance with NRC's unchanged interpretation of its fire protection requirements, which require that one safe shutdown train remain free of fire damage.

### Federal Register Notification

A notice of opportunity for public comment on this GL was published in the **Federal Register** (XX FR XXXXX) on October XX, 2005.

### Small Business Regulatory Enforcement Fairness Act

The NRC has determined that this action is not subject to the Small Business Regulatory Enforcement Fairness Act of 1996.

### Paperwork Reduction Act Statement

This GL contains information collections that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). These information collections were approved by the Office of Management and Budget (OMB), clearance number 3150-0011, which expires on February 28, 2007.

The burden to the public for these mandatory information collections is estimated to average 300 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in the GL and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

Send comments on any aspect of these information collections, including suggestions for reducing the burden, to the Records and FOIA/Privacy Services Branch (T5-F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to [BJS1@NRC.GOV](mailto:BJS1@NRC.GOV); [INFOCOLLECTS@NRC.GOV](mailto:INFOCOLLECTS@NRC.GOV); and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202 (3150-0011), Office of Management and Budget, Washington, DC 20503.

#### Public Protection Notice

The NRC may not conduct nor sponsor, and a person is not required to respond to, an information collection unless the requesting document displays a currently valid OMB control number.

#### Contact

Please direct any questions about this matter to the technical contact or the Lead Project Manager listed below, or to the appropriate Office of Nuclear Reactor Regulation (NRR) project manager.

Bruce A. Boger, Director, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.

Technical Contact: Robert Wolfgang, NRR, 301-415-1624, E-mail: [rjw1@nrc.gov](mailto:rjw1@nrc.gov).

Lead Project Manager: Chandu Patel, NRR, 301-415-3025, E-mail: [cpp@nrc.gov](mailto:cpp@nrc.gov).

**Note:** NRC generic communications may be found on the NRC public Web site, <http://www.nrc.gov> under Electronic Reading Room/Document Collections.

#### End of Draft Generic Letter

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/NRC/ADAMS/index.html>. If you do not have access to ADAMS or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to [pdr@nrc.gov](mailto:pdr@nrc.gov).

Dated at Rockville, Maryland, this 13th day of October 2005.

For the Nuclear Regulatory Commission.

**Michael J. Case,**

*Deputy Director, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.*

[FR Doc. E5-5752 Filed 10-18-05; 8:45 am]

**BILLING CODE 7590-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

#### Extension:

Regulations 13D and 13G; Schedules 13D and 13G; OMB Control No. 3235-0145; SEC File No. 270-137.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Schedules 13D and 13G are filed pursuant to sections 13(d) and 13(g) of the Securities Exchange Act of 1934 ("Exchange Act") and Regulation 13D and 13G thereunder, to report beneficial ownership of equity securities registered under section 12 of the Exchange Act. Regulations 13D and 13G provide investors and the subject issuers with information about accumulations of securities that may have the potential to change or influence control of the issuer. Schedules 13D and Schedule 13G are used by persons, including small entities, to report their ownership of more than 5% of a class of equity securities registered under section 12. We estimate that it takes approximately 43,500 total burden hours to prepare a Schedule 13D and that it is filed by approximately 3,000 respondents. The respondent prepares 25% of the 43,500 annual burden hours for a total reporting burden of 10,875 hours. Schedule 13G takes approximately 98,800 total burden hours to prepare and is filed by an estimated 9,500 respondents. The respondent prepares 25% of the 98,800 annual burden hours for a total reporting burden of 24,700 hours.

The information provided by respondents is mandatory. Schedule 13D or Schedule 13G is filed by a respondent only when necessary. All information provided to the

Commission is public. However, Rules 0-6 and 24b-2 under the Exchange Act permit reporting persons to request confidential treatment for certain sensitive information concerning national security, trade secrets, or privileged commercial or financial information.

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

October 10, 2005.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5743 Filed 10-18-05; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 12d2-1, SEC File No. 270-98, OMB Control No. 3235-0081; Rule 12d2-2, SEC File No. 270-86, OMB Control No. 3235-0080

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget requests for extension of the previously approved collections of information discussed below.

Rule 12d2-1 was adopted in 1935 pursuant to Sections 12 and 23 of the Securities Exchange Act of 1934 ("Act"). Rule 12d2-1 provides the procedures by which a national securities exchange may suspend from trading a security that is listed and

registered on the exchange. Under Rule 12d2-1, an exchange is permitted to suspend from trading a listed security in accordance with its rules, and must promptly notify the Commission of any such suspension, along with the effective date and the reasons for the suspension.

Any such suspension may be continued until such time as the Commission may determine that the suspension is designed to evade the provisions of Section 12(d) of the Act and Rule 12d2-2 thereunder.<sup>1</sup> During the continuance of such suspension under Rule 12d2-1, the exchange is required to notify the Commission promptly of any change in the reasons for the suspension. Upon the restoration to trading of any security suspended under Rule 12d2-1, the exchange must notify the Commission promptly of the effective date of such restoration.

The trading suspension notices serve a number of purposes. First, they inform the Commission that an exchange has suspended from trading a listed security or reintroduced trading in a previously suspended security. They also provide the Commission with information necessary for it to determine that the suspension has been accomplished in accordance with the rules of the exchange, and to verify that the exchange has not evaded the requirements of Section 12(d) of the Act and Rule 12d2-2 thereunder by improperly employing a trading suspension. Without Rule 12d2-1, the Commission would be unable to fully implement these statutory responsibilities.

There are nine national securities exchanges that are subject to Rule 12d2-1. The burden of complying with Rule 12d2-1 is not evenly distributed among the exchanges, however, since there are many more securities listed on the New York Stock Exchange, Inc. ("NYSE") and the American Stock Exchange LLC ("Amex") than on the other exchanges.<sup>2</sup> However, for purposes of this filing, it is assumed that the number of responses is evenly divided among the exchanges. Since approximately 104 responses under Rule 12d2-1 are received annually by the Commission from the national securities exchanges, the resultant aggregate annual reporting hour burden would be, assuming on average one-half reporting hour per response, 52 annual burden hours for all

exchanges. The related costs associated with these burden hours are \$2886.00.

Rule 12d2-2 and Form 25 were adopted in 1935 and 1952, respectively, pursuant to Sections 12 and 23 of the Act. Rule 12d2-2 sets forth the conditions and procedures under which a security may be delisted from an exchange and withdrawn from registration under Section 12(b) of the Act. The Commission has recently adopted amendments to Rule 12d2-2 and Form 25.<sup>3</sup> The amendments will become effective on August 22, 2005 and the compliance date of the amendments is April 24, 2006. Under the amended Rule 12d2-2, all issuers and national securities exchanges seeking to delist and deregister a security in accordance with the rules of an exchange will file the newly adopted version of Form 25 with the Commission. The Commission has also adopted amendments to Rule 19d-1 under the Act to require exchanges to file the newly adopted version of Form 25 as notice to the Commission under Section 19(d) of the Act. Finally, the Commission has adopted amendments to exempt options and security futures from Section 12(d) of the Act. These amendments are intended to simplify the paperwork and procedure associated with a delisting and to unify general rules and procedures relating to the delisting process.

The Form 25 is useful because it informs the Commission that a security previously traded on an exchange is no longer traded. In addition, the Form 25 enables the Commission to verify that the delisting has occurred in accordance with the rules of the exchange. Further, the Form 25 helps to focus the attention of delisting issuers to make sure that they abide by the proper procedural and notice requirements associated with a delisting. Without Rule 12d2-2 and the Form 25, as applicable, the Commission would be unable to fulfill its statutory responsibilities.

There are seven national securities exchanges that trade equity securities that will be respondents subject to Rule 12d2-2 and Form 25.<sup>4</sup> The burden of complying with Rule 12d2-2 and Form 25 is not evenly distributed among the exchanges, however, since there are many more securities listed on the NYSE and the Amex than on the other exchanges. However, for purposes of this filing, the staff has assumed that the number of responses is evenly divided

among the exchanges. Since approximately 648 responses under Rule 12d2-2 and Form 25 for the purpose of delisting equity securities are received annually by the Commission from the national securities exchanges, the resultant aggregate annual reporting hour burden would be, assuming on average one hour per response, 648 annual burden hours for all exchanges. In addition, since approximately 57 responses are received by the Commission annually from issuers wishing to remove their securities from listing and registration on exchanges, the Commission staff estimates that the aggregate annual reporting hour burden on issuers would be, assuming on average one reporting hour per response, 57 annual burden hours for all issuers. Accordingly, the total annual hour burden for all respondents to comply with Rule 12d2-2 is 705 hours. The related costs associated with these burden hours are \$37,830.00.

The collection of information obligations imposed by Rule 12d2-1, Rule 12d2-2 and Form 25 are mandatory. The response will be available to the public and will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, by sending an e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 10, 2005.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5744 Filed 10-18-05; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 15c1-5, SEC File No. 270-422 OMB, OMB Control No. 3235-0471.

<sup>1</sup> Rule 12d2-2 prescribes the circumstances under which a security may be delisted from an exchange and withdrawn from registration under Section 12(b) of the Act, and provides the procedures for taking such action.

<sup>2</sup> In fact, some exchanges do not file any trading suspension reports in a given year.

<sup>3</sup> See Securities Exchange Act Release No. 52029 (July 14, 2005), 70 FR 42456 (July 22, 2005).

<sup>4</sup> We note that there are two additional national securities exchanges that only trade standardized options which, as noted above, are exempt from Rule 12d2-2.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget requests for extension on the previously approved collection of information discussed below.

Rule 15c1-5 states that any broker-dealer controlled by, controlling, or under common control with the issuer of a security that the broker-dealer is trying to sell to or buy from a customer must give the customer written notification disclosing the control relationship at or before completion of the transaction. The Commission estimates that 360 respondents collect information annually under Rule 15c1-5 and that approximately 3,600 hours would be required annually for these collections.

There is no retention period requirement under Rule 15c1-5. This Rule does not involve the collection of confidential information. Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the information above should be directed to the following persons: (i) the Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Building, Washington, DC 20503 or by sending an e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 11, 2005.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5745 Filed 10-18-05; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 15c1-6, SEC File No. 270-423, OMB Control No. 3235-0472

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget request for approval of extension on the following rule:

Rule 15c1-6 states that any broker-dealer trying to sell to or buy from a customer a security in a primary or secondary distribution in which the broker-dealer is participating or is otherwise financially interested must give the customer written notification of the broker-dealer's participation or interest at or before completion of the transaction. The Commission estimates that 725 respondents collect information annually under Rule 15c1-6 and that approximately 7,250 hours would be required annually for these collections.

There is no retention period requirement under Rule 15c1-6. This Rule does not involve the collection of confidential information. Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the estimated burden hours should be directed to: (i) the Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or send an e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 11, 2005.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5746 Filed 10-18-05; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549-0004.

Extension:

Rule 32a-4; SEC File No. 270-473; OMB Control No. 3235-0530.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget requests for extension of the previously approved collections of information discussed below.

Section 32(a)(2) of the Investment Company Act requires that shareholders of a registered investment management or face-amount certificate company ("fund") ratify or reject the selection of a fund's independent public accountant. Rule 32a-4 exempts a fund from this requirement if (i) the fund's board of directors establishes an audit committee composed solely of independent directors with responsibility for overseeing the fund's accounting and auditing processes,<sup>1</sup> (ii) the fund's board of directors adopts an audit committee charter setting forth the committee's structure, duties, powers and methods of operation, or sets out similar provisions in the fund's charter or bylaws,<sup>2</sup> and (iii) the fund maintains a copy of such an audit committee charter permanently in an easily accessible place.<sup>3</sup>

Each fund that chooses to rely on rule 32a-4 incurs two collection of information burdens. The first, related to the board of directors' adoption of the audit committee charter, occurs once, when the committee is established. The second, related to the fund's maintenance and preservation of a copy of the charter in an easily accessible place, is an ongoing annual burden. The information collection requirement in rule 32a-4 enables the Commission to monitor the duties and responsibilities of an independent audit committee formed by a fund relying on the rule.

Commission staff estimates that, on average, the board of directors takes 15 minutes to adopt the audit committee charter. Commission staff has estimated that with an average of 8 directors on the board,<sup>4</sup> total director time to adopt the charter is 2 hours. Combined with an estimated 1 hour of paralegal time to prepare the charter for board review, the staff estimates a total one-time collection of information burden of 3 hours for each fund. Once a board adopts an audit committee charter, a fund generally maintains it in a file cabinet or as a computer file. Commission staff has estimated that

<sup>1</sup> Rule 32a-4(a).

<sup>2</sup> Rule 32a-4(b).

<sup>3</sup> Rule 32a-4(c).

<sup>4</sup> See Management Practice Inc. Bulletin: Fund directors pay increases 17% in smaller complexes, 8% in larger (2003) available at <http://www.mfgovern.com>.

there is no annual hourly burden associated with maintaining the charter in this form.<sup>5</sup>

Because virtually all funds extant have now adopted audit committee charters, the annual one-time collection of information burden associated with adopting audit committee charters in the future will be limited to the burden incurred by newly established funds. Commission staff estimates that fund sponsors establish approximately 400 new funds each year,<sup>6</sup> and that all of these funds will adopt an audit committee charter in order to rely on rule 32a-4. Thus, Commission staff estimates that the annual one-time hour burden associated with adopting an audit committee charter under rule 32a-4 going forward will be approximately 1200 hours.<sup>7</sup>

As noted above, all funds that rely on rule 32a-4 are subject to the ongoing collection of information requirement to preserve a copy of the charter in an easily accessible place. This ongoing requirement, which Commission staff has estimated has no hourly burden, applies to the 400 new funds that adopt an audit committee charter each year and the 8044 funds that have previously adopted the charter and continue to maintain it.

When funds adopt an audit committee charter in order to rely on rule 32a-4, they also may incur one-time costs related to hiring outside counsel to prepare the charter. Commission staff estimates that those costs average approximately \$1000 per fund.<sup>8</sup>

<sup>5</sup> No hour burden related to such maintenance of the charter was identified by the funds the Commission staff surveyed. Commission staff understands that many audit committee charters have been significantly revised after their adoption in response to the Sarbanes-Oxley Act (Pub. L. No. 107-204, 116 Stat. 745) and other developments. However, the costs associated with these revisions are not attributable to the requirements of rule 32a-4.

<sup>6</sup> See Investment Company Institute ("ICI"), Mutual Fund Factbook (2005) ("ICI 2005 Factbook"), at 9. The total number of funds in the marketplace has remained approximately the same each year for the past three years. Although there has been some variation in the number of funds that are newly established and funds that has ceased operations each year, Commission staff has estimated that the total number of respondents will remain constant. Id at 9.

<sup>7</sup> This estimate is based on the following calculation: (3.0 burden hours for establishing charter × 400 new funds = 1200 burden hours).

<sup>8</sup> Costs may vary based on the individual needs of each fund. However, based on the staff's conversations with outside counsel that prepare these charters, legal fees related to the preparation and adoption of an audit committee charter usually average \$1000 or less. The Commission also understands that the ICI has prepared a model audit committee charter, which most legal professionals use when establishing audit committees, thereby reducing the costs associated with drafting a charter.

Commission staff understands that virtually all funds now rely on rule 32a-4 and have adopted audit committee charters, and thus estimates that the annual cost burden related to hiring outside legal counsel will, in the future, be limited to newly established funds.

As noted above, Commission staff estimates that approximately 400 new funds each year will adopt an audit committee charter in order to rely on rule 32a-4, and that an additional 8044 funds will continue to preserve their audit committee charters in order to rely on rule 32a-4. Thus, Commission staff estimates that the ongoing annual cost burden associated with rule 32a-4 in the future will be approximately \$400,000.<sup>9</sup>

The estimates of average burden hours and costs are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.<sup>10</sup>

The collections of information required by rule 32a-4 are necessary to obtain the benefits of the rule. The Commission is seeking OMB approval, because an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

September 12, 2005.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5747 Filed 10-18-05; 8:45 am]

**BILLING CODE 8010-01-P**

<sup>9</sup> This estimate is based on the following calculations: (\$1000 cost of adopting charter × 400 newly established funds = \$400,000).

<sup>10</sup> These estimates are based on telephone interviews between Commission staff and fund representatives.

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52596; File No. SR-ISE-2005-40]

### Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Market Maker Quotation Obligations

October 12, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 6, 2005, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to clarify the implementation of changes to Exchange Rule 804 regarding market maker quotation obligations.

#### 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 III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

In file number SR-ISE-2005-18, the Exchange proposed to adopt rule changes on a pilot basis to allow Electronic Access Members to designate "Preferred Market Makers" on orders

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 21 CFR 240.19b-4.

Electronic Access Members enter into the Exchange's systems. In Amendment No. 1 to SR-ISE-2005-18, the Exchange proposed to increase the quotation obligations of Competitive Market Makers under Exchange Rule 804, who are eligible to be designated as Preferred Market Makers. Specifically, in SR-ISE-2005-18, as amended, the Exchange proposed to amend Exchange Rule 804 to require that Competitive Market Makers maintain continuous quotes in all of the series of any options class the Competitive Market Maker is quoting. The Exchange also proposed to amend Exchange Rule 804 to limit to 60 the number of options classes a Competitive Market Maker is required to quote when there are more than 100 options classes in such Competitive Market Maker's appointed Group. The Commission approved SR-ISE-2005-18, as amended, on June 10, 2005, for a pilot period expiring on July 18, 2005.<sup>3</sup> The pilot period subsequently was extended to June 10, 2006.<sup>4</sup>

While the Exchange included the changes to Exchange Rule 804 as part of the Exchange's proposal to allow Competitive Market Makers to be designated as Preferred Market Makers, the Exchange did not intend that the proposed changes to Exchange Rule 804 be adopted on a pilot basis. The purpose of this rule filing is to clarify that the changes to Exchange Rule 804 were intended by the Exchange to be adopted on a permanent basis. The Exchange notes that SR-ISE-2005-18, as amended, was published for comment in the **Federal Register**, and no comments were received on the proposed changes to Exchange Rule 804.

## 2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is found in section 6(b)(5) of the Act,<sup>5</sup> in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, because the proposal clarifies that the amendments to Exchange Rule 804 were intended to be adopted on a permanent basis.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that the proposed rule change does not impose

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit comments on the proposed rule change. The Exchange has not received any written comments from members or other interested parties.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2005-40 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303. All submissions should refer to File Number SR-ISE-2005-40. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File Number SR-ISE-2005-40 and should be submitted on or before November 9, 2005.

### IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of section 6 of the Act<sup>6</sup> and the rules and regulations thereunder applicable to a national securities exchange,<sup>7</sup> and, in particular, the requirements of section 6(b)(5) of the Act.<sup>8</sup> Section 6(b)(5) requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission previously approved, on a pilot basis, changes to Exchange Rule 804 that (a) require Competitive Market Makers to maintain continuous quotes in all of the series of any options class the Competitive Market Maker is quoting and (b) limit to 60 the number of options classes a Competitive Market Maker is required to quote when there are more than 100 options classes in such Competitive Market Maker's appointed Group (together, the "Exchange Rule 804 Changes").<sup>9</sup> Although the Exchange Rule 804 Changes were part of the Exchange's proposals to allow, on a pilot basis, Electronic Access Members to designate "Preferred Market Makers" on orders such Electronic Access Members enter into the Exchange's systems, the Commission notes that the Exchange Rule 804 Changes apply to all Competitive Market Makers, even in cases in which a Competitive Market Maker does not receive a designated order. The Commission also notes that the Exchange stated that the proposed rule change clarifies the intent of the Exchange that the Exchange Rule 804 Changes be approved on a permanent basis. The Commission further notes that the Exchange Rule 804 Changes were published for comment in the **Federal Register** in connection with File Number SR-ISE-2005-18 and File

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 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).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See *supra* notes 3 and 4.

<sup>3</sup> See Securities Exchange Act Release No. 51818 (June 10, 2005), 70 FR 35146 (June 16, 2005).

<sup>4</sup> See Securities Exchange Act Release No. 52066 (July 20, 2005), 70 FR 43479 (July 27, 2005).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

Number ISE-2005-35,<sup>10</sup> and that no comments were received on such changes. The Commission believes that the proposed rule change would clarify that the obligations of Competitive Market Makers continue, regardless of whether the Preferred Market Maker pilot program is extended, and that such clarification does not raise any regulatory issues. For these reasons, the Commission believes that approving the Exchange Rule 804 Changes on a permanent basis is consistent with the Act.

The Exchange has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. The Commission notes that no comments were received in connection with the approvals of the Exchange Rule 804 Changes on a pilot basis. The Commission believes that accelerating approval of the proposed rule change should allow for more efficient market operation by offering clarity to existing ISE rules. Accordingly, the Commission finds good cause, consistent with section 19(b)(2) of the Act,<sup>11</sup> for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-ISE-2005-40) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-5742 Filed 10-18-05; 8:45 am]

**BILLING CODE 8010-01-P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

[Docket No. OST-95-950]

#### Notice of Request for Extension of a Previously Approved Collection

**AGENCY:** Office of the Secretary.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this

notice announces the Department of Transportation's (DOT) intention to request an extension of a previously approved information collection.

**DATES:** Comments on this notice must be received December 19, 2005.

**ADDRESSES:** You may submit comments [identified by DOT-DMS Docket Number OST-95-950] by any of the following methods.

- *Web Site:* <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

• *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**Instructions:** All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this information collection. For detailed instructions on submitting comments and additional information, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading under Regulatory Notes.

**Docket:** For access to the docket to read background documents or comments received go to <http://dms.dot.gov> at any time or to Room PL-401, on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Jack Schmidt, Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-5420.

#### SUPPLEMENTARY INFORMATION:

*Title:* Passenger Manifest Information.  
*OMB Control Number:* 2105-0534.  
*Expiration Date:* January 31, 2006.  
*Type of Request:* Extension without change of a previously approved collection.

*Abstract:* Public Law 101-604 (entitled the Aviation Security Improvement Act of 1990, or "ASIA

90", and later codified as 49 U.S.C. 44909) requires that certificated air carriers and large foreign air carriers collect the full name of each U.S. citizen traveling on flight segments to or from the United States and solicit a contact name and telephone number. In case of an aviation disaster, airlines would be required to provide the information to the Department of State and, in certain instances, to the National Transportation Safety Board. Each carrier would develop its own collection system. The Passenger Manifest Information, Final Rule (14 CFR 243), was published in the **Federal Register**, Vol. 63, No. 32 (February 18, 1998). The rule was effective March 20, 1998.

**Respondents:** U.S. air carriers, foreign air carriers, travel agents and air travelers.

**Estimated Total Burden on Respondents:** 1.05 million hours.

**Estimated Respondents:** 23,245 (excluding air travelers).

**Comments are invited on:** (a) Whether the continued collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the current information collection; (c) ways to enhance the quality, utility, and clarity of the information being collected, and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

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

Issued in Washington, DC on October 13, 2005.

**Todd Homan,**

*Acting Director, Office of Aviation Analysis.*

[FR Doc. 05-20897 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-62-P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

[Docket No. OST-2005-21074]

#### Notice of Request for Extension of a Previously Approved Collection

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq.), this notice announces that the Information

<sup>10</sup> *Id.*

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> CFR 200.30-3(a)(12).

Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected cost and burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 29, 2005 [FR Vol. 70, No. 82, pages 22388 and 22389]. No comments were received.

**DATES:** Comments on this notice must be received by November 18, 2005 attention DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Ms. Torlanda Archer (202) 366-1037, Office of International Aviation, Office of the Secretary, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** *Title:* Public Charter Rules.

*OMB Control Number:* 2106-0005.

*Summary:* The collection involved here under 14 CFR Part 380 requires the charter operator, direct air carrier and financial institution(s) involved to certify that proper financial instruments are in place or other arrangements have been made to protect the charter participants' funds and that all parties will abide by the Department's Public Charter regulations.

*Respondents:* Public Charter Operators.

*Estimated Total Burden on Respondents:* 1,290 hours.

*Comments are invited on:* (a) Whether the continued collection of information is necessary for the proper performance of the functions of the Office of International Aviation, including whether the information will have practical utility; (b) the accuracy of the Office of International Aviation's estimate of the burden of the current information collection; (c) ways to enhance the quality, utility and clarity of the information being collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

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

Issued in Washington, DC on October 12, 2005.

**Steven Lott,**

*Manager, Strategic Integration, IT Investment Management Office.*

[FR Doc. 05-20898 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-62-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Participation in the Transportation Technology Innovation and Demonstration Program

**AGENCY:** Federal Highway Administration (FHWA), United States Department of Transportation (U.S. DOT).

**ACTION:** Notice; request for expression of consent to participate.

**SUMMARY:** As authorized by section 5508 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), the U.S. DOT/FHWA is interested in working with eligible State and local governments and one or more private sector partners to build upon the Intelligent Transportation Infrastructure Program (ITIP) that began under the provisions of section 5117(b)(3) of the Transportation Equity Act for the 21st Century (TEA-21). The SAFETEA-LU provides for the extension and further expansion of the ITIP program under the Transportation Technology Innovation and Demonstration Program (TTID), a new 2-part program that would advance the deployment of an operational intelligent transportation infrastructure system, through measurement of various transportation system parameters, to simultaneously aid in local transportation planning and analysis activities, while also supporting national monitoring of traffic congestion levels. The purpose of this program is threefold: Addressing national, local, and commercial data needs through enhancement of surveillance and data management capabilities in major metropolitan areas. This involves integration of data from existing surveillance infrastructure, and strategic deployment of supplemental surveillance infrastructure to support the provision of both real-time and archived roadway system performance data. At the national level, the goal is to develop an ability to measure the operating performance of the roadway system across the nation. Made available locally, such roadway system performance data can be used to assist in local system planning, evaluation, and management activities. The same

data that is useful to the public transportation agencies also has value for commercial traveler information purposes. To achieve these objectives, the U.S. DOT/FHWA is seeking expressions of consent from eligible State and/or local transportation agencies/organizations interested in forming a public-private partnership, with a private partner that has either been pre-selected, or that will be selected, by the U.S. DOT/FHWA, to participate in the TTID program.

**DATES:** Expressions of consent to participate must be received by 4 p.m., e.t., February 6, 2006.

**ADDRESSES:** Expressions of consent to participate should be submitted directly to the Federal Highway Administration, Office of Transportation Management, HOTM-1, Attention: Chung Eng, 400 Seventh St., SW., Room 3404, Washington, DC 20590. Material may be submitted electronically to: [chung.eng@fhwa.dot.gov](mailto:chung.eng@fhwa.dot.gov).

**FOR FURTHER INFORMATION CONTACT:** Mr. Chung Eng, Office of Transportation Management (HOTM-1), (202) 366-8043, or Mr. Wilbert Baccus, Office of the Chief Counsel (HCC-40), (202) 366-0780, U.S. Department of Transportation, Federal Highway Administration, 400 Seventh St., SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Background

The ITIP program has its origin in section 5117(b)(3) of the TEA-21 (Pub. L. 105-178, as amended by title IX of Pub. L. 105-206), which required private technology commercialization initiatives as part of a program to "advance the deployment of an operational intelligent transportation infrastructure system for the measurement of various transportation system activities to aid in the transportation planning and analysis while making a significant contribution to the ITS program." To that end, the U.S. DOT/FHWA retained a private sector Consortium consisting of Signal Corporation (now a part of General Dynamics); Traffic.com; Michael Baker Jr., Inc.; L.R. Kimball & Associates, Inc.; and PB Farradyne, Inc. to experiment with the collection and archiving of performance monitoring data that would ultimately be used to measure national system performance while also using this data for commercial traveler information purposes. The successful testing of this public-private partnership in the two pilot cities of Pittsburgh and Philadelphia, Pennsylvania led to a \$50

million expansion of the ITIP program to accommodate up to 25 additional deployments in pre-selected deployment areas with a pared down Consortium consisting of Traffic.com as lead partner, and General Dynamics. Progress to date on the ITIP program expansion is as follows:

- \$28 million committed to 14 expansion deployment areas:

(a) 4—Fully Operational: Chicago, Providence, Tampa, Boston.

(b) 8—Partially Deployed: Detroit, Los Angeles, Oklahoma City, Phoenix, St. Louis, San Diego, San Francisco, Washington DC Region.

(c) 2—Design In Progress: Baltimore, Seattle.

- 5 deployment areas are in negotiations with the Consortium, including Las Vegas, Miami, New York, Orlando, and Salt Lake City.

- 8 deployment areas opted out of the original program, including Birmingham, Cincinnati/Northern Kentucky, Cleveland, Dallas/Ft. Worth, Denver, Houston, Indianapolis, and Portland (OR).

- \$22 million remains available under the current contract with the Consortium, enough to accommodate 11 additional eligible areas.

The completed and planned deployments in each metropolitan area feature the following:

- Public-private partnership for the provision of data services to the public agency partners;

- Up to 100 sensors deployed in each metropolitan area, primarily along freeways and other major arterials, capable of providing data on volume, speed, lane occupation, and limited vehicle classification;

- Archived database function;

- Commercialization component to enable self sufficiency;

- Free Web-based access to real-time as well as archived data for public agency stakeholders;

- Free Web-based basic traffic condition information to the general public (<http://www.traffic.com>);

- Additional value-added commercial services available on a fee basis;

- Private funding contribution toward infrastructure;

- Firm, fixed price contract where the private partner owns, operates, and maintains the system;

- Integration of at least one legacy system (e.g. the Pennsylvania DOT's Traffic Operations Center in Pittsburgh);

- Sharing of gross revenues to support system enhancements; and

- Reliability performance measure calculations and reports provided on a monthly basis.

In section 5508 of the SAFETEA-LU (Pub. L. 109-59; 119 Stat. 1144; Aug. 10,

2005), Congress extended the existing relationship with the TEA-21 Consortium in Part I, and further expanded the existing program by providing the opportunity to participate in Part II, of the new 2-part TTID program.

#### Solicitation of Interest

This notice solicits expressions of consent to participate in the 2-part TTID program, which is described in greater detail below. For the purpose of this notice, an "expression of consent to participate" is defined to mean a commitment to enter into negotiations for possible participation in the program. The legislation identifies specific "deployment" and "congested" areas that will have the opportunity to participate in the enhanced program and requires that these eligible areas express consent to participate, or establish a date by which they will consent to participate within the first 180 days after enactment of the SAFETEA-LU (by February 6, 2006). This notice does not affect those deployment areas that have already received prior funding through the ITIP program. The process and method for submitting expressions of consent is set forth in the Instructions to Respondents section below.

Part I of the TTID program provides for the selection, under the current task order contract<sup>1</sup> with the Consortium, of up to 11 metropolitan areas to receive Federal grants of no more than \$2 million each. Part II will expand the program by the U.S. DOT/FHWA awarding contracts on a competitive basis for the deployment of systems in selected congested areas, with consent from the affected State DOT's. Part II currently has funding to support the selection of no more than 3 metropolitan areas to receive Federal grants of no more than \$2 million each, but may receive additional funding through future appropriations. The focus in both Part I and Part II of the TTID program is to enhance existing surveillance infrastructure in participating areas through integration, along with strategic deployment of supplemental surveillance infrastructure. The enhanced surveillance infrastructure and performance data generated will be used to: (1) Aid the public sector partner in carrying out system management activities including operations, planning, analysis, and maintenance; (2) support provision of basic traveler

information to the public at no cost to the public; (3) provide opportunities for commercialization of other Advanced Traveler Information Services (ATIS); and (4) support submittal of data and system performance measure reports to the U.S. DOT/FHWA on a monthly basis.

#### U.S. DOT/FHWA Objectives

The U.S. DOT/FHWA will provide funding under the 2-part TTID program to:

- Build, enhance, and/or integrate intelligent transportation infrastructure in major metropolitan areas to enable and help manage the continuous monitoring of the roadway system for purposes of providing real-time as well as archived data to aid in the operation, planning, analysis, and maintenance activities of the U.S. DOT/FHWA and State and local agencies;

- Enhance the quality, availability, and accessibility of transportation system performance data to enable the calculation of mobility performance and system reliability measures while satisfying system operational needs at the same time;

- Provide to the U.S. DOT/FHWA specified performance data and reports;

- Provide a traveler information service that includes free public access to basic traveler information, and supports provision of a 511 based telephone service;

- Realize and publicize the benefits of regionally integrated and interoperable intelligent transportation infrastructure capable of supporting regional as well as national needs;

- Provide private technology commercialization initiatives to generate revenues that will be reinvested in the intelligent transportation infrastructure system;

- Aggregate data into reports for multipoint data distribution techniques; and

- With respect to Part I of the TTID program, use an advanced information system designed and monitored by an entity with experience with the Department of Transportation in the design and monitoring of high reliability, mission critical voice and data systems.

#### Funding

The U.S. DOT/FHWA will select up to 11 metropolitan areas to participate in Part I, and up to 3 metropolitan areas to participate in Part II. A total of up to \$2 million in Federal funds per metropolitan area will be made available to the consenting metropolitan areas selected. For Part I, the Federal funding will be made available to the

<sup>1</sup> A copy of the current task order contract may be obtained by contacting Chung Eng at (202) 366-8043 or [chung.eng@fhwa.dot.gov](mailto:chung.eng@fhwa.dot.gov).

selected partnerships through an existing contract involving the Consortium. For Part II, the Federal funding will be made available to the selected partnerships through competitive awards to one or more private partners to be selected by the U.S. DOT/FHWA, with appropriate input and consent from the selected metropolitan areas.

Federal funding for the TTID program shall be used to support:

1. Creation of a process and mechanism to collect, integrate, archive, manage, and report new and existing transportation data for mobility and performance monitoring, planning, evaluation, and other similar purposes;
2. Creation of a data repository of new and existing real-time traveler information for dissemination to the traveling public through a variety of delivery mechanisms, including support for a 511 based telephone service, and free public access to basic traveler information, and commercial traveler information services;

3. Creation of a regional transportation information system that integrates and supplements existing surveillance infrastructure to support public sector transportation management needs and private sector commercialization; and

4. Accommodation/integration of existing transportation data collection, archival, and dissemination mechanisms.

There will be a twenty percent matching share (\$500,000 match required if full \$2 million in federal funds is provided) that must be from non-federally derived funding sources, as required in sections 5508 of SAFETEA-LU and 5117(b)(3) of TEA-21. For the purposes of this program, this matching share must consist of a cash contribution to the project. The non-federally derived funding may come from State, local government, or private sector partners.

**Note:** Funding identified to support continued operations, maintenance, and management of the system will not be

considered as part of the partnership's cost-share contribution.

The U.S.DOT/FHWA and the Comptroller General of the United States will have the right to access all documents pertaining to the use of Federal funds and non-Federal contributions. Non-Federal partners must maintain sufficient documentation to substantiate these costs. Such items as direct labor, fringe benefits, material costs, consultant costs, public involvement costs, subcontractor costs, and travel costs should be included in that documentation.

**Eligibility**

*Eligible Areas Defined*

- *Group A:* Deployment areas in active negotiations under current contract.
- *Group B:* Deployment areas that had previously opted out of the ITIP program.
- *Group C:* Newly eligible congested areas.

TABLE I.—ELIGIBLE AREAS

Group A*	Group B	Group C
1 Las Vegas .....	1 Birmingham .....	1 Albany.
2 Miami .....	2 Cincinnati .....	2 Atlanta.
3 New York/Northern New Jersey** .....	3 Cleveland .....	3 Austin.
4 Orlando .....	4 Dallas/Fort Worth .....	4 Burlington.
5 Salt Lake City .....	5 Denver .....	5 Charlotte.
	6 Houston .....	6 Columbus, OH.
	7 Indianapolis .....	7 Greensboro.
	8 Portland, OR .....	8 Hartford.
		9 Jacksonville.
		10 Kansas City.
		11 Louisville.
		12 Milwaukee.
		13 Minneapolis/St. Paul.
		14 Nashville.
		15 New Orleans.
		16 Norfolk (Virginia Beach).
		17 Raleigh/Durham.
		18 Richmond.
		19 Sacramento.
		20 San Jose.
		21 Tucson.
		22 Tulsa.

\* Group A areas will be given first priority for participation in Part I.

\*\* New Jersey had previously opted not to participate, but will have an opportunity to express consent as part of the New York/Northern New Jersey metropolitan area if New York does not execute a local agreement with the Consortium under the current contract by February 6, 2006.

*Eligibility Summary*

- *Current Contract*—Continuity of the current contract will be maintained during the 180 day period. Accordingly, Group A areas may proceed as normal during this period to negotiate and execute a local agreement with the Consortium any time through February 6, 2006, and begin deployment under the terms of the current contract.
- *Part I*—Group A areas unable to execute a local agreement with the

Consortium by February 6, 2006, may maintain eligibility by expressing consent to participate or establishing a date by which they will consent to participate by February 6, 2006. Group B and Group C areas may also express consent to participate or establish a date by which they will consent to participate in Part I by February 6, 2006. In selecting consenting areas to participate in Part I, first priority will be given to Group A areas. Groups B and

C will receive equal priority. Priority within individual groups will be based on congestion rankings contained in "The 2005 Urban Mobility Report"<sup>2</sup> developed by the Texas Transportation Institute. Rankings for the eligible areas are shown in Table II below. All Groups proceed with the understanding that

<sup>2</sup> A copy of "The 2005 Urban Mobility Report" is available from the Texas Transportation Institute at the following URL: <http://mobility.tamu.edu/ums/>.

distribution of available funding to the selected consenting areas from all Groups will begin immediately after February 6, 2006. Those areas that choose to establish a date beyond February 6, 2006, by which they will consent to participate will be accommodated only as remaining funding permits when consent to participate is actually provided.

Once selected for participation in Part I, the selected metropolitan areas must establish a partnership and execute a partnership agreement with the Consortium within 180 days of being notified by the FHWA of selection, or forfeit the right to participate in Part I. Selected metropolitan areas must be willing to work within the current contractual mechanism for the initial deployments. This will involve the following:

1. The FHWA has a contractual arrangement with the Consortium in the form of a task order under the DOT's Information Technology Omnibus Procurement (ITOP) program to develop and deploy systems in up to 25 metropolitan areas. Since this program extension is basically a continuation of the current ITOP task order, the Federal funds provided will continue to be made available to the selected partnerships through this arrangement.

**Note:** This involves direct payment to the Consortium of the Federal funds to be provided; and

2. The selected metropolitan areas are expected to negotiate their own partnership agreements with the Consortium to address any specific needs beyond those included in the ITOP task order, including the facilitation of their financial contribution and accommodation of the work to be performed. This will include a commitment to share existing surveillance data with the Consortium and to provide access to rights-of-way for the installation of additional surveillance infrastructure by the Consortium. The ITOP task order(s), including payment schedule, will be adjusted as necessary to reflect the agreements that have been individually negotiated between the selected metropolitan areas/States and the private partner. Information on ITOP can be found at the following URL: <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=/ep/channel/gsaOverview.jsp&channelId=-15642>.

- *Part II*—Group A areas unable to execute a local agreement with Traffic.com by February 6, 2006, may also express consent to participate or establish a date by which they will

consent to participate in Part II by February 6, 2006. Group B and Group C areas may also express consent to participate or establish a date by which they will consent to participate in Part II by February 6, 2006. No preference will be given to any Groups in the selection of Part II participants. Rather, selection will be prioritized based on congestion rankings contained in "The 2005 Urban Mobility Report" developed by the Texas Transportation Institute. Rankings for the eligible areas are shown in Table II. Once selected for participation in Part II, the selected metropolitan areas will be asked to provide appropriate input to a Federal competitive process for the selection of a private partner. The selected metropolitan areas will also need to negotiate a separate partnership agreement with the chosen private partner to address any specific needs beyond those included in the Federal contract, including the facilitation of their financial contribution and accommodation of the work to be performed. Federal funding will be made available to the selected partnerships through the Federal contract with the chosen private partner.

Eligible areas may express consent to participate as follows: only for Part I; only for Part II; or for both Part I and Part II of the program. Eligible areas expressing consent to participate only for Part I or only for Part II will receive consideration only for the part indicated. Those eligible areas that express consent to participate for both Part I and Part II proceed with the understanding that a single area will ultimately be eligible to participate in only one part of the program. Once selected to participate in one part of ITIP, an eligible area will receive no further consideration for participation in the other part. Any eligible area that expresses consent to participate for both parts, and whose ranking makes them candidates for selection for both parts at the same time, will be given the choice of participating in one or the other.

TABLE II.—CONGESTION RANKINGS (BASED ON DATA FROM "THE 2005 URBAN MOBILITY REPORT" DEVELOPED BY THE TEXAS TRANSPORTATION INSTITUTE)

Rank/Metro area	Rank/Metro area
1 Atlanta .....	19 Salt Lake City (Group A).
2 Houston .....	20 Las Vegas (Group A).
3 Dallas/Fort Worth ..	21 Cincinnati.
4 Orlando (Group A)	22 Columbus, OH.

TABLE II.—CONGESTION RANKINGS (BASED ON DATA FROM "THE 2005 URBAN MOBILITY REPORT" DEVELOPED BY THE TEXAS TRANSPORTATION INSTITUTE)—Continued

Rank/Metro area	Rank/Metro area
5 San Jose .....	23 Raleigh /Durham.
6 Miami (Group A) ....	24 Birmingham.
7 Denver .....	25 Greensboro*.
8 Austin .....	26 Norfolk (Virginia Beach).
9 New York (Group A).	27 Milwaukee.
10 Minneapolis / St. Paul.	28 New Orleans.
11 Charlotte .....	29 Kansas City.
12 Louisville .....	30 Richmond.
13 Sacramento .....	31 Hartford.
14 Portland, OR .....	32 Albany.
15 Indianapolis .....	33 Tulsa.
16 Nashville .....	34 Cleveland.
17 Tucson .....	35 Burlington*.
18 Jacksonville .....	

\* Data for Greensboro and Burlington were appended to the report.

**Instructions to Respondents**

Expressions of consent to participate should be in the form of a written letter and must be submitted by the State DOT for the respective eligible areas. Local transportation agencies/organizations that are interested in participating in the program should coordinate with their respective State DOT's to submit a joint expression of consent. Only one expression of consent will be accepted from each eligible area. It is understood that an expression of consent to participate is merely a commitment to enter into negotiations for possible participation in the program. Expressions of consent should include the following:

- Identify the eligible area represented and the agency/organization or agencies/organizations involved. Joint expressions of consent should identify the lead agency/organization;
- Provide an expression of consent to participate, or a date by which consent to participate will be provided, in one of the following: only in Part I; only in Part II; or in both Part I and Part II;
- Provide a statement to the effect that the purpose of the program is understood;
- Acknowledge understanding that the following commitments are necessary in order to participate:
  1. Satisfy the non-Federal match requirement (80/20 Federal/non-Federal);
  2. Work with private partner toward achievement of program objectives;
  3. Share existing surveillance data with private partner;

4. Provide access to rights-of-way for installation of additional surveillance infrastructure by the private partner.

- Identify a point of contact along with appropriate contact information.

For those areas that do not have any interest in participating in either part of the program, we ask that the appropriate State DOT submit a simple letter response identifying the area, and

including a statement similar to the following: "We understand the purpose of the U.S. DOT's Transportation Technology Innovation and Demonstration Program, and do not wish to participate in either part of this program."

*Information Sessions:* Two information sessions will be available to

interested transportation agencies/ organizations from the eligible areas to address any questions or concerns relating to participation in the program. The information sessions will be conducted via video conferencing with linkages to appropriate local FHWA Division Offices. Times and locations for the sessions are as follows:

Session 1: 11/8/05 (2 p.m. ET)		Session 2: 11/10/05 (1 p.m. ET)	
FHWA division offices	Address	FHWA division offices	Address
Arizona .....	One Arizona Center, Suite 410, 400 East Van Buren St., Phoenix, AZ 85004-2285.	Alabama .....	500 Eastern Blvd., Suite 200, Montgomery, AL 36117-2018.
California .....	650 Capitol Mall, Suite 4-100, Sacramento, CA 95814.	Connecticut .....	628-2 Hebron Ave., Suite 303, Glastonbury, CT 06033-5007.
Colorado .....	12300 West Dakota Ave., Suite 180, Lakewood, CO 80228.	Florida .....	545 John Knox Rd., Suite 200, Tallahassee, FL 32303.
Kansas .....	6111 SW 29th Street, Suite 100, Topeka, KS 66614-4271.	Georgia .....	61 Forsyth St., SW., Suite 17T100, Atlanta, GA 30303-3104.
Louisiana .....	5304 Flanders Dr., Suite A, Baton Rouge, LA 70808-4348.	Indiana .....	575 N. Pennsylvania St., Rm 254, Indianapolis, IN 46204-1576.
Minnesota .....	Galtier Plaza, 380 Jackson St., Suite 500, St. Paul, MN 55101-2904.	Kentucky .....	330 W. Broadway, Frankfort, KY 40601-1922.
Missouri .....	209 Adams St., Jefferson City, MO 65101-3203.	New Jersey .....	840 Bear Tavern Rd., Suite 310, West Trenton, NJ 08628-1019.
Nevada .....	705 North Plaza St., Suite 220, Carson City, NV 89701-0602.	New York .....	Leo W. O'Brien Fed. Bldg., Rm 719, Clinton Ave. and North Pearl St., Albany, NY 12207.
Oklahoma .....	300 N. Meridian, Suite 105 S, Oklahoma City, OK 73107-6560.	North Carolina .....	310 New Bern Ave., Suite 410, Raleigh, NC 27601-1441.
Oregon .....	The Equitable Center, Suite 100, 530 Center Street, NE., Salem, OR 97301-3740.	Ohio .....	200 North High St., Room 328, Columbus, OH 43215.
Texas .....	Federal Office Building, 300 East Eighth St., Room 826, Austin, TX 78701-3233.	Tennessee .....	640 Grassmere Park Ro., Suite 112, Nashville, TN 37211-3568.
Utah .....	2520 West 4700 South, Suite 9A, Salt Lake City, UT 84118-1847.	Vermont .....	Federal Building, 87 State St., Montpelier, VT 05602-2954.
Washington .....	Suite 501, Evergreen Plaza, 711 South Capitol Way, Olympia, WA 98501-1284.	Virginia .....	400 North 8th St., Room 750, Richmond, VA 23240.
Wisconsin .....	Highpoint Office Park, 567 D'Onofrio Dr., Madison, WI 53719-2814.		

**Authority:** Sec. 5117(b)(3) of Public Law 105-178, as amended by title IX of Public Law 105-206; and Sec. 5508 of Public Law 109-59 (119 Stat. 1144).

Issued on: October 13, 2005.

**J. Richard Capka,**

*Acting Federal Highway Administrator.*

[FR Doc. 05-20870 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-22-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA-2005-22530]

**Submission for Office of Management and Budget Approval and Public Comment Request**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Request for public comments and Office of Management and Budget

(OMB) approval of an existing collection.

**SUMMARY:** This notice seeks comments from the public regarding the need for FMCSA to collect paperwork information that relates to a motor carrier's responsibility for ensuring that employees safely maintain and operate its commercial motor vehicles. This notice is published (pursuant to the Paperwork Reduction Act of 1995) to measure the need for the proposed paperwork collection, to find ways to minimize the burden on motor carriers, to find ways to enhance the quality of information collected, and to verify the accuracy of the agency's estimate of the burden (measured in work hours) on motor carriers. This is a request to continue the collection of information already approved under OMB Control Number 2126-0003, which is scheduled to expire on December 31, 2005, and to renew that approval.

**DATES:** Comments must be submitted on or before December 19, 2005.

**ADDRESSES:** You may submit written comments to the docket by any of the following methods:

- Mail: Dockets Facility, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. Anyone wanting confirmation of mailed comments must include a self-addressed stamped postcard.

- Hand delivery or courier: Room PL-401 on plaza level of the Nassif Building, 400 Seventh Street, SW., Washington DC. The Dockets Facility is open from 10 a.m. to 5 p.m., Monday through Friday, except on Federal holidays.

- Web site: Go to <http://dms.dot.gov>, click on "Comments/Submissions" and follow instructions at the site.

All written comments should identify the docket number and notice number stated in the heading of this notice.

**Docket access:** For copies of this notice or other materials in the docket, you may contact the Dockets Facility by phone (202-366-9329) or visit the facility at the above street address. For Web access to the dockets to read and download filed material, go to <http://dms.dot.gov/search>. Then type in the last four digits of the docket number shown in the heading of this notice, and click on "Search."

Anyone can search the electronic form of all comments filed in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the April 11, 2000 issue of the **Federal Register** (65 FR 19477) or go to <http://dms.dot.gov>.

Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeffrey Van Ness, (202) 366-8802, Vehicle and Roadside Operations Division (MC-PSV), Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The Secretary of Transportation (Secretary) is authorized under the provisions of 49 U.S.C. 31502 to prescribe requirements for qualifications and maximum hours-of-service of employees of, and safety and equipment standards of, motor carriers that operate commercial motor vehicles (CMVs) in interstate commerce. Under 49 U.S.C. 31136, the Secretary also has authority to prescribe regulations to ensure that CMVs are maintained, equipped, loaded and operated safely; and under 49 U.S.C. 31143 to establish standards for annual or more frequent inspections of CMVs under the provisions of U.S.C. 31142. The Secretary's authority to establish improved standards or methods to ensure brakes and brake systems of CMVs are inspected by appropriate

employees and maintained properly is provided under 49 U.S.C. 31137(b).

Motor carriers must maintain, or require maintenance of, records documenting the inspection, repair and maintenance activities performed on their owned and leased vehicles. There are no prescribed forms. Electronic recordkeeping is allowed for all records except for those requiring a signature (i.e., driver vehicle inspection reports) (See 49 CFR 390.31(d)). FMCSA allows electronic driver vehicle inspection reports if certain conditions are satisfied. The records are used by the FMCSA and its representatives to verify motor carriers' compliance with the inspection, repair, and maintenance standards in 49 CFR part 396 of the Federal Motor Carrier Safety Regulations.

**Type of Information Collection Request:** Renewal of an existing information collection.

**Title of Information Collection:** Inspection, Repair, and Maintenance.

**OMB Approval Number:** 2126-0003.

**Frequency:** Annual and on occasion.

**Use:** This collection is used by FMCSA to ensure that motor carriers have adequate documentation of their systematic inspection, repair, and maintenance programs necessary to reduce the likelihood of CMV accidents.

**Estimated Number of Respondents:** 406,843.

**Respondents:** Motor carriers, commercial motor vehicle drivers.

**Total Annual Hours Requested:** 34,798,257.

Issued on: October 13, 2005.

**Annette M. Sandberg,**  
Administrator.

[FR Doc. 05-20888 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2005-22177]

#### Qualification of Drivers; Exemption Applications; Diabetes

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of applications for exemption from the diabetes standard; request for comments.

**SUMMARY:** This notice publishes the FMCSA's receipt of applications from three individuals for an exemption from the diabetes mellitus prohibition in the Federal Motor Carrier Safety Regulations. If granted, the exemptions

will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the requirement prescribed in 49 CFR 391.41(b)(3).

**DATES:** Comments must be received on or before November 18, 2005.

**ADDRESSES:** You may submit comments identified by any of the following methods. Please identify your comments by the DOT DMS Docket Number FMCSA-2005-22177.

- Web site: <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

**Instructions:** All submissions must include the agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

**Docket:** For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Office of Bus and Truck Standards and Operations, (202) 366-4001, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 8 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

**Public Participation:** The exemption requests and supporting materials, such as the safety analysis, should be placed in the DMS docket as required by 49

CFR 381.315(d). The DMS is available 24 hours each day, 365 days a year. You can get electronic submission and retrieval help guidelines under the "help" section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments online.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act statement in the **Federal Register** published April 11, 2000 (65 FR 19477-78) or you may visit <http://dms.dot.gov>.

### Background

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the agency to renew exemptions at the end of the 2-year period. The three individuals listed in this notice have recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statute.

### Qualifications of Applicants

1. *Doyle F. Heiner.* Mr. Heiner, age 42, has had insulin-treated diabetes mellitus since 2001. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, "He senses easily when his blood sugars are low. He is willing and able to properly monitor and manage his diabetes." Mr. Heiner meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and stated, "There was no diabetic retinopathy." Mr. Heiner reported he has driven straight trucks for 24 years, accumulating 120,000 miles, and buses for 10 years, accumulating 130,000 miles. He holds a Class A commercial driver's license (CDL) from Idaho. His

driving record shows no crashes or convictions for moving violations in a CMV for the past 3 years.

2. *James R. Moretz, Jr.* Mr. Moretz, age 40, has had insulin-treated diabetes mellitus since 1997. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, "Jim is able and has demonstrated willingness to properly monitor and manage his diabetes." Mr. Moretz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and certified that his non-proliferative diabetic retinopathy is stable. Mr. Moretz reported that he has driven straight trucks for 4 years, accumulating approximately 100,000 miles, and tractor-trailer combinations for 6.5 years, accumulating approximately 325,000 miles. He holds a Class A CDL from Pennsylvania. His driving record shows no crashes or convictions for moving violations in a CMV for the past 3 years.

3. *Uve J. Witsch.* Mr. Witsch, age 42, has had insulin-treated diabetes mellitus since 1999. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, "He has received diabetes education and management through my office and his knowledge of diabetes is good. He is able to properly monitor and manage his diabetes. He is knowledgeable about the disease and compliant with my recommendations." Mr. Witsch meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and stated, "Dilated fundus exam revealed normal healthy retina and no diabetic retinopathy." Mr. Witsch reported he has driven straight trucks for 8 years, accumulating 85,000 miles. He holds a Class C CDL from California. His driving record shows no crashes or convictions for moving violations in a CMV for the past 3 years.

### Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before

the close of business on the closing date indicated earlier in the notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the agency to begin within 90 days of enactment to revise the physical qualification rules for truck and bus drivers to allow individuals who use insulin to treat their diabetes to operate commercial motor vehicles in interstate commerce. The revised rule must provide for individual assessment of diabetic drivers, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (TEA-21) (set out as a note to 49 U.S.C. 31305). In response to section 4018, the Secretary transmitted to Congress a study, "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Equity Act for the 21st Century." This report concluded that a safe and practical protocol to allow certain insulin-treated diabetic drivers to operate commercial motor vehicles (CMVs) is feasible.

There are three substantive changes in the standards required by section 4129: (1) Removal of the requirement for three years' experience operating a commercial motor vehicle while being treated with insulin; (2) establishment of a minimum period of insulin use before being allowed to operate a commercial motor vehicle; and (3) establishing limited operating, monitoring and medical requirements that are deemed medically necessary. Section 4129(b)-(c). In addition, the section contemplates that similar revisions will be made in the current exemption program established by the September 3, 2003 (68 FR 52441), notice of final disposition. Until the agency issues a final rule, however, insulin-treated diabetic drivers must continue to apply for exemptions from FMCSA, and request renewals of such exemptions in a timely manner.

Issued on: October 13, 2005.

**Annette M. Sandberg,**  
Administrator.

[FR Doc. 05-20887 Filed 10-18-05; 8:45 am]

BILLING CODE 4910-EX-P

**DEPARTMENT OF TRANSPORTATION****National Highway Traffic Safety Administration**

[U.S. DOT Docket Number NHTSA-2005-21025]

**Reports, Forms, and Recordkeeping Requirements**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period was published on April 27, 2005 [Vol. 70 FR 21838]. This document describes collection of information for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before November 18, 2005.

**ADDRESSES:** Comments must refer to the docket notice numbers cited at the beginning of this notice and be submitted to Docket Management, National Highway Traffic Safety Administration, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590. It is requested, but not required, that 2 copies of the comment be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Mr. Steve Beretzky, Office of Defects Investigation, National Highway Traffic Safety Administration (NVS-217), 400 Seventh Street, SW. (Room 5326), Washington, DC 20590. Mr. Beretzky's telephone number is (202) 366-6761. Copies of the ICR may be obtained at no charge.

**SUPPLEMENTARY INFORMATION:**

Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

*Agency:* National Highway Traffic Safety Administration.

*Title:* Reporting of Information and Documents About Potential Defects.

*OMB Number:* 2127-0616.

*Type of Request:* Extension of currently approved collection.

*Abstract:* Under Chapter 301 of Title 49 of the United States Code, manufacturers of motor vehicles and items of motor vehicle equipment are periodically required to submit certain information to NHTSA, including information about claims and notices about deaths and serious injury, property damage data, communications to customers and others, and information on incidents resulting in fatalities or serious injuries from possible defects in vehicles or equipment in the United States or in identical or substantially similar vehicles or equipment in foreign countries. The statute also authorized NHTSA to require the submission of other data that may assist in the identification of safety-related defects in vehicles and equipment.

Information and documents submitted are intended to provide NHTSA with "early warning" of potential safety-related defects in motor vehicles and motor vehicle equipment. NHTSA will rely on the information provided (as well as other relevant information) in deciding whether to open safety defect investigations. Please note that the currently approved ICR, "Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects" (OMB Control Number 2127-0620) is incorporated with this request for collections.

*Affected Public:* Manufacturers of motor vehicles and motor vehicle equipment sold in the U.S.

*Estimated Total Annual Burden:* The annual burden is estimated to be 84,218 hours. The estimated annual cost is \$8,105,551.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: October 13, 2005.

**Kathleen C. Demeter,**

*Director for Office of Defects Investigation.*

[FR Doc. 05-20885 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-59-P**

**DEPARTMENT OF TRANSPORTATION****National Highway Traffic Safety Administration****Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on April 22, 2005 (70 FR 20962).

**DATES:** OMB approval has been requested by November 18, 2005.

**FOR FURTHER INFORMATION CONTACT:** William Evans at the National Highway Traffic Safety Administration, Office of Crash Avoidance Standards, 202-366-2272, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:****National Highway Traffic Safety Administration**

*Title:* 49 CFR 571.403, Platform lift systems for motor vehicles and 49 CFR 571.404, Platform lift installations in motor vehicles.

*OMB Number:* 2127-0621.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* FMVSS No. 403, Platform lift systems for motor vehicles, establishes minimum performance standards for platform lifts designed for installation on motor vehicles. Its purpose is to prevent injuries and fatalities to passengers and bystanders during the operation of platform lifts that assist persons with limited mobility in entering and leaving a vehicle. FMVSS No. 404, Platform lift installations in motor vehicles, places specific requirements on vehicle manufacturers or alterers who install platform lifts in new vehicles. Under these regulations, lift manufacturers must certify that their lifts meet the requirements of FMVSS No. 403 and must declare the certification on the owner's manual insert, the installation instructions and the lift operating instruction label. Certification of compliance with FMVSS No. 404 is on the certification label already required

of vehicle manufacturers and alterers under 49 CFR part 567. Therefore, lift manufacturers must produce an insert that is placed in the vehicle owner's manual, installation instructions and one or two labels that are placed near the controls of the lift. The requirements and our estimates of the hour burden and cost to lift manufacturers are given below. There is no burden to the general public.

*Affected Public:* Platform lift manufacturers and vehicle manufacturers/alterers that install platform lifts in new motor vehicles before first retail sale.

*Estimated Total Annual Burden:* 144 hours and \$9,315.32.

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

#### Comments Are Invited On

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate for the burden of the proposed information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it prior to November 18, 2005.

Issued on: October 13, 2005.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. 05-20891 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office

of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on May 11, 2005 [70 FR 24860]. This is a request for a new collection.

**DATES:** Comments must be submitted on or before November 18, 2005.

**FOR FURTHER INFORMATION CONTACT:** Donovan Green, NHTSA, 400 Seventh Street, SW., Room 5307, NVS-122, Washington, DC 20590. Mr. Green's telephone number is (202) 493-0248.

#### SUPPLEMENTARY INFORMATION:

##### National Highway Traffic Safety Administration

*Title:* Tires and Rim Labeling.

*OMB Control Number:* 2127-0503.

*Form Number:* This collection of information uses no standard forms.

*Requested Expiration Date of Approval:* Three years from the approval date.

*Type of Request:* Request for public comment on a previously approved collection of information.

*Abstract:* Each tire manufacturer and rim manufacturer must label their tire or rim with the applicable safety information. These labeling requirements ensure that tires are mounted on the appropriate rims; and that the rims and tires are mounted on the vehicles for which they are intended.

*Affected Public:* Tire and Rim Manufacturers.

*Estimated Total Annual Burden:* \$3,611,460.00.

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

*Comments Are Invited On:*

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate for the burden of the proposed information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on: October 7, 2005.

**Roger A. Saul,**

*Director, Office of Crashworthiness Standards.*

[FR Doc. 05-20892 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2005-22644]

#### Notice of Receipt of Petition for Decision That Nonconforming 2001 Bentley Arnage Passenger Cars, Manufactured From January 1, 2001, Through December 31, 2001, Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001 through December 31, 2001, are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001, through December 31, 2001, that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is November 18, 2005.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 am to 5 pm]. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202) 366-3151.

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Automobile Concepts, Inc. ("AMC"), of North Miami, Florida (Registered Importer 01-278) has petitioned NHTSA to decide whether nonconforming 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001, through December 31, 2001, are eligible for importation into the United States. The vehicles which AMC believes are substantially similar are 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001, through December 31, 2001, that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001, through December 31, 2001, to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

AMC submitted information with its petition intended to demonstrate that non-U.S. certified 2001 Bentley Arnage passenger cars, manufactured from

January 1, 2001, through December 31, 2001, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2001 Bentley Arnage passenger cars, manufactured from January 1, 2001, through December 31, 2001, are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch System*, 116 *Motor Vehicle Brake Fluids*, 124 *Accelerator Control Systems*, 135 *Passenger Car Brake Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 212 *Windshield Mounting*, 214 *Side Impact Protection*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, 225 *Child Restraint Anchorage Systems*, and 302 *Flammability of Interior Materials*.

The petitioner states that the vehicles also conform to the Bumper Standard found in 49 CFR part 581.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: installation of a U.S.-model speedometer reading in miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: inspection of all vehicles and installation of U.S.-model components, on vehicles that are not already so equipped, to ensure compliance with the standard.

Standard No. 110 *Tire Selection and Rims*: installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection*: installation of U.S. version software, or installation of a supplemental key warning system to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems*: installation of U.S. version software to ensure that the systems meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection*: (a) installation of U.S. version software to ensure that the seat belt warning system meets the requirements of this standard, and (b) inspection of all vehicles and replacement of any non-U.S.-model components needed to achieve conformity with this standard with U.S.-model components.

Petitioner states that the vehicles are equipped with airbags and knee bolsters at the front outboard seating positions, and with combination lap and shoulder belts at the front and rear designated seating positions.

Standard No. 209 *Seat Belt Assemblies*: inspection of all vehicles and replacement of any non-U.S.-model seat belts with U.S.-model components on vehicles that are not already so equipped.

Standard No. 210 *Seat Belt Assembly Anchorages*: inspection of all vehicles and replacement of any non-U.S.-model seat belt anchorage components with U.S.-model components on vehicles that are not already so equipped.

Standard No. 301 *Fuel System Integrity*: inspection of all vehicles and installation of U.S.-model components on vehicles that are not already so equipped.

Standard No. 401 *Interior Trunk Release*: for vehicles manufactured after August 31, 2001, installation of U.S.-model components on vehicles that are not already so equipped.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.]. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. 05-20871 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### Petition for Exemption From the Vehicle Theft Prevention Standard; Mitsubishi Motors

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Grant of petition for exemption.

**SUMMARY:** This document grants in full the petition of Mitsubishi Motors R&D of America (Mitsubishi), for an exemption in accordance with § 543.9(c)(2) of 49 CFR Part 543, *Exemption from the Theft Prevention Standard*, for the Mitsubishi Endeavor vehicle line beginning with model year (MY) 2006. This petition is granted because the agency has determined that the antitheft device to be placed on the Endeavor vehicle line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard. Mitsubishi requested confidential treatment for the information and attachments it submitted in support of its petition. The agency will consider the petitioner's request for confidential treatment and will respond by separate letter.

**DATES:** The exemption granted by this notice is effective beginning September 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Ms. Ballard's telephone number is (202) 366-0846. Her fax number is (202) 493-2290.

**SUPPLEMENTARY INFORMATION:** In a petition dated February 25, 2005, Mitsubishi requested exemption from the parts-marking requirements of the theft prevention standard (49 CFR Part 541) for the Mitsubishi Endeavor vehicle line beginning with MY 2006. The petition requested an exemption from parts-marking pursuant to 49 CFR 543, *Exemption from Vehicle Theft Prevention Standard*, based on the installation of an antitheft device as

standard equipment for the entire vehicle line. Subsequently, the agency notified Mitsubishi of the areas of deficiency in its petition for exemption. Mitsubishi was also informed that its submission would be considered incomplete until such time the supplementary information addressing the areas of deficiency had been received. The agency received Mitsubishi's supplementary information on July 11, 2005.

Under § 543.5(a), a manufacturer may petition NHTSA to grant exemptions for one line of its vehicle lines per year. In its petition, Mitsubishi provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the new vehicle line. Mitsubishi will install its passive, electronic immobilizer antitheft device as standard equipment beginning with MY 2006. Mitsubishi's submission is considered a complete petition as required by 49 CFR 543.7, in that it meets the general requirements contained in 543.5 and the specific content requirements of 543.6.

In addressing the specific content requirements of 543.6, Mitsubishi provided information on the reliability and durability of its proposed device. To ensure reliability and durability of the device, Mitsubishi conducted tests based on its own specified standards. Mitsubishi also provided a detailed list of the tests conducted and believes that the device is reliable and durable since the device complied with its specified requirements for each test.

Mitsubishi compared the device proposed for its vehicle line with devices which NHTSA has determined to be as effective in reducing and deterring motor vehicle theft as would compliance with the parts-marking requirements. Mitsubishi's proposed device, as well as other comparable devices that have received full exemptions from the parts-marking requirements, lack an audible and visible alarm. Therefore, these devices cannot perform one of the functions listed in 49 CFR 542.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. However, theft data have indicated a decline in theft rates for vehicle lines that have been equipped with antitheft devices similar to that which Mitsubishi purposes. In these instances, the agency has concluded that the lack of a visual or audible alarm has not prevented these antitheft devices from being effective protection against theft.

On the basis of this comparison, Mitsubishi has concluded that the antitheft device proposed for its vehicle line is no less effective than those

devices in the lines for which NHTSA has already granted full exemption from the parts-marking requirements.

Based on the evidence submitted by Mitsubishi, the agency believes that the antitheft device for the Mitsubishi vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by 49 U.S.C. 33106 and 49 CFR 543.6(a)(4) and (5), the agency finds that Mitsubishi has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information Mitsubishi provided about its device, much of which is confidential. This confidential information included a description of reliability and functional tests conducted by Mitsubishi for the antitheft device and its components.

For the foregoing reasons, the agency hereby grants in full Mitsubishi's petition for exemption of its Endeavor vehicle line from the parts-marking requirements of 49 CFR part 541. The agency notes that 49 CFR part 541, Appendix A-1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all Part 543 petitions. Advanced listing, including the release of future product nameplates, is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the Theft Prevention Standard.

If Mitsubishi decides not to use the exemption for this line, it must formally notify the agency, and, thereafter, the line must be fully marked as required by 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if Mitsubishi wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based.

Further, § 543.9(c)(2) provides for the submission of petitions “to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.”

The agency wishes to minimize the administrative burden that part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

**Authority:** 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: October 13, 2005.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. 05-20890 Filed 10-18-05; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket No. RSPA-03-15852]

#### Pipeline Safety: Workshops on Public Awareness Programs for Pipeline Operators

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of workshops.

**SUMMARY:** PHMSA and the National Association of Pipeline Safety Representatives (NAPSR) will host two workshops to help ensure full compliance with new public awareness program requirements for pipeline operators. PHMSA will provide an update on the compliance review plan. In addition, these workshops will provide a forum to share strategies for implementing these new requirements successfully. Participants can learn about collaborative efforts undertaken in different sectors of the pipeline industry to improve both the effectiveness and efficiency of their related programs.

**DATES:** The November workshop will focus on helping gas distribution operators improve their public awareness programs. It will be held on November 9-10, 2005. The December workshop will focus on helping

hazardous liquid and gas transmission operators improve their public awareness programs. It will be held on December 7-8, 2005. Both workshops will begin at 1 p.m. on the first day and end at noon on the second day.

**ADDRESSES:** The November 9-10, 2005, workshop will be held at the Hyatt Regency Baltimore on the Inner Harbor, 300 Light Street, Baltimore, MD 21202. Hotel reservations under the U.S. Department of Transportation room block can be made at 410-528-1234 or 1-800-233-1234. The meeting room will be posted at the hotel on the day of workshop.

The December 7-8, 2005, meeting will be held at the Hilton America, 1600 Lamar Street, Houston, TX 77010. Hotel reservations under the U.S. Department of Transportation room block can be made at 713-739-8000 or 1-800-4HILTON. The meeting room will be posted at the hotel on the day of workshop.

**FOR FURTHER INFORMATION CONTACT:** Blaine Keener, OPS, (202) 366-0970, [blaine.keener@dot.gov](mailto:blaine.keener@dot.gov).

#### SUPPLEMENTARY INFORMATION:

**Registration:** To register for the workshops, select the workshop you would like to attend from <http://primis.phmsa.dot.gov/meetings/>. Hotel reservations must be made by contacting the hotel directly.

**Web Casting:** Both workshops will be Web cast and will be available for one month after each workshop. The Web cast Internet address will be posted to the registration Web page prior to the workshop.

**Background:** The Pipeline Safety Improvement Act of 2002 requires operators to evaluate and, where needed, improve their pipeline safety public awareness programs. The Act also authorized the Secretary of Transportation to prescribe standards to govern these programs. Accordingly, PHMSA issued a Final Rule (70 FR 28833) on May 19, 2005, establishing requirements for pipeline operator public awareness programs. This Final Rule revised 49 CFR 192.616 and 195.440.

The revised regulations require operators of pipeline systems to implement public awareness programs in accordance with American Petroleum Institute (API) Recommended Practice (RP) 1162, *Public Awareness Programs for Pipeline Operators*, First Edition, December 2003. On June 16, 2005, PHMSA issued a Final Rule Correction Notice (70 FR 35041) to clarify that all pipeline system operators must follow the baseline and, where appropriate, the supplemental requirements of API RP

1162. Most operators must enhance their public awareness programs to meet the new requirements by June 20, 2006. Small propane and master meter operators have until June 20, 2007, to revise their programs. The announced workshops will provide additional guidance to operators as they revise their public awareness programs.

PHMSA has created a public awareness resource Web page at <http://primis.phmsa.dot.gov/comm/PublicEducation.htm>.

PHMSA and NAPSR will begin each workshop with a brief presentation on the Public Awareness Program Final Rule and the Final Rule Correction. Industry presentations will describe efforts industry has undertaken to ensure effective and efficient compliance with these rules, including guidance on how to:

- Determine the content of public awareness messages;
- Establish delivery methods for public awareness messages;
- Determine supplemental enhancements to baseline programs; and
- Evaluate public awareness program effectiveness.

PHMSA and NAPSR will discuss oversight plans. In particular, they will discuss current plans to use a central clearinghouse approach to review public awareness programs. Finally, PHMSA will respond to frequently asked questions.

PHMSA will post agendas for the workshops on its Web site (<http://phmsa.dot.gov/>) approximately two weeks prior to the workshop.

Issued in Washington, DC on October 13, 2005.

**Stacey L. Gerard,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 05-20867 Filed 10-13-05; 3:40 pm]

**BILLING CODE 4910-60-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Ex Parte No. 656 (Sub-No. 1)]

#### Investigation Into the Practices of the National Classification Committee

**AGENCY:** Surface Transportation Board.

**ACTION:** Request for comments from interested persons.

**SUMMARY:** The Board is commencing an investigation into the practices of the National Classification Committee (NCC), which administers the motor carrier classification system for its motor carrier members pursuant to an agreement approved by the Board under 49 U.S.C. 13703. The purpose of this

investigation is to develop a more thorough record regarding charges of abuse of market power by NCC, in its practices generally, and particularly with its action changing the classification of lighting products and fixtures in 2004.

**DATES:** Opening comments may be filed by persons opposing renewal of NCC's bureau agreement by November 18, 2005. NCC may file reply comments by December 8, 2005.

**ADDRESSES:** Any filing submitted in this proceeding must refer to STB Ex Parte No. 656 (Sub-No. 1) and must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's <http://www.stb.dot.gov> Web site, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. Because all comments will be posted to the Board's Web site, persons filing them with the Board need not serve them on other participants but must furnish a hard copy on request to any participant.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar (202) 565-1609. (Federal Information Relay Service for the hearing impaired: 1-800-877-8339.)

**SUPPLEMENTARY INFORMATION:** Additional information on this proceeding appears in the Board's decision in this proceeding. This decision will be published on the Board's Web site at <http://www.stb.dot.gov>, under docket number STB Ex Parte No. 656 (Sub-No. 1). Board filings, decisions, and notices are available at this site.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: October 12, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

**Vernon A. Williams,**  
Secretary.

[FR Doc. 05-20806 Filed 10-18-05; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Finance Docket No. 34758]

#### RailAmerica, Inc., et al.—Control Exemption—Point Comfort and Northern Railway Company, Rockdale, Sandow & Southern Railroad Company, The Massena Terminal Railroad Company, and Bauxite & Northern Railway Company

RailAmerica, Inc. (RailAmerica), Palm Beach Rail Holding, Inc. (Palm Beach), and RailAmerica Transportation Corp. (RTC), have filed a notice of exemption to permit RailAmerica, Palm Beach, and RTC to acquire control of Point Comfort and Northern Railway Company (PCNR), Rockdale, Sandow & Southern Railroad Company (RSSR), The Massena Terminal Railroad Company (MTRC), and Bauxite & Northern Railway Company (BXNR) by purchase of all of their stock from Alcoa, Inc. PCNR, RSSR, MTRC, and BXNR are Class III carriers. PCNR and RSSR operate in Texas, MTRC operates in New York and BXNR operates in Arkansas.

The transaction was scheduled to be consummated on or after September 30, 2005.

RailAmerica directly controls one Class II rail carrier and 26 Class III rail carriers. In addition, RailAmerica directly controls Palm Beach, which in turn directly controls RTC.

Applicants state that: (i) The rail lines involved in this transaction do not connect with any rail lines now controlled, directly or indirectly by RailAmerica; (ii) this transaction is not part of a series of anticipated transactions that would connect any of these rail lines with each other; and (iii) this transaction does not involve a Class I carrier. Therefore, this transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. See 49 CFR 1180.2(d)(2).

The purpose of this transaction is to make the efficiencies and economies of the RailAmerica structure available to PCNR, RSSR, MTRC, and BXNR.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Because the transaction involves at least one Class II and one or more Class III rail carriers, the exemption is subject to the labor protection requirements of 49 U.S.C. 11326(b).

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. 34758, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Louis E. Gitomer, Of Counsel, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>.

Decided: October 11, 2005.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

**Vernon A. Williams,**  
Secretary.

[FR Doc. 05-20807 Filed 10-18-05; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

October 13, 2005.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**Dates:** Written comments should be received on or before November 18, 2005 to be assured of consideration.

#### Internal Revenue Service (IRS)

**OMB Number:** 1545-0718.

**Type of Review:** Extension.

**Title:** Employer's Monthly Federal Tax Return.

**Form:** IRS form 941-M.

**Description:** Form 941-M is used by certain employers to report payroll taxes on a monthly rather than quarterly basis. Employers who have failed to file form 941 or who have failed to deposit taxes as required are notified by the District Director that they must file form 941-M monthly.

**Respondents:** Business or other for-profit and individuals and households.

**Estimated Total Burden Hours:** 166,320 hours.

*OMB Number:* 1545-1237.

*Type of Review:* Extension.

*Title:* REG-209831-96 (Final)

Consolidated Returns—Limitations on the Use of Certain Losses and Deductions.

*Description:* Section 1502 provides for the promulgation of regulations with respect to corporations that file consolidated income tax returns. These regulations amend the current regulations regarding the use of certain losses and deductions by such corporations.

*Respondents:* Business or other for-profit.

*Estimated Total Burden Hours:* 2,000 hours.

*OMB Number:* 1545-1467.

*Type of Review:* Extension.

*Title:* Electronic Federal Tax Payment System (EFTPS).

*Form:* IRS form 9779, 9779(SP), 9783, 9783(SP), 9787, 9787(SP), 9789, 9789(SP) and 12252.

*Description:* Enrollment is vital to the implementation of the Electronic Federal Tax Payment System (EFTPS). EFTPS is an electronic remittance processing system that the service will use to accept electronically transmitted federal tax payments. This system is a necessary outgrowth of advanced information and communication technologies.

*Respondents:* Business or other for-profit, Individuals and households and State, Local or Tribal Government.

*Estimated Total Burden Hours:* 766,613 hours.

*Clearance Officer:* Glenn P. Kirkland, (202) 622-3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Alexander T. Hunt, (202) 395-7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Michael A. Robinson,**

*Treasury PRA Clearance Officer.*

[FR Doc. 05-20906 Filed 10-18-05; 8:45 am]

**BILLING CODE 4830-01-P**



# Federal Register

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Wednesday,  
October 19, 2005

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## Part II

### Department of the Interior

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Fish and Wildlife Service

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50 CFR Part 17

**Endangered and Threatened Wildlife and  
Plants; Designation of Critical Habitat for  
the Southwestern Willow Flycatcher  
(*Empidonax traillii extimus*); Final Rule**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AT88

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the southwestern willow flycatcher (*Empidonax traillii extimus*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 48,896 hectares (ha) (120,824 acres (ac)) or 1,186 kilometers (km) (737 miles (mi)) fall within the boundaries of the critical habitat designation. The critical habitat is located in Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, and Yavapai counties in Arizona (AZ), Kern, Santa Barbara, San Bernardino, and San Diego counties in southern California (CA), Clark County in southeastern Nevada (NV), Grant, Hidalgo, Mora, Rio Arriba, Socorro, Taos, and Valencia counties in New Mexico (NM), and Washington County in Southwestern Utah (UT).

**DATES:** This rule is effective November 18, 2005.**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 AZ Ecological Services Office, U.S. Fish and Wildlife Service, 2321 West Royal Palm, Suite 103, Phoenix, AZ 85021 (telephone 602/242-0210). The final rule, final environmental analysis, final economic analysis, and maps are available via the Internet at <http://www.fws.gov/arizonaes>.**FOR FURTHER INFORMATION CONTACT:** For information about Santa Barbara County in CA, contact Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA, 93003 (telephone 805/644-1766; facsimile 805/644-3958). For information about San Bernardino or San Diego Counties in CA, contact Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011 (telephone 760/431-9440; facsimile 760/431-9624). For information about Kern County in

CA, contact Wayne White, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825 (telephone 916/414-6600; facsimile 916/414-6713). For information about Grant, Hidalgo, Mora, Rio Arriba, Socorro, Taos, or Valencia Counties in NM, contact Susan MacMullin, Field Supervisor, NM Fish and Wildlife Service Office, 2105 Osuna Road NE, Albuquerque, NM 87113 (telephone 505/346-2525; facsimile 505/346-2542). For information about Clark County in NV, contact Cynthia Martinez, Field Supervisor, Las Vegas Fish and Wildlife Service Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130 (telephone 702/515-5230; facsimile 702/515-5231). For information about Washington County in UT, contact Henry Maddux, Field Supervisor, Salt Lake City Fish and Wildlife Service Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119 (telephone 801/975-3330; facsimile 801/975-3331). For information about Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, or Yavapai Counties in AZ, contact Steve Spangle, Field Supervisor, AZ Fish and Wildlife Service Office, 2321 West Royal Palm, Suite 103, Phoenix, AZ 85021 (telephone 602/242-0210; facsimile 602/242-2513).

**SUPPLEMENTARY INFORMATION:****Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

**Role of Critical Habitat in Actual Practice of Administering and Implementing the Act**

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most

circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 466 species or 37 percent of the 1,268 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat.

We address the habitat needs of all 1,268 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club v. U.S. Fish and Wildlife Service et al.*, F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United State Fish and Wildlife Service*). In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

**Procedural and Resource Difficulties in Designating Critical Habitat**

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically

imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

### Background

Background information on the southwestern willow flycatcher can be found in our proposal of critical habitat for the southwestern willow flycatcher, published in the **Federal Register** on October 12, 2004 (69 FR 60706); the Southwestern Willow Flycatcher Recovery Plan (USFWS 2002); our previous designation of critical habitat for this species, published on July 22, 1997 (62 FR 39129), and August 20, 1997 (62 FR 44228); and the final rule listing this bird as endangered (February 27, 1995; 60 FR 10694). That information is incorporated by reference into this final rule. This rule becomes effective on the date listed under **DATES** at the beginning of this document, and replaces the July 22, 1997, critical habitat designation for this species that was set aside pursuant to a court order on May 11, 2001.

### Previous Federal Actions

Previous Federal actions for the southwestern willow flycatcher can be found in our proposal of critical habitat for the southwestern willow flycatcher published on October 12, 2004 (69 FR 60706). That information is incorporated by reference into this final rule.

### Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the southwestern willow flycatcher in the proposed rule published on October 12, 2004 (69 FR 60706). The comment period was extended on December 13, 2004 (69 FR 72161), and on March 31, 2005 (70 FR 16474), resulting in the comment period being continuously open until May 31, 2005. The comment period was re-opened once more from July 7 to July 18, 2005 (70 FR 39227). We contacted the appropriate Federal, State, and local agencies, Tribes, scientific organizations, elected officials, and other interested parties and invited them to comment on the proposed rule. We contacted these groups by letter, electronic mail, and/or post card at the time of publication of the proposed rule; at each extension of the comment period; when we announced the availability of the draft economic analysis, draft environmental assessment, and location of public hearings (70 FR 21988); and during re-opening of the comment period (70 FR 39227). Following publication of each **Federal Register** notice, we widely distributed news releases and posted them on the Internet. We also sent two newsletter updates to these groups during the rulemaking process to update them on the status of the proposal and associated documents.

In addition, we invited public comment on the proposal through the publication of legal notices in 14 regional newspapers announcing 8 public hearings, 8 public information meetings, and the availability of the draft economic analysis and draft environmental assessment. These legal notices were published in the Arizona Republic, Silver City Daily Press, Santa Fe New Mexican, Grand Junction Sentinel, The Spectrum (St George, UT), Las Vegas Review Journal, Kern Valley Sun, The Bakersfield Californian, Riverside Press-Enterprise, San Bernardino Sun, San Diego Union Tribune, Albuquerque Journal, Albuquerque Tribune, and Valley Courier (Alamosa, CO). We published legal ads prior to NEPA scoping meetings and also when we announced the documents' availability and the public hearings.

We held public hearings and NEPA informational open houses at Escondido and Chino, CA (May 2–3, 2005); Las Vegas, NV, and Lake Isabella, CA (May 9–10, 2005); and Mesa, AZ, Silver City, NM, Albuquerque, NM, and Alamosa, CO (May 16–19, 2005). We also

contacted and sent press releases to news media in Arizona, New Mexico, Southern California, Southern Nevada, Southern Utah and Southern Colorado. Additional public information meetings were held in Camp Verde, AZ (February 17, 2005—sponsored by the Verde Watershed Association); Albuquerque, NM (May 18, 2005—sponsored by Northern NM Pueblos), Bishop, CA (May 24, 2005—sponsored by Los Angeles Department of Water and Power), and Safford, AZ (July 7, 2005—sponsored by Graham County). All comments and new information received during the open comment period have been incorporated into this final rule as appropriate.

We received a total of 534 pieces of correspondence (e-mails, letters, and faxes) during the public comment periods. Of the 534 comment letters, 237 were received from individuals, 164 from government agencies, 31 from 21 different tribes, 62 from organizations, and 40 from businesses.

We received comments from each State represented in the proposed designation. We received 260 comments letters from AZ, 72 comment letters from CA, 64 from NM, 40 from CO, 8 from NV, and 5 from UT. A total of 85 were received from outside of these States or areas where critical habitat was proposed for designation. Comments from each piece of correspondence were identified, grouped by issue, and reviewed.

### Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from at least three knowledgeable individuals who have expertise with the species, with the geographic region where the subspecies occurs, and/or familiarity with the principles of conservation biology. Of the seven individuals contacted, three responded. The peer reviewers that submitted comments generally supported the proposal and provided us with comments, which are included in the summary below and incorporated into the final rule, as appropriate. We received comments from the peer reviewers during the comment period on our proposed rule.

#### Peer Review Comments

(1) *Comment:* Peer reviewers commented that we made good use of the current data, published and gray literature, expert opinion, and the Recovery Plan (USFWS 2002).

*Our Response:* We believe we have considered and applied to this designation the best available scientific

and commercial information regarding the southwestern willow flycatcher.

(2) *Comment:* One peer reviewer commented that while we described in detail the dynamic aspects of flycatcher habitat, that dynamic component is not reflected in the primary constituent elements (PCEs). Limiting critical habitat to only where vegetation currently exists undermines the dynamic component of its habitat.

*Our Response:* As we have described in the proposed rule and this final rule, the dynamic aspects of flycatcher habitat are an important component of its long-term suitability for nesting and the overall quality and presence of riparian vegetation. Because flycatchers commonly place nests in the dense riparian vegetation in early successional growth, recycling of habitat from natural disturbances (*i.e.*, flooding) is necessary to promote dense growth. Germination and growth of riparian vegetation is essential. As a consequence of river dynamics and proximity to water, the location and/or condition of its habitat can change from one season to the next due to drought, flooding, or simple growth of vegetation. Our PCEs focused on the end result of all the components that culminate in the development of flycatcher habitat. We described those components (*e.g.*, broad floodplain, surface water, fine sediments, hydrologic regime, channel-floodplain connectivity, elevated groundwater, etc.) in detail in the supporting text for the PCEs (69 FR 60712–60715). For example, we described in the *Sites for Germination and Seed Dispersal* section, the importance of appropriate floodplain conditions for the development, abundance, distribution, maintenance, and germination of flycatcher habitat, including features such as elevated groundwater, and fine/moist soils for seed germination and insect production.

As the peer reviewer mentioned, we described in great detail the dynamic aspects of flycatcher habitat location and growth in the proposed rule. However, we did not reflect the essential aspect of vegetation germination and growth (*i.e.*, succession) that should accompany these PCEs. In order to more accurately reflect our proposal and the PCEs for the southwestern willow flycatcher, we have added a “successional” component to the PCEs. The Act requires that Federal action agencies consider and consult on actions that affect the PCEs. Thus, projects that impede the regeneration and/or growth of riparian vegetation, depending on the scope of the project, could result in an adverse

affect to riparian habitat, thus requiring consultation under section 7 of the Act.

(3) *Comment:* One peer reviewer commented, with respect to the PCEs, that flycatcher habitat is more than dense vegetation. Southwestern willow flycatchers require a mosaic of riparian vegetation in a variety of developmental (*i.e.*, successional) stages.

*Our Response:* We agree. Southwestern willow flycatcher habitat consists of riparian vegetation in a variety of growth stages used for a variety of life-history needs, such as foraging, migration, and dispersal. An area with dense vegetation for nest placement is the most defined structure and is captured in PCEs 1b through 1e. By emphasizing shorter/sparser vegetation, with a mosaic not uniformly dense as small as 0.1 ha (.25 ac), PCEs 1a and 1e not only encompasses riparian plant species, but important habitats for breeding and foraging southwestern willow flycatchers, but also accounts for habitat for dispersing and migrating southwestern willow flycatchers. Also, on the basis of the issue raised in this comment, and the need for further clarification, we expanded PCE number 1 in this final rule to accurately reflect other life-history needs of the southwestern willow flycatcher (*i.e.*, migration, dispersal, foraging, and shelter) fulfilled by riparian vegetation described in our proposed and final rules. However, we note that the methodology used for designating critical habitat for the southwestern willow flycatcher was based around nesting territories, and critical habitat is not being designated solely as an area that is used for migration, dispersal, foraging, and shelter.

(4) *Comment:* Two peer reviewers remarked that extant, large populations of southwestern willow flycatchers are the most important assets for recovery. But excluding other locations with smaller populations may fall short in providing specific areas essential to the conservation of a listed species and that may require special management considerations. Management Units where recovery goals exist that are not represented in this designation were used as examples.

*Our Response:* We recognize that there are locations and areas within the geographical area occupied by the southwestern willow flycatcher that were not proposed as critical habitat. We also agree with the comment that locations with smaller breeding populations or improvement of habitat conditions in areas with no breeding populations are important. However, 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 unless the Secretary determines that all such areas are essential to the conservation of the species. As described below, the methodology used to define those areas that meet the definition of critical habitat focused on large populations that are in high connectivity to one another. Thus, while not all areas important for flycatcher recovery were proposed as critical habitat, we believe this designation defines those areas that are essential. We also acknowledge that while Recovery Plans formalize the recovery strategy for a species, they are not regulatory documents and that critical habitat can contribute to the overall recovery strategy for a listed species, but does not, by itself, achieve recovery plan goals.

We encourage Federal and State agencies, Tribal governments, municipalities, private groups, and landowners to continue conducting surveys for flycatchers, protect and strive to improve smaller populations of flycatchers, and manage flycatcher habitat to create more populations in order to reach recovery. Because an area is not designated as critical habitat, does not mean it is not important for flycatcher recovery.

(5) *Comment:* Two peer reviewers, who were involved with the development of the population viability analysis for the flycatcher, generally agreed that we interpreted the information correctly and appropriately identified 10 territories as a large population. One reviewer commented that, “the recommendation in the Recovery Plan with regard to metapopulation stability was based on a population viability analysis conducted to answer questions about the relationship between individual flycatcher sites and their relative importance to overall flycatcher population size. The emphasis in the Recovery Plan of the importance of large populations to metapopulation stability is based on the positive relationship between population size and colonization potential. The relationship however is non-linear with increase in colonization potential diminishing for growth above 10 territories and virtually disappearing for growth above 25 territories. Given this, a biologically based break point of 10 territories to distinguish between large and small populations (sites) is appropriate.”

*Our Response:* We recognize that the use of numbers and break points can be difficult, and also agree that we interpreted and used the data appropriately.

(6) *Comment:* Peer reviewers generally agreed that our application of a 29 km (18 mi) radius, determined by the between-year movements recorded from banded southwestern willow flycatchers, was appropriate to delineate the limits of essential habitat and a high degree of connectivity between collections of smaller sites. However, two peer reviewers recognize that, given more time and with additional banding, survey, and monitoring efforts, it is likely that greater distance movements would be recorded more frequently.

*Our Response:* We acknowledge the input provided by the reviewers with respect to longer movements, and note that the researchers have also provided this perspective. We understand that there are some between-year flycatcher movements that are very large (greater than 400 km/248 miles) (E. Paxton, USGS, e-mail). However, these movements, while important to understand the connection of populations, are not common. Populations located hundreds of kilometers (miles) apart would not likely be considered "highly" connected. Conversely, sites only a kilometer or so apart could hardly be considered a different site. From 1997 to 2003, Paxton (USGS, e-mail) reported 267 of 292 band recoveries occurred within 29 km (18 mi) of previous year's location. Our approach with respect to use of the results of banding data, was to determine highly connected southwestern willow flycatcher sites in order to identify essential habitat and define population connectivity. We believe our interpretation of the data for the purposes used here was appropriate.

(7) *Comment:* Peer reviewers supported using the survey results from the years 1993 to 2002 to develop this designation of critical habitat for the southwestern willow flycatcher.

*Our Response:* The information collected throughout the bird's range by the public and surveyors completing and submitting forms, and State and Federal agencies summarizing and cataloging these results in databases is invaluable. It is this quality and level of data that provides us the ability to develop the appropriate guidance documents and regulations pursuant to the Act that assist in the recovery of federally listed species such as the southwestern willow flycatcher.

(8) *Comment:* Peer reviewers generally agreed that a lateral extent boundary tracking the extent of riparian vegetation within the 100-year floodplain was appropriate.

*Our Response:* As one peer reviewer noted and we pointed out in the proposed rule, flycatcher habitat will

change its location and condition within the 100-year floodplain due to events such as flooding, drought, and vegetation growth. Therefore, a lateral extent that reasonably captures the boundaries of that dynamic habitat movement, we believe, is appropriate.

(9) *Comment:* One peer reviewer commented that rarely, flycatcher breeding habitat may persist outside of the 100-year floodplain in response to an artificial or man-made situation.

*Our Response:* We are aware that infrequently, flycatcher breeding habitat and migratory habitat may occur in unusual locations outside the floodplain. There may also be more natural situations where flycatchers use upland habitat for nesting or foraging. However, we believe we captured essential areas across the bird's range through our methodology as described in this rule. We point out, as the reviewer did, that direct or indirect adverse affects to those areas are still subject to consultation under section 7 of the Act and those birds are still protected by the prohibitions set forth in section 9 of the Act.

(10) *Comment:* One peer reviewer pointed out that there are significant anthropogenic influences throughout the bird's range that help support southwestern willow flycatcher habitat which we did not elaborate on in the proposed rule. Because of that, there may be some confusion over what constitutes a "riparian developed" area.

*Our Response:* As the peer reviewer noted, irrigation canals and/or agricultural run-off, among other things, can help develop and support flycatcher habitat. The Recovery Plan (USFWS 2002: D-15) discussed that "\* \* \* although some flycatcher breeding sites \* \* \* are relatively un-impacted by human activities, most of the riparian vegetation patches in which the flycatcher breeds are supported by various types of supplemental water including agricultural and urban run-off, treated water outflow, irrigation or diversion ditches, reservoirs, and dam outflows. Although the water provided to these habitats might be considered "artificial", they are often essential for maintaining the habitat in a suitable condition for breeding flycatchers. However, reliance on such water sources for riparian vegetation persistence may be problematic because the availability (in quantity, timing, and quality) is often subject to dramatic changes based on human use patterns; there is little guarantee that the water will be available over the long-term."

Our PCEs focused on the culmination of factors such as floodplain shape, soils, water, and groundwater elevation

that resulted in vegetation and insects appropriate for southwestern willow flycatchers when they are breeding (flycatchers that are documented attempting to nest; breeding flycatchers are always territorial flycatchers), migrating (flycatchers traveling north to breeding grounds and south to wintering grounds), dispersing (young-of-the-year and adult flycatchers typically following nesting and prior to migration), territorial (flycatchers during the breeding season that defend a territory; territorial flycatchers often nest, however un-paired territorial birds may not), and non-breeding (flycatchers during a portion of or for the entire nesting season that do not defend a territory or attempt to nest; these birds can also be referred to as floaters). Anthropogenic (*i.e.*, man-made) factors can, if conditions are right, mimic some of those factors and help support southwestern willow flycatcher habitat. Also, these same types of activities, depending on the degree, location, and extent of their influence, can degrade southwestern willow flycatcher habitat. For example, dam operations can cause water to spread out over a wider area more consistently than there would be without the dam, potentially causing the development of riparian habitat over a large area. However, depending on how that dam is operated, flycatcher habitat may or may not be able to develop due to the amount and length of time water covers the floodplain/lake bottom. Additionally, some dams divert water from a river such that water rarely returns to the river channel, thereby removing the opportunities for habitat to develop below the dam.

Our description of riparian developed areas in the lateral extent section refers to infrastructures that do not grow riparian vegetation such as agricultural fields, roads, houses, landscaped areas surrounding houses, cement pads, bridge footings, bases of utility structures, and existing gravel pits.

Overall, we recognize the value of situations where man-made activities augment, maintain, enhance, or develop southwestern willow flycatcher habitat. We also recognize the potential difficulties that may arise with respect to a landowner's desire to change practices that could result in incidental take of flycatchers (regardless of a critical habitat designation). In these instances, we seek to work with landowners and/or agencies to provide Endangered Species Act coverage through section 7 consultations, a Safe Harbor Agreement, or Habitat Conservation Plan to ensure conservation of the flycatcher and to

provide regulatory authorization and unburden a landowner.

*Comments Related to Previous Federal Actions, the Act, and Implementing Regulations*

(11) *Comment:* Many commented that our discussion concerning the value of designating critical habitat, and the procedural and resource difficulties involved should be addressed in a different forum, not in a critical habitat rule.

*Our Response:* As discussed in the sections “Designation of Critical Habitat Provides Little Additional Protection to Species,” “Role of Critical Habitat in Actual Practice of Administering and Implementing the Act,” and “Procedural and Resource Difficulties in Designating Critical Habitat” and other sections of this and other critical habitat designations, we believe that, in most cases, other conservation mechanisms provide greater incentives and conservation benefits than does the designation of critical habitat. These other mechanisms include the section 4 recovery planning process, section 6 funding to the States, section 7 consultations, the section 9 protective prohibitions of unauthorized take, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations.

(12) *Comment:* Many commenters identified particular areas that they believed should not be designated because critical habitat will unnecessarily burden the regulated public and will overload Service staff with implementation of the designation. Specifically, many private landowners with agricultural fields, water diversions, and cattle ranches throughout the bird’s range commented that this designation would cause them harm economically and delay projects through the regulatory process.

*Our Response:* Pursuant to the Act, we are statutorily required to designate critical habitat for a federally listed species if it is determined to be both prudent and determinable. We have previously made a determination that critical habitat was both prudent and determinable in our previous designation for this species (62 FR 39129, July 22, 1997). We further note that we are under court order to re-designate critical habitat for the southwestern willow flycatcher (please refer to our proposed rule (69 FR 60706, October 12, 2004) under Previous Federal Action for a discussion of the litigation history concerning this designation). Critical habitat designations do not constitute or create

a regulatory burden, by themselves, in terms of Federal laws and regulations on private landowners carrying out private activities, but in certain areas they may trigger additional State regulatory reviews and other requirements. For example, actions occurring in critical habitat in California may be subject to additional regulatory reviews under the California Environmental Quality Act and other State laws and regulations. When a private action requires Federal approval, permit, or is federally funded, the critical habitat designation may impose a Federal regulatory burden for private landowners; absent Federal approval, permits, or funding, the designation should not affect farming and ranching activities on private lands. Similarly, a Federal nexus could result in the designation affecting future land use plans, and the designation may trigger State requirements which could impact such plans. However, we note that lands included in this proposal are waterways with limited development (housing or commercial structures) potential. As explained in this rule, we are required to and have developed an economic analysis of the effects of this designation pursuant to section 4(b)(2) of the Act which considers the issues raised by the commenters.

(13) *Comment:* Some commented that designation of critical habitat for the southwestern willow flycatcher conflicts with management of native fish (Lake Mead and Horseshoe Lake), and similarly, that critical habitat for the flycatcher is inappropriate because it results in single species management.

*Our Response:* Management for southwestern willow flycatcher habitat and native fish and other riparian/aquatic species should largely be compatible. A large number of riparian species are listed as threatened or endangered, species that naturally inhabit the riparian and/or aquatic habitats to which the flycatcher is also tied (USFWS 2002: 55–60). This underscores that southwestern riparian and aquatic habitats, while supporting disproportionately high levels of biodiversity, have also been degraded at a landscape level. The presence of so many listed species within this broad ecosystem does not mean that difficult decisions must be made of managing for one listed species rather than, or at the expense of, another. Rather this situation illustrates that if riparian and aquatic ecosystems are improved to a more natural, heterogeneous conditions (recognizing that restoring rivers to completely wild conditions is not possible), many imperiled species will benefit.

We do recognize however that there may be some specific instances where situations such as water storage could result in conflicts in somewhat artificial environments such as lakes for the flycatcher and listed fish. However, these instances throughout the flycatcher’s range and this designation, we believe, are few and far between, and are site specific. The two locations brought up in comments, Lake Mead and Horseshoe Lake, are being excluded from this final rule pursuant to section 4(b)(2) of the Act.

(14) *Comment:* Some comments pointed out that our critical habitat proposal was significantly different in the amount and location of areas identified in our 1997 designation, and there was no discussion or analysis of the difference.

*Our Response:* As the comment points out, some areas designated as critical habitat in 1997 were not proposed for designation in this proposal, some of the same areas were proposed, and new areas were proposed. Our draft NEPA document described the specific streams that changed between the two proposals. Our specific methodology used to identify areas proposed as critical habitat provided our approach to critical habitat in contrast to the previous designation (which had no specific methodology). The science provided in the Recovery Plan (USFWS 2002) and our improved knowledge of the distribution and abundance of territories, use of river corridors for migration, year-to-year movements, and habitat use within territories helped guide our approach and provided support for the segments proposed. Therefore, it was largely our improved knowledge of the flycatcher and its habitat that provided the difference in areas proposed in 2004 compared to those in 1997.

(15) *Comment:* Some stated that our comment periods for the proposed rule, NEPA document, and economic analysis were inadequate to allow the public to understand and comment meaningfully on the proposed rule and should be extended.

*Our Response:* The proposed critical habitat rule for the southwestern willow flycatcher was available to the public for review and comment from October 12, 2004, to May 31, 2005, and for an additional 11 days from July 7 to July 18, 2005. The comment periods for the economic analysis and NEPA document extended from April 28, 2005, to May 31, 2005, plus the additional 11-day period in July. Therefore, there was an open comment period for 43 days for the draft economic analysis and NEPA documents, plus there was a total of just

over 70 days where the public was able to examine these documents. We believe these two public comment periods of over 8 months for the proposal, and 43 days (but over 70 days to review) for the NEPA and economic analysis, provided adequate opportunity for public comment. In addition, due to the large scope of this rule and in order to comply with our September 30, 2005, court ordered date for completion of the final rule it would not have been possible to extend the comment period beyond July 18, 2005.

(16) *Comment:* One commenter stated that the Service did not adequately notify landowners where proposed critical habitat was located. Another commenter expressed concern that the quality of the maps was poor and therefore, made it difficult for the public to adequately comment on the proposed revisions.

*Our Response:* Due to the large scope of the proposed designation it was not possible to contact each landowner. However, we issued a widely disseminated news release regarding our proposal and published legal notices in major newspapers in areas involved in the proposal. We published numerous **Federal Register** notices including a notice of intent to conduct scoping for critical habitat, the critical habitat proposal, comment period extensions, notice of availability of draft documents, notices of scoping meetings and hearings. We sent out thousands of letters and cards to State and Federal government agencies, private individuals and groups, elected officials, and tribal governments also announcing the proposal, document availability, and public meetings/hearings. We also developed and sent out press releases concurrent with **Federal Register** notice announcements. A web page of southwestern willow flycatcher critical habitat materials was maintained at Arizona Ecological Services Web Site <http://www.fws.gov/arizonaes>. Public meetings, open houses and/or hearings on the published proposal were held in the following locations: February 17, 2005—Camp Verde, AZ (sponsored by Verde Watershed Association); May 2, 2005, Escondido, CA; May 3, 2005, Chino, CA; May 9, 2005, Las Vegas, NV; May 10, 2005, Lake Isabella, CA; May 16, 2005, Mesa, AZ; May 17, 2005, Silver City, NM; May 18, 2005, Albuquerque, NM; May 19, 2005, Alamosa, CO; May 24, 2005—Bishop, CA (sponsored by Los Angeles Water and Power Authority); July 7, 2005—Safford, AZ (sponsored by Graham County). NEPA scoping meetings were held at Escondido, Chino, and Lake Isabella, CA; Phoenix,

AZ; Las Vegas, NV; Silver City and Albuquerque, NM, and Alamosa, CO in early 2004.

Maps delineating the boundaries of critical habitat were included in the October 12, 2004, proposed rule, and posted at <http://criticalhabitat.fws.gov> were specific GIS layers of the proposed critical habitat. In the proposed rule we provided contact information for eight Service Field Offices for anyone seeking assistance with the proposed critical habitat. Therefore, we believe that we made every effort possible to reach all interested parties and provide avenues for them to obtain information concerning our proposal and supporting documents.

(17) *Comment:* One commenter stated that local land use controls provide sufficient protection for the southwestern willow flycatcher.

*Our Response:* Although there are other State, local, and Federal laws that offer some protection to endangered species and their habitats (e.g., Clean Water Act and California Environmental Quality Act), none provide the same level of protection and review for threatened and endangered species as does the Act. These laws are not redundant and work in concert to provide protection for environmental resources.

(18) *Comment:* Some comments expressed that the Service failed to identify special management considerations related to a variety of lands across the subspecies range.

*Our Response:* In our proposed designation of critical habitat for the southwestern willow flycatcher that published on October 12, 2004 (69 FR 60706), we identified special management considerations shared by all stream segments proposed for southwestern willow flycatcher critical habitat. We cited threats such as loss and modification of habitat due to industrial, agricultural, and urban developments, and directed the reader to locations where the threats are described in great detail in the final listing rule (60 FR 10694, February 27, 1995), the previous critical habitat designation (62 FR 39129, July 22, 1997), and the final recovery plan (USFWS 2002). We note there are complete appendices included in the Recovery Plan (USFWS: Appendices A–O) that elaborate on rangewide southwestern willow flycatcher management issues focusing on water management, livestock grazing, recreation, cowbird parasitism, habitat restoration, exotic plants, fire management, recreation, etc.

(19) *Comment:* One comment asked whether on-going activities, such as

routine inspections, road grading, and construction adjacent to designated critical habitat are considered to appreciably decrease habitat values or quality through indirect effects.

*Our Response:* The effects of any such activities on critical habitat must be considered by the Federal agency planning to conduct such activities. The action agency determines whether their action(s) “may affect” the southwestern willow flycatcher or its primary constituent elements within the adjacent critical habitat based on their analyses. If so, the action agency would enter into consultation with us under section 7. We do not anticipate that grading existing roads or inspection of existing developed areas would likely result in an effect to critical habitat. Construction, depending on the type of activity, could have adverse effects, especially if it indirectly resulted in impacts to habitat such as groundwater pumping, channel manipulation, habitat trampling, etc.

(20) *Comment:* Several comments expressed concern that commercial activities, such as mining, mineral prospecting, agriculture, etc. would be prohibited or severely restricted by a designation of critical habitat.

*Our Response:* 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 result in the destruction or adverse modification of 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 action agency ensures that their actions do not destroy or adversely modify critical habitat. Section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, and critical habitat designation would not provide any additional protections under the Act for private or non-Federal activities. Critical habitat does not prohibit private or commercial activities from occurring. However, all parties, Federal, State, private, and tribal are unable to take (e.g., harm, harass, pursue) listed species under section 9 without the appropriate permit.

(21) *Comment:* Some comments suggested that the designation of critical habitat would prohibit mosquito abatement programs.

*Our Response:* The Service does not believe that mosquito abatement programs focused in communities and developed areas necessarily pose a risk to southwestern willow flycatchers. We

encourage cooperation and coordination from those applying chemicals to riparian areas in and around river water due to possible concerns regarding southwestern willow flycatchers, other wildlife dependent on insect populations, and water quality. We believe there are applications of mosquito abatement in riparian areas that could be compatible with southwestern willow flycatchers and reduce risk to other wildlife and people. For example, application of larvicide is typically most effective, target specific, and provides the least risk to non-target species (CDC 2003).

*Comments Related to Critical Habitat, Primary Constituent Elements, and Methodology*

(22) *Comment:* Some questioned the scientific evidence used to determine critical habitat, one describing it as junk science.

*Our Response:* In designating critical habitat for the southwestern willow flycatcher, we have used the best available scientific and commercial information, including results of numerous surveys, peer-reviewed literature, unpublished reports by scientists and biological consultants, habitat models (Hatten and Paradzick 2003; Dockens and Paradzick 2004), a stakeholder-driven Recovery Plan (USFWS 2002), and expert opinion from biologists with extensive experience studying the southwestern willow flycatcher and its habitat. Further, information provided in comments on the proposed designation and the draft economic analysis were evaluated and taken into consideration in the development of this final designation, as appropriate. The literature cited for this rule is posted at <http://www.fws.gov/arizonaes/>. Also, the proposed rule has undergone peer review, and those comments are included above.

(23) *Comment:* One commenter remarked that the information developed for the 29 km (18 mi) radius is inappropriate because it was site specific and is only a by-product of the study area.

*Our Response:* We disagree and note the support for this radius provided by peer reviewers in comment number 6. In the instance of the work conducted by U.S. Geological Survey (USGS) that provided the information on natural movements of southwestern willow flycatchers, we are familiar with no other study that has occurred for as many years (since 1997), over as large an area, and has trapped, banded, and re-sighted as many birds. The primary study area occurs along lower Tonto Creek, Roosevelt Lake, the Salt River

immediately above Roosevelt Lake, the lower San Pedro River (encompassing an area from approximately Bingham Cienega to Winkelman), and the Gila River from Dripping Springs Wash downstream past Kearny. However, the ability to detect banded flycatchers extends beyond this general study area to AZ, and to a lesser extent, across the entire bird's range.

Banding and re-sighting of birds by the USGS occurs primarily in conjunction with crews from Arizona Game and Fish Department. In some years, approximately 40 or more people are directly participating in this effort. In past years, the USGS has traveled to locations across AZ, such as Camp Verde; the Gila River near Safford; and Greer to trap, band, and/or re-locate banded southwestern willow flycatchers, and has traveled throughout the subspecies range to trap, band, collect genetic material, and possibly detect previously banded birds.

The primary study area encompasses a variety of habitats and conditions and locations over a large area. The habitat varies from free-flowing Tonto Creek and Salt River, to the regulated conservation space of Roosevelt Lake, to the regulated Gila River below Coolidge Dam, and the free-flowing San Pedro River. The work encompassed within-drainage and between-drainage movements. We believe these are diverse locations providing diverse habitats over a wide ranging study area. This large study area did not place artificial geographic limits on potential re-sightings of banded southwestern willow flycatchers.

A portion of each southwestern willow flycatcher recovery permit, issued by the Service for surveying in Region 2, identifies the importance of banded birds and the reporting requirements if one is detected. The USGS is able to respond to these reports to try and confirm these sightings. Also in support of this effort, the importance of documenting banded flycatchers is a section of each survey training session that every permitted surveyor attends. Therefore, the area and effort to determine the movements of flycatchers extends beyond the primary Roosevelt/San Pedro/Gila River area, to all survey sites across AZ, and to a lesser extent, across the bird's range. The USGS is also in contact with scientists studying flycatchers across their range, such as SWCA, Inc. and the Bureau of Reclamation along the lower Colorado River, and ongoing research on the Kern River, CA. Additionally, band recoveries are reported to the USGS Bird Banding Lab and reported back to the scientists.

We understand that the selection of a study area could limit the extent of data collected, but in this case, we do not believe it hampered our ability to make an appropriate conclusion on southwestern willow flycatcher movements to determine high connectivity between distant sites. The frequency (267 of 292) of band recoveries within 29 km (18 mi) radius; the approximate 150 km/93 mi distance between the limits of intensive monitoring (Tonto Creek inflow to Roosevelt Lake to Bingham Cienega on San Pedro River); the training, survey effort, and band recovery opportunities statewide and rangewide; and range of flycatcher movements recorded (0 km/mi to 440 km/276 mi) leads us to conclude that our application of the data collected was appropriate.

(24) *Comment:* One commented that the critical habitat designation is not consistent with the Recovery Plan's definition of occupied habitat.

*Our Response:* The Recovery Plan and survey protocols established for southwestern willow flycatchers define or describe the determination of an occupied nesting territory, but do not address, nor were intended to address, the amount or extent of area used by southwestern willow flycatchers for life-history needs, its home range, migration stopover areas, or how to delineate critical habitat. We note the Recovery Plan's (USFWS 2002: 16) conclusion that "nesting habitat is only a small portion of the larger landscape that needs to be considered when developing management plans, recovery actions, biological assessments for section 7 consultations with the USFWS, or other documents defining management areas or goals for flycatcher recovery." The critical habitat designation follows this guidance.

(25) *Comment:* One individual commented that critical habitat should be designated and recovery should be conducted on a patch-by-patch basis.

*Our Response:* Flycatcher habitat is ephemeral and its mosaic-like distribution is dynamic in nature, because riparian vegetation is prone to periodic disturbance (*i.e.*, flooding) (USFWS 2002:17). Therefore, it is not realistic to assume that any breeding habitat patch will remain suitable over the long-term, or persist in the same location (USFWS 2002:17). Designation at the patch level is technologically unfeasible because comprehensive mapping of flycatcher habitat at the patch level does not exist.

Cardinal and Paxton (2005) described the extent of area or home range used by pre-breeding, breeding, and post-nesting southwestern willow flycatchers

and dispersing young-of-the-year southwestern willow flycatchers, and discovered flycatchers using a variety of habitats extending beyond the area where a nest is placed for foraging, territory establishment, mate discovery, and staging for migration. Koronkiewicz *et al.* (2004) and McLeod *et al.* (2005) described the use of the entire length of the lower Colorado River and its tributaries by willow flycatchers during migration. Also, southwestern willow flycatchers exhibit general site fidelity, rather than specific nest fidelity, largely in response to its dynamic habitat (USFWS 2002: 22). Breeding southwestern willow flycatchers typically move from one season to the next, regularly up to 29 km (18 mi). A few birds have been detected at greater than 400 km (248 miles) from a previous year's breeding location (E. Paxton, USGS, e-mail).

(26) *Comment:* Many commented that areas identified in the Recovery Plan for recovery should be designated as critical habitat, specifically river segments not proposed in the Hassayampa/Agua Fria, Amaragosa, Santa Cruz, San Francisco, lower Rio Grande, Powell, San Juan, and Santa Clara Management Units.

*Our Response:* Recovery plans are not regulatory documents, and as a result, there are no specific protections, prohibitions, or requirements afforded a species based solely on a recovery plan. Critical habitat contributes to the overall recovery strategy for listed species, but does not by itself achieve recovery plan goals. The Act states, at section 3(5)(c), that except in particular circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. It is not the intent of the Act to designate critical habitat for every population and every documented historical location of a species. We have designated habitat that contain features essential for the conservation of the species.

While proposed critical habitat for the southwestern willow flycatcher does not mirror the exact goals identified in the Recovery Plan, it does reflect the concepts of conservation biology used by the Recovery Team (USFWS 2002: 74–77). Specifically, our methodology targeted large populations and small populations that exist in high connectivity which equaled a large population (USFWS 2002: 74–75). This approach was chosen by the Team because large populations contribute the most to metapopulation stability and those smaller sites arranged in high connectivity may provide as much or more stability (USFWS 2002: 74–75).

This choice subsequently supports important conservation principles: (1) Populations should be distributed close to each other to allow for movement, and (2) those populations should provide for stable metapopulations, gene flow, connectivity, and protection against catastrophic losses. As a result, across 6 southwestern states, our proposal included river segments in 21 of the 29 Management Units with numerical conservation goals.

(27) *Comment:* Some commenters recommended that all areas occupied by the southwestern willow flycatcher be designated as critical habitat and more unoccupied areas should be designated.

*Our Response:* 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 unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, "The Secretary shall designate as critical habitat areas outside the geographic area occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." In this instance, we have determined that all areas that can be occupied or are presently within the geographical area of the southwestern willow flycatcher are not essential for conservation of the bird.

(28) *Comment:* Some comments stated that our PCEs are too narrow in scope and omit important features such as water or moist soils.

*Our Response:* Our PCEs specifically refer to the following: (1) Riparian plant species needed for breeding, foraging, and shelter for breeding, non-breeding, territorial, migrating, and dispersing flycatchers, (2) the variety of structural vegetation features targeted for nest placement, (3) the range of more generalized riparian habitat used for migrating, foraging, dispersing, and non-breeding southwestern willow flycatchers; and (4) their food requirements. River hydrology and geomorphology, groundwater, surface water, channel-floodplain connectivity, overbank flooding, hydrologic regime, fine sediments, moist soils, microclimate, and other processes such as erosion, precipitation, drought, humidity, etc. are important for the presence, development, location, abundance, growth, regeneration, suitability, and maintenance of the vegetation and insects identified as the PCEs. We described in great detail the setting and function of these components and their role in supporting southwestern willow flycatcher habitat in the proposal (69 FR 60712–60715).

(29) *Comment:* Several comments stated that we included areas where the southwestern willow flycatcher and their PCEs were absent, such as roads, developed areas, agricultural fields, bridges, or where the bird's status is uncertain. Some requested that we examine the segments more closely, particularly in Graham County, AZ, and more finely remove areas that do not contain PCEs. Others recommended that we also exclude right-of-way corridors adjacent to bridges or transmission lines.

*Our Response:* In the development of this final rule, we have reviewed lands included in our proposal and have revised and removed areas from critical habitat that we could determine did not contain features essential to the conservation of the species or in some cases entire river segments (see Summary of Changes section below). For example, we received GIS layers and aerial photos where we could identify, confirm, and subsequently eliminate portions of agricultural fields in the Verde Valley, AZ, that fell within the designation; we removed Pinto Creek and the South Fork of the Little Colorado River in AZ; and we shortened the Big Sandy River segment in AZ, etc. We made an effort to exclude all developed areas, such as towns, housing developments, and other lands not reasonably believed to contain features essential to the conservation of the southwestern willow flycatcher.

However, due to the limitations in technology, it is not possible to remove each and every one of these developed areas. Nor does the Service have the ability to ground truth and confirm each recommended developed area for removal. As a result, even at the refined mapping scale, the maps of the final designation may still include developed areas that do not contain primary constituent elements (see *Criteria Used to Identify Critical Habitat section*). Areas that do not contain the PCEs within the boundaries of critical habitat are not considered to be critical habitat and thus, actions in those areas would not trigger consultation unless they affected adjacent critical habitat.

With regard to the request that all right-of-ways be removed from critical habitat, we are familiar with flycatcher habitat within right-of-ways adjacent to bridges or underneath transmission lines; therefore, those locations would have the PCEs.

(30A) *Comment:* We received numerous comments that the designation of critical habitat for the southwestern willow flycatcher would prevent the restoration of native habitat for the southwestern willow flycatcher-

specifically, the conversion of exotic saltcedar/tamarisk to native cottonwood-willow habitat.

*Our Response:* Our 4(b)(8) determination in this final rule, and the approach provided in the Recovery Plan (USFWS 2002: Appendix H and K), supports site-specific restoration of habitat from exotic habitat to native vegetation (or possibly mixed native/exotic) of equal or better quality for the flycatcher. The approach provided in the Recovery Plan was designed to apply to general riparian restoration in addition to those efforts specifically for the southwestern willow flycatcher. While these efforts may require section 7 consultation due to temporary adverse effects to flycatchers and their habitat, we do not believe that a project would result in adverse modification if the results of site-specific analysis and restoration culminate in equal or better habitat quality for the flycatcher.

(30B) *Comment:* Those supportive of the use of biocontrol (introduction of nonnative insects) to degrade or kill tamarisk (an exotic plant species used by flycatchers for nesting, foraging, etc.) through leaf consumption expressed: (1) Opposition to designation of flycatcher critical habitat in general; (2) disapproval of the approach to biocontrol that is discussed in the final Recovery Plan for the flycatcher; (3) asserted that tamarisk does not provide suitable nesting habitat (*i.e.*, is inadequate) for flycatchers and other wildlife; and (4) that by removing tamarisk, it will reduce the amount of water consumed by tamarisk through evapo-transpiration from those drainages, which will in turn, increase the amount of water in the river.

*Our Response:* As indicated above in our response to comment number 30, the Recovery Plan (USFWS 2002: Appendix H and K), supports site-specific restoration of exotic habitat to native vegetation (or possibly mixed native/exotic) of equal or better quality for the flycatcher. The Recovery Plan (USFWS 2002: Appendix H and K) provides guidance to determine the cause for exotic plant proliferation, long-term ecosystem solutions, measures to determine the success of restoration activities, and restoration strategies. Absent any new information on biocontrol, we continue to support the concern related to the use of biocontrols and guidance provided in the Recovery Plan regarding introduction of biocontrol into the breeding range of the flycatcher (USFWS 2002:121).

(31) *Comment:* We received comments that our approach in targeting occupied segments does not allow for

the growth of southwestern willow flycatcher populations.

*Our Response:* We disagree and believe our approach in targeting river segments with large populations and collections of small sites in high connectivity that equal a large population provides for the growth of populations within designated critical habitat and outside of critical habitat. The focus on protection of large sites with the ability to produce dispersers was a conservation strategy of the Recovery Team (USFWS 2002:75). The Recovery Team (USFWS 2002:75) described that "maintaining and augmenting existing breeding populations is a faster, easier, and more reliable way to maintain and achieve population goals \* \* \*." "Thus, maintenance and protection of existing populations is a priority." Existing sites have the opportunity to grow and produce dispersers to develop nesting areas within designated critical habitat segments, or disperse to pioneer sites outside of designated critical habitat. Because all potential or existing flycatcher habitat is not designated as critical habitat, this does not imply that non-designated areas are not important for southwestern willow flycatcher conservation.

(32) *Comment:* Some commented that our departure from our methodology in the Coastal CA Recovery Unit, specifically in the Santa Ana Management Unit, was arbitrary and capricious.

*Our Response:* We disagree and believe we described why we departed from our methodology, how we arrived at the proposed river segments, and the goals of this approach. We described in our proposal (69 FR 60716) that due to the wide diversity and conditions of habitat across the bird's range and complexity of the flycatcher's habitat needs, we believed it was necessary to consider other factors in the Coastal CA Recovery Unit. Because of the fractured and limited nature of habitat in Coastal CA Recovery Unit and due to nearly all sites being in high connectivity, we did not believe that every river segment was essential. As a result, we relied on the Recovery Plan recommendations, conservation goals, flycatcher habitat needs, and expert opinion to generate appropriate critical habitat segments. We sought to provide locations that would generate metapopulation stability by selecting the drainages with the largest amount of territories (Santa Ana, Santa Margarita, San Luis Rey, and Santa Ynez rivers) and nearby adjacent stream segments to allow for population connectivity, metapopulation stability, growth, dynamic river processes, and

protection against catastrophic losses. We identified that there were some locations that held territories that were located within our 29 km (18 mi) radius that we did not select, because when considered within the entire range of habitats and stream segments selected, these were not believed to be essential.

(33) *Comment:* One comment asserted that the proposed rule did not support the concept that small sites are important.

*Our Response:* A metapopulation, as defined for the flycatcher, is a group of spatially disjunct local southwestern willow flycatcher populations connected to each other by immigration and emigration (USFWS 2002:72). Results of the status of the southwestern willow flycatcher population persistence or metapopulation stability vary geographically (Lamberson *et al.* 2000). Metapopulations are most stable where many connected sites and/or large populations exist (USFWS 2002:72). Many connected sites would include "small" sites, or those with few territories, but are closely connected with other "small" sites. The Coastal CA, Gila, and Rio Grande Recovery Units were the most stable, because of the abundance and proximity of breeding sites (USFWS 2002:72). This critical habitat designation focused on those areas with large populations or small sites in close proximity to each other that equaled a large population. While our target was on large populations or collections of smaller sites in close proximity, we emphasize that any southwestern willow flycatcher breeding site is important due to the bird's endangered status and the need to improve metapopulation stability, gene flow, and protect against catastrophic losses throughout the bird's range.

(34) *Comment:* Some commented that maps and legal descriptions fail to indicate the width of critical habitat. On the same topic, others wrote that because we described that critical habitat would be dynamic due to river flow, the boundary would also change, and using the floodplain boundary is inappropriate because the floodplain itself is constantly changing and difficult to define.

*Our Response:* The lateral extent of critical habitat, contrary to these comments, is a defined boundary. Southwestern willow flycatcher habitat is expected to be dynamic "within" the defined lateral extent boundaries. In our proposal, we provided a web site with a link to the specific boundaries and widths of proposed critical habitat. For the final rule, the same web site can be accessed with the specific information. The web address is <http://>

*criticalhabitat.fws.gov*. We also published legal descriptions in the proposed rule and this final rule identifying the lateral extent of critical habitat.

(35) *Comment*: Some commented that the lateral extent of critical habitat is too broad. One wrote that the Service may need to establish a corridor, but it need not be this broad. To simply say that because the river may wander it should encompass the entire alluvial plain is simply overreaching.

*Our Response*: We used the best available technology (existing digital sources and expert visual interpretation of aerial photographs and satellite imagery) to map the riparian zone within river corridors in proposed areas across six States. In developing the lateral extent, we found that using existing data sources such as the 100-year floodplain was in some places, too wide. However, in other areas, the entire 100-year floodplain was appropriate because it encompassed available flycatcher habitat. However, throughout the entire designation, the lateral extent is constrained to areas either equal to or less than the 100-year floodplain. Our visual interpretation examined the boundaries of actual riparian vegetation growth in order to ensure accuracy. Therefore, these locations are the areas where rivers flow and sandy soils exist and riparian vegetation grows. We do not extend our boundaries into traditionally developed areas (commercial and housing) outside of the 100-year floodplain.

(36) *Comment*: Some commented that we inappropriately omitted important plant species used by southwestern willow flycatchers under primary constituent element number 1.

*Our Response*: In order to not be redundant, we provided great detail in the text supporting the PCEs and the known plant species used by nesting southwestern willow flycatchers (69 FR 60714) by citing the Recovery Plan (USFWS 2002: D-3, 5, and 9). In response to this comment, we have altered the language of this PCE to include those known riparian plant species important for southwestern willow flycatchers.

(37) *Comment*: Comments were provided using the results of Arizona Game and Fish Department's Mapping and Monitoring Southwestern Willow Flycatcher Breeding Habitat in Arizona: A Remote Sensing Approach (Dockens and Paradzick 2004) to demonstrate that river segments were not occupied by the flycatcher and segments did not have the PCEs.

*Our Response*: We reviewed and considered this model, but did not rely

solely on it in the development of our proposed designation due to the limitations of the results that the authors of the model described in their report. They described, "this model provides a snapshot in time of predicted suitable (nesting) habitat \* \* \* reoccurring disturbances influence the distribution and abundance of SWWF (southwestern willow flycatcher) breeding habitat in any one year." Therefore, the results of this model do not account for the dynamics of habitat over time. The authors also described other limitations in the use of the results of their model as a conservation tool. They wrote, "The model only predicts suitable nesting habitat and does not predict all habitat used by nesting SWWF. Nesting habitat is one part of a larger matrix of habitat used by SWWF during the migration and breeding season."

(38) *Comment*: Some provided comment that we should not designate critical habitat in Elephant Butte Reservoir on the Rio Grande in NM for a variety of reasons. Additionally, some commented that the power lines were an inadequate boundary for the southern boundary of the middle Rio Grande segment, because it may not be a permanent location.

*Our Response*: The conservation space of Elephant Butte Reservoir was not part of the proposal, and therefore, is not included in the critical habitat designation. The description of the southern boundary of the Middle Rio Grande segment as the power line crossing upstream of Elephant Butte Reservoir is to provide readers with an easily identifiable reference point. The mapping of critical habitat boundaries is permanent with legal descriptions for the boundaries, and mapped boundaries are found in GIS layers at <http://criticalhabitat.fws.gov>.

(39) *Comment*: Some commented that our proposal included segments of tributaries and washes not described in the text, specifically areas along the upper Rio Grande, Verde River, and San Pedro River.

*Our Response*: We agree. There were short stream segments of adjacent side drainages described in the legal descriptions and in the maps that were not described in the text of the proposal. We have re-examined the proposed segments and removed these short side drainages (creek, rivers, washes, etc.) that were not described in the text that extend beyond the stream segments proposed. We note that at the confluence of a tributary and main stem it is difficult to differentiate between habitats, therefore, we used our best

judgment on where to specifically draw the line.

(40) *Comment*: Some commented that because numerical recovery goals were reached in the San Luis Valley Management Unit and the Santa Ana Management Unit, that critical habitat should not be designated within these areas.

*Our Response*: Our methodology for critical habitat specifically targeted the locations where large populations or small populations in high connectivity that equaled a large population exist. This, we believe, adheres to the principles of conservation biology described by the Recovery Team (USFWS 2002: 74-77). The Recovery Team (USFWS 2002: 75) described that "maintaining and augmenting existing breeding populations is a faster, easier, and more reliable way to maintain and achieve population goals. \* \* \*" "Thus, maintenance and protection of existing populations is a priority."

The Santa Ana River and Santa Ana Management Unit possess a large population of flycatchers, with territories extending along the length of the Santa Ana River and along some of its tributaries. We note that the numerical goal for the Santa Ana Management Unit is 50 territories, and the most recent published information for this Management Unit cites 41 territories for 2003 (Durst *et al.* 2005). Compiled rangewide data does not yet exist for 2004. There are additional recovery goals associated with Management Units other than number of territories, such as maintenance of populations for at least 5 years, completed management plans, and habitat objectives not yet achieved (USFWS 2002: 77-81).

The San Luis Valley Management Unit, as commenters pointed out, has reached its numerical goal, reaching 73 territories in 2003 (Durst *et al.* 2005) and surpassing the goal of 50 territories. But other goals have not been met. For example, the population has not been maintained for 5 years and habitat objectives have not been reached. Please note though, that due to partnerships developed with the Service, we are excluding river segments found in the San Luis Valley Management Unit (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion of this exclusion below).

(41) *Comment*: Many commented that critical habitat should not be designated in areas such as the Middle Rio Grande due to the need to manage for fire.

*Our Response*: It is our belief that the need for fire management, especially areas such as the Middle Rio Grande or

the lower Colorado River, is consistent with the needs of the southwestern willow flycatcher, and if done appropriately, is not expected to result in adverse modification of critical habitat. The Recovery Plan (USFWS 2002: Appendix L) provides a description of changes that have lead to increased risk and occurrence of fire in riparian areas. It also describes measures to reduce occurrence of fire in riparian areas and appropriate management of areas to reduce the risk and damage of wildfire to riparian habitat and the southwestern willow flycatcher (USFWS 2002: Appendix H, K and L). Therefore, we do not believe, if conducted appropriately, that fire management is inconsistent with necessary flycatcher management activities.

(42) *Comment:* One comment remarked that the C-Spear Ranch along the San Pedro River, AZ, is not occupied by southwestern willow flycatchers.

*Our Response:* The C-Spear Ranch had a southwestern willow flycatcher territory detected in 2002 (Smith *et al.* 2003). Additionally, flycatchers are found nesting in close proximity upstream and downstream of the Ranch, and as a result, it is reasonably certain that, due to the use of riparian areas as migration corridors and dispersal areas, that non-breeding southwestern willow flycatchers visit the Ranch temporarily. Therefore, the C-Spear Ranch is within the geographical area occupied by the species. We refer to our discussion of the geographical area occupied by the southwestern willow flycatcher below for further explanation.

(43) *Comment:* We received many site-specific comments regarding the occupancy of stream segment proposed for designation, while others provided more general comments on the concept of occupancy. For example, some claimed that flycatchers do not occupy a particular stretch of the Santa Ynez River, but described that two migrants were recorded. Others remarked we improperly designated unoccupied areas, claiming that they were occupied. Some commented that our conclusion that an area we described as having “no territories” should be removed because it was not occupied. Others claimed that we determined that migration habitat was essential, but was not adequately addressed in the proposal. Additionally others indicated that we proposed areas not known to be occupied at the time of listing and provided no justification.

*Our Response:* In this final rule we provide specific language to clarify the geographic area occupied by the southwestern willow flycatcher (see

*Geographic Area Occupied by the Species* section below) (including areas used by breeding, non-breeding, migrating, foraging, dispersing, and territorial southwestern willow flycatchers), and also describe why specific areas not known to be occupied at the time of listing are essential to the conservation of the subspecies (see *Justification of Including Areas Not Known To Be Within the Geographical Area Occupied by the Species at the Time of Listing* section below). Our methodology further describes how we arrived at determining essential and more specific locations to propose and subsequently designate as critical habitat.

(44) *Comment:* One comment described that flycatcher habitat at Roosevelt Lake, AZ, is not essential for the flycatcher because it is ephemeral.

*Our Response:* We disagree. The southwestern willow flycatcher population at Roosevelt Lake, depending on the year, can be the largest population of flycatchers across the subspecies’ range. In 2004, it represented 40 percent (209/522) of all known flycatcher territories in AZ (Munzer *et al.* 2005) and 12 percent of the entire subspecies in the most recent 2003 rangewide summary report (Durst *et al.* 2005). This population not only provides territories to reach conservation goals for the Roosevelt Management Unit, but provides dispersers to other nearby Management Units, helps provide gene flow, populations stability, and protection against catastrophic losses. As a result, we believe it is a very important location and we made this conclusion in a biological opinion for raising Roosevelt Dam and for an HCP for dam operations. We described in our proposal (69 FR 60712) with respect to all flycatcher habitat that, “Because riparian vegetation is prone to periodic disturbance (e.g., flooding), flycatcher habitat is ephemeral and its distribution is dynamic in nature.”

(45) *Comment:* The proposed inclusion of reservoir bottoms as critical habitat could unnecessarily hinder reservoir operations by limiting the timing and magnitude of water elevation changes.

*Our Response:* Our 4(b)(8) determination in the proposed rule (69 FR 60732) describes how certain dam operations, like Roosevelt Dam in central AZ, are not likely to destroy or adversely modify critical habitat. Roosevelt Dam allows water to significantly increase and decrease in the conservation space depending on availability and demand. This fluctuation results in the exposure of

fine/moist soils in the flat/broad floodplain of the exposed ground and has led to the development of hundreds of hectares (acres) of flycatcher habitat. The same operating regime that creates the habitat will also inundate and cause loss of habitat; at this particular location, habitat is expected to persist on the perimeter and over time will increase and decrease (USFWS 2003). It is this very process of the ebb and flow of the conservation pool that ensures persistence of habitat over time, although habitat will vary spatially and temporally, as does flycatcher habitat in natural settings.

(46) *Comment:* We received comment with respect to portions or lengths of many stream segments. In particular, we received comments about the Big Sandy River, Pinto Creek, and South Fork of Little Colorado River, AZ; Upper Gila River (Middle Gila Box), NM; Santa Ana River below Seven Oaks Dam, Temecula Creek, Temescal Creek, Santa Ysabel River, Mill Creek, and Cuyamaca Lake, CA; and Kern River, CA. We also re-evaluated segments that were not included in the comments.

*Our Response:* In refinements made to the delineation of critical habitat in the development of this final rule, we shortened segments (Big Sandy River, Verde River, Bill Williams River, Temecula Creek, Santa Ysabel River, Mill Creek, Oak Glen Creek, and Temescal Creek), removed segments (South Fork of Little Colorado River, Pinto Creek, San Diego River, Yucaipa Creek, Wilson Creek, San Timoteo Wash, Cuyamaca Lake, Cristianitos Creek), and removed sections (Middle Gila Box and Santa Ana River Wash) of stream segments in response to comments and our re-evaluation of these areas because we determined they were not essential for the conservation of the flycatcher. These changes are also listed in the *Summary of Changes* section below, and described in more detail with justification in the appropriate *Unit Description* section below.

#### *Comments Related to Military Lands*

(47) *Comment:* One commenter stated that they oppose the designation of critical habitat for the southwestern willow flycatcher on Naval Weapons Station, Seal Beach, Detachment Fallbrook because of the existence of an Integrated Natural Resources Management Plan (INRMP), potential complications in conservation efforts with other listed species, and adverse impacts on national security.

*Our Response:* We have reviewed Detachment Fallbrook’s Fire Management Plan and INRMP. The

Secretary determined, in writing, that Detachment Fallbrook's INRMP provides a benefit to the southwestern willow flycatcher. Therefore, consistent with Public Law 108-136 (Nov. 2003): Nat. Defense Authorization Act for FY04 and Section 4(a)(3) of the Act, the Department of Defense's Detachment Fallbrook lands are exempt from critical habitat based on the adequacy of their completed and approved INRMP (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion of this exemption below).

(48) *Comment:* Some commenters recommended that the Service should exclude all essential lands on Camp Pendleton, including State lease lands because of their Integrated Natural Resource Management Plan (INRMP).

*Our Response:* We agree with the commenter and have exempted all essential areas, including State lease lands, from designated critical habitat on Camp Pendleton based on their INRMP (see *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion). Because the INRMP provides an overall conservation benefit to the southwestern willow flycatcher, these lands are exempt from critical habitat pursuant to section 4(a)(3).

(49) *Comment:* One commenter strongly supported the designation of critical habitat for the southwestern willow flycatcher within those portions of Camp Pendleton that are leased to the State (San Onofre State Beach) because this area is important for southwestern willow flycatchers.

*Our Response:* We agree with the commenter that this area is important for the conservation of the southwestern willow flycatcher. However, we have exempted these lands that are leased to the State because they are within the area covered by Camp Pendleton's INRMP (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion). Because the INRMP provides an overall conservation benefit to the southwestern willow flycatcher, these lands are exempt from critical habitat pursuant to section 4(a)(3).

#### *Comments Related to Tribal Lands*

(50) *Comment:* A variety of commenters stated that the Service needs to work more closely to meaningfully contact the Bureau of Indian Affairs and/or Tribes to fully meet the tenet of Executive Order 13175 and Secretarial Order 3206.

*Our Response:* We agree that we need to work closely with Tribes and Pueblos potentially impacted by the designation of critical habitat. We increased our efforts to work with the Tribes/Pueblos throughout the process of developing this rule. Each Tribe possibly affected by this rule was contacted when we published our notice of intent to designate critical habitat and conduct NEPA. They were also provided with the location of scoping meetings we were holding near their area. We later contacted all Tribes/Pueblos specifically requesting management plans and offering Government-to-Government consultations. We provided two newsletters updating this process and contacted each Tribe/Pueblo when the proposed rule was published. We provided all Tribes/Pueblos included in the draft proposal a Management Plan template. Representatives from local field offices in AZ, CA, and NM contacted Tribes/Pueblos in person, through telephone calls, and/or during meetings to inform them about this rule and offer help with development of management plans. In many cases, the Service provided review and assisted Tribes in the development of management plans. We contacted each Tribe/Pueblo when the draft Economic Analysis and draft Environmental Assessment were made available and informed them of the dates and locations of public hearing and open house meetings. We held an open house meeting specifically for the Pueblos in NM. We intend to keep improving our relationships with the Tribes and the Bureau of Indian Affairs following the tenets of Secretarial Order 3206 and Executive Order 13175.

#### *Comments Related to HCPs, NCCP Programs, and Other Exclusion Areas*

(51) *Comment:* Several comments were supportive of the policy that lands covered by approved and nearly completed HCPs that provide take authorization for the southwestern willow flycatcher should be excluded from critical habitat. Several of these commenters also requested that HCP exclusions should also apply to draft HCPs, lands enrolled in the NCCP program, and lands covered by the Joint Water Agency (JWA) draft plan.

*Our Response:* While we trust that jurisdictions will attempt to fulfill their commitment to complete conservation plans, this voluntary enrollment does not assure that such plans will be finalized. Protections for southwestern willow flycatcher habitat provided through participating jurisdiction's enrollment in the California's Natural Communities Conservation Program

(NCCP) processes are temporary and are not assured; such protections may be lost if the jurisdiction elects to withdraw from the NCCP program. Guidelines for the NCCP program direct habitat loss to areas with low long-term conservation potential that will not preclude the development of adequate NCCP/HCP plans and ensure that connectivity between areas of high habitat value will be maintained. We will consider excluding lands within pending HCP areas where we have received a permit application from the participants, an environmental analysis has been completed and released for public review and comment under the authority of NEPA, and we have completed a preliminary review of the HCP to ensure that the issuance of the associated incidental take permit would not result in a jeopardy or adverse modification finding for the subject species or its designated critical habitat. By completing these criteria, jurisdictions demonstrate their intent to finalize their HCP/NCCPs.

(52) *Comment:* Several comments stated that the designation of critical habitat removes incentives to participate in NCCP and HCP processes, in part because of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, delayed approval and development of the plan, and greater vulnerability to legal challenge.

*Our Response:* HCPs and NCCPs in California are one of the most important tools for reconciling land use with the conservation of listed species on non-Federal lands. We look forward to working with applicants to ensure that their plans meet the issuance criteria and that the designation of critical habitat on lands where a HCP/NCCP is in development does not delay the approval and implementation of their HCP/NCCP.

(53) *Comment:* One commenter asked whether the designation of critical habitat would be considered a changed and unforeseen circumstance with respect to the various HCPs presently approved or pending.

*Our Response:* If an area covered by a HCP was designated as critical habitat, it would cause the Service to reinitiate section 7 consultation on the issuance of that permit and evaluate critical habitat. However, approved or pending HCPs that were determined to provide a benefit to the conservation of the southwestern willow flycatcher and were excluded from the critical habitat designation would not cause a changed circumstance or reinitiation of section 7 consultation because no critical habitat would be designated in those areas (see

*Application of Sections 3(5)(A), 4(a)(3), and Exclusions Under Section 4(b)(2) of the Act*). The lone HCP where critical habitat is designated is along the Virgin River in Clark County, NV. In this instance, the Service would reinstate section 7 consultation. See comment 56 below for further explanation. However, due to our “no surprises” regulation, we would expect no additional measures required above and beyond those already established in the HCP.

(54) *Comment*: Several comments stated multiple reasons for why essential southwestern willow flycatcher habitat within several HCPs, military installations, tribes, etc. should not be excluded from critical habitat. They stated that the benefit of designating these areas as critical habitat outweighs the benefits of excluding them because exclusions are based partly on speculative and unproven future activities and critical habitat provides a greater benefit than measures contained in draft and approved conservation plans. They also stated that the Service unlawfully predetermined the benefits of excluding essential habitat because our determination was made prior to soliciting public review.

*Our Response*: In many cases, partnerships with individual landowners and conservation agreements with a variety of stakeholders can provide a much greater conservation benefit for the southwestern willow flycatcher and other species, as they offer proactive positive management actions on private lands that cannot be achieved through a critical habitat designation. We have determined that the exclusion of certain lands covered by HCPs, INRMPs, tribal management plans, and others from critical habitat designation will not result in the extinction of the southwestern willow flycatcher and that a greater conservation benefit to the flycatcher than from a critical habitat designation will be provided (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion).

However, we did not reach this conclusion prior to receipt of public comment as contended in this comment; areas excluded from the draft proposal because of their inclusion in HCPs or coverage by INRMPs were identified as such, proposed justifications offered for public review, and notice was provided that these areas might be included in the final designation based on public comments.

(55) *Comment*: One commenter asked whether areas covered under existing

section 7 permits can be excluded from critical habitat in a manner similar to areas under existing section 10 permits.

*Our Response*: Consultation under section 7 of the Act does not always result in the issuance of an incidental take permit for listed species. Federal actions where we conclude that the project is not likely to jeopardize the continued existence of a listed species are exempted from the prohibition against take of listed animal species under section 9 of the Act when the Federal agency, and any permittee comply with the terms and conditions of the incidental take statement accompanying the Service’s biological opinion. Proposed Federal projects do not necessarily commit a Federal agency to protect an area for a listed species, and in many instances the Federal agency is only permitting an action and does not have land management authority. Section 7 of the Act only commits a Federal agency to not jeopardize a species or cause adverse modification of critical habitat due to a specific project it initiates, permits, or funds. Typically HCPs provide greater conservation benefits to a covered species by assuring the long-term protection and management of a covered species and its habitat, and funding for such management is assured through the standards found in the 5-Point Policy for HCPs (64 FR 35242), the HCP No Surprises regulation (63 FR 8859), and relevant regulations governing the issuance and implementation of HCPs, such as those requiring the permittee to minimize and mitigate the taking to the maximum extent practicable. However, such assurances are typically not provided in connection with Federal projects subject to section 7 consultations which, in contrast to activities on non-Federal lands covered by HCPs, are not required to and often do not commit to long-term special management or protections. Thus, a consultation unrelated to a HCP typically does not accord the lands it covers the extensive benefits a HCP provides. However, management of some Federal lands included in this designation, such as Lake Isabella, Roosevelt Lake, and Horseshoe Lake provide protection of southwestern willow flycatcher habitat in conjunction with section 7 consultation and/or HCPs (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section). In cases where we have determined that conservation by a Federal landowner provides a substantial, long-term benefit to the species, we have excluded these Federal lands from the critical habitat

designation (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section).

(56) *Comment*: We received a few comments recommending we exclude the Virgin River as a result of the Clark County HCP.

*Our Response*: The Clark County Multiple Species Habitat Conservation Plan (MSHCP) was completed in November 2000, and the incidental take permit was issued on January 9, 2001. The southwestern willow flycatcher, as well as five additional riparian obligate species, was included in the MSHCP and permit application. The permit issued for the MSHCP covered the County, the Cities of Clark County, and Nevada Department of Transportation (permittees) for take of the covered species on all non-Federal Land with the County, up to a maximum loss of 58,681 ha (145,000 ac) of habitat within a 30-year period. However, due to the relatively large percentage of riparian habitat that occurs on non-Federal lands, the permit obligated the County to fulfill certain conditions prior to authorization of take of the avian riparian obligate species. These conditions include (1) the development of conservation management plans that identify the management and monitoring actions needed for desert riparian habitats along the Muddy River, Virgin River, and Meadow Valley Wash; and (2) the acquisition of private lands in desert riparian habitats along the Muddy River, Virgin River, and Meadow Valley Wash, with the total number and location of hectares (acres) within each watershed to be identified in the conservation management plans. These two conditions have not yet been fulfilled, as the development of the conservation management plans has not yet begun. A habitat conservation planning process has been initiated for the Virgin River, but planning efforts have not yet identified the activities that may impact the species, or the conservation actions that would be required to offset those impacts. Until these conditions are met, the permittees are not authorized for take of the flycatcher, or the other covered riparian obligate species in the event they are listed under the Act. Given the lack of progress the permittees have demonstrated in fulfilling these conditions, we have determined that the status of the conservation planning for the Virgin River falls short of meeting the criteria for exclusion under section 4(b)(2) of the Act.

*Comments Related to Economic Impacts and Analysis; Other Relevant Impacts*

Policy Issues

(57) *Comment:* Several commenters state that the economic analysis should incorporate the recent ruling in the Ninth Circuit Court of Appeals, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*.

*Our Response:* The economic analysis acknowledges that a recent Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. The Service is currently reviewing the decision to determine what effect it (and to a limited extent *Center for Biological Diversity v. Bureau of Land Management* (Case No. C-03-2509-SI, N.D. Cal.)) may have on the outcome of consultations pursuant to section 7 of the Act.

(58) *Comment:* Several comments stated that the economic analysis fails to use the proper baseline for analysis as determined in *New Mexico Cattlegrowers' Association* (10th Circuit Court of Appeals). Two comments stated that the economic analysis should differentiate between impacts of listing and impacts of critical habitat designation. Another comment stated that the economic analysis should describe the costs of designation above and beyond those costs associated with past and future conservation activities, including listing, ongoing activities, and potential future conservation costs.

*Our Response:* The economic analysis estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (*i.e.*, the cost estimates are fully co-extensive). In 2001, the U.S. 10th Circuit Court of Appeals instructed the Service to conduct a full analysis of all of the economic impacts of proposed critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes (*New Mexico Cattle Growers Ass'n v. USFWS*, 248 F.3d 1277 (10th Cir. 2001)). The economic analysis complies with direction from the U.S. 10th Circuit Court of Appeals.

This analysis identifies those economic activities believed to most likely threaten the flycatcher and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. In instances where critical habitat is being proposed after a species is listed, some future impacts may be

unavoidable, regardless of the final designation and exclusions under 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be coextensive with the designation.

(59) *Comment:* One comment stated that the economic analysis did not identify the criteria or analytical methods by which the Secretary will make the decision on where benefits of including areas in the critical habitat designation for flycatcher outweigh the benefits of excluding areas from the critical habitat designation. One comment stated that the economic analysis failed to determine whether benefits of inclusion outweigh the benefits of exclusion within each flycatcher management unit. Another comment specifically noted that the economic analysis does not identify biological terms that are used to balance the benefits and costs of designation. Finally, one comment stated that the cost-effectiveness approach is the appropriate method to use in weighing the costs and benefits of critical habitat designation, and that the economic analysis does not use this method.

*Our Response:* In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is to designate areas in need of special management that contain the features that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from "just knowing" that a particular listed species' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both

positive and negative and by definition, are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, however, the economic analysis did not identify any credible estimates or measures of positive economic impacts that could offset some of the negative economic impacts analyzed earlier in this analysis.

Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. OMB's Circular A-4 distinguishes two types of economic benefits: Direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose of the rulemaking. In the context of critical habitat, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation and recovery of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

We have accordingly considered, in evaluating the benefits of excluding versus including specific area, the biological benefits that may occur to a species from designation (see below, Exclusions Under section 4(b)(2) of the Act), but these biological benefits are not addressed in the economic analysis.

*General Issues*

(60) *Comment:* One comment stated that the economic analysis should

combine efficiency and distributional impacts for each management unit.

*Our Response:* As stated in Section 1 of the economic analysis, efficiency and distributional economic impacts are fundamentally different measurements of economic impact, and as such, cannot be added or directly compared. See section 1 of the economic analysis for a more detailed discussion of the distinctions between these terms.

(61) *Comment:* One comment stated that the economic analysis should consider the cumulative effects of flycatcher habitat and other existing and proposed critical habitat designations in Southern California.

*Our Response:* The economic analysis quantifies economic effects associated with flycatcher conservation activities. This information is intended to assist the Service in determining whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas. It is therefore beyond the scope of the economic analysis to evaluate the cumulative effects of all previous designations.

(62) *Comment:* Two comments stated that the economic analysis underestimates the length of delay on projects that are subject to Section 7 consultations (e.g. water facility maintenance, fire management activities).

*Our Response:* The revised analysis includes a discussion of the potential impacts of delay in Section 4 (Water Management), Section 6 (Development) and Section 10 (Other Activities).

#### Mining Issues

(63) *Comment:* Several comments stated that the economic analysis failed to consider potential economic impacts of the flycatcher critical habitat designation on mining activities in the southwestern United States.

*Our Response:* The draft economic analysis did not discuss potential impacts to mining activities. Based on information provided during the public comment period from mining interests, the economic analysis has been revised to include a chapter that considers potential impacts to the mining industry.

#### Water Issues

(64) *Comment:* At least two public comments question how flycatcher critical habitat designation may impact existing state and Federal water law.

*Our Response:* The Recovery Plan recognizes a number of legal constraints on the Service's or other action agencies ability to modify water management practices to protect for the flycatcher,

including water rights, delivery contracts, legal commitments to power generation, and requirements for flood control. These types of arrangements exist on many of the rivers included in critical habitat designation areas.

However, where legal precedents exist, no changes to water law are anticipated to result from this rulemaking. For example, currently there is no legal requirement for USBR to maintain water levels below flycatcher habitat at the lake created by Hoover Dam [Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998)]. The Department of the Interior has interpreted the U.S. Supreme Court's injunction [*Arizona v. California*, 376 U.S. 340 (1964)] as precluding the release of water from Lake Mead for the sole purpose of protecting flycatcher habitat. Congress has also enacted legislation to prohibit USBR from releasing San Juan/Chama water for flycatcher management purposes at Heron Reservoir.

(65) *Comment:* One comment questioned a number of water price and supply assumptions in the economic analysis. First, the comment stated that the economic analysis makes water price assumptions that are inappropriate given the large water supply potentially impacted by the critical habitat designation, the probable difference in the marginal value of water across different scenarios, and the variation in water prices over time. This comment also stated that the economic analysis makes water supply assumptions that fail to consider the costs of alternate water supply sources, barriers to water reallocation and marketing, and water supply conditions in relatively dry years.

*Our Response:* Scenario 2 provides context for understanding the magnitude of impacts that could occur if operators are forced to alter water management in order to avoid adverse modification of habitat. As stated in Section 4 of the economic analysis, considerable uncertainty surrounds Scenario 2 and the probability of various outcomes is unknown. As discussed in the economic analysis, detailed assessment of the economic impacts on facilities and end users would require detailed system-wide hydrologic and economic models. That is, the analysis would require models that predict changes in water allocation under alternative water management regimes and the behavioral responses of various water users when faced with potential shortfalls and/or higher water prices. Such models do not exist for most areas potentially affected by flycatcher conservation activities. As a

result, this analysis utilizes best available data and simplifying assumptions to provide estimates that bound the magnitude of potential impacts that could result from alterations to water operations.

Given the geographic and hydrological variation across systems, it is unlikely that all facilities will lose storage capacity in the same year. Furthermore, the economic analysis assumes that flycatcher conservation measures will not affect regional water markets or prices because the potential storage capacity lost represents a very small component of the total available storage capacity. Refer to Exhibits 4-3, 4-7, and Appendix exhibits A-2, A-3 and A-4.

This analysis conservatively assumes that any spilled water is lost from consumptive (i.e., municipal, industrial, commercial, etc.) use and develops an approximate estimate of related economic losses using information on water rights prices and other replacement costs. This analysis assumes that these costs are a reasonable proxy for the value of water in conservation storage, and the value lost when storage is limited. Note that the market value of consumptive water rights is dependent on a variety of considerations, including priority and point of diversion, among other factors. If the actual cost of water is higher (or lower) than the reported cost, the economic impacts will also be higher (or lower).

The economic analysis estimates costs to water storage facilities based on average conditions. In reality, some years are wetter or dryer than others. Dry-year constraints may create an additional economic burden for water managers. The revised economic analysis presents information on the likely amount of spill that would be needed in the 50th and 95th percentile driest water years, to provide a sense of the sensitivity of the results presented.

(66) *Comment:* Several comments highlight water supply and flood control structures and projects that are not considered in the economic analysis, and for which they claim potential impacts are possible pursuant to critical habitat designation for flycatcher. In addition, two comments state that the economic analysis failed to consider the potential loss of the ability to divert surface and groundwater in the Little Colorado MU and the Upper Gila MUs.

*Our Response:* The revised economic analysis incorporates a discussion of potential economic impacts on water users in the Little Colorado, Upper Gila MUs, and other concerned areas for

which public comments were submitted.

Section 4 of the economic analysis provides an analysis of economic impacts associated with flycatcher conservation activities related to water management activities, including dam operations, hydropower production, water diversion, groundwater pumping, river channelization, and bank stabilization. As discussed in Section 4, detailed assessment of the economic impacts on facilities and end users would require detailed system-wide hydrologic and economic models. This analysis utilizes best available data and simplifying assumptions to provide estimates that bound the magnitude of potential impacts that could result from alterations to water operations in proposed critical habitat designation areas.

(67) *Comment:* One commenter states that the assumption that, in the case of Horseshoe Reservoir, reservoir managers will adapt water management to avoid water losses caused by a reduction in reservoir capacity over time is unrealistic because the storage capacity of the reservoirs is small in relation to the flow of the river system, and thus water losses would occur. Second, the commenter states that the economic analysis inappropriately downplays the loss of water resulting from flycatcher critical habitat designation by stating that some windfall use by downstream users may occur. Another comment states that the assumption made in the economic analysis related to Scenario 2 do not consider the recent drought and current low water levels, or ongoing population growth and resulting increases in water demand.

*Our Response:* The ability of storage facilities to adapt water management practices is unique for each facility based on hydrology, water management system, and current legal water agreements. Some facilities may be able to adapt management practice to reduce water losses due to flycatcher conservation measures, while others may not. As stated in Section 4 of the economic analysis, analysis does not subtract any costs associated with “windfall” downstream use of water following spillage—that is, this analysis assumes that all water released will be not be used by downstream users (*i.e.*, lost to the ocean).

However, we agree that flycatcher conservation measures may impose additional costs and changes on top of significant ongoing trends, including long-term drought, in the Southwest. The economic analysis notes in Section 4 that flycatcher conservation measures may accelerate and compound ongoing

trends in natural resource use in the Southwest, including increasing population growth and long-term droughts.

#### *Tribal Issues*

(68) *Comment:* Numerous comments state that the economic analysis does not address the full suite of impacts to affected Tribes. Two comments state that estimates included in the economic analysis grossly understate the real economic costs to Tribal governments of critical habitat designation on Tribal lands. Another comment states that administrative costs to Tribes are not adequately discussed in the economic analysis. Three Tribes were concerned that they were overlooked in the economic analysis: Taos Pueblo, the Pueblo of Isleta, and the Santo Domingo Tribe.

*Our Response:* Section 7 of the economic analysis presents all available information regarding potential flycatcher conservation activities that have affected or which may affect the fifteen Tribes whose lands fall within proposed critical habitat designation areas. Attempts were made to contact each Tribe with lands in proposed critical habitat designation, as well as a number of other Tribes outside of critical habitat designation that expressed concern about potential impacts on them. Exhibit 7–3 summarizes potential impacts on the Tribes, and highlights where costs to the Tribes are unknown. Section 7 of the economic analysis also notes that publicly available information was not always available to fully assess the potential costs of flycatcher conservation activities. The revised economic analysis now includes a statement that “in many cases, information was not available for costs of flycatcher conservation activities [to Tribes], such as species surveys. In addition, administrative costs [to Tribes] of compliance with the Act are often not known. Overall, the absence of cost information related to the potential impacts of flycatcher conservation on Tribal lands results in a probable underestimate of future costs to Tribal entities in this section.”

Known potential administrative costs are included Section 3 of this analysis. However, some additional administrative costs of compliance with ESA are unknown and therefore not included in estimates. To the extent that these unknown administrative costs relate to southwestern willow flycatcher, administrative costs estimates for the Tribes may be underestimated. Section 7 acknowledges this limitation.

The economic analysis did not include Taos Pueblo or Santo Domingo in its analysis of potential economic impacts to tribal activities since they fall outside of critical habitat designation areas. The economic analysis discussed potential impacts on the Pueblo of Isleta in Section 7 of the economic analysis. However, public comments submitted by the Tribe expressed concerns related to economic, cultural, and treaty impacts of critical habitat designation. Additional information provided in these comments were incorporated into the economic analysis.

#### *Grazing Issues*

(69) *Comment:* Numerous comments state that the economic analysis underestimates impacts of flycatcher critical habitat designation to grazing and does not consider the impact that even a small reduction in AUMs may have on ranching operations.

*Our Response:* Section 5 of the economic analysis examines potential impacts on grazing activities that include exclusion or removal of livestock grazing from riparian areas year-round or during the flycatcher breeding season. In many cases, the estimates include impacts that may be associated with other riparian habitat initiatives and other endangered species. Estimates also include potential impacts on private lands grazing, although the Service questions the assumption that private grazing will be affected in the future. The analysis includes a range that includes the potential for all private grazing to be removed from the riparian area due to flycatcher conservation activities. As a result, Section 5 acknowledges that the loss of 89,000 AUMs is conservative, that is, estimates are more likely to overstate than understate impacts due to flycatcher.

Section 5 of the revised economic analysis now recognizes the possibility that small reductions in AUMs could affect the viability of some ranching operations. The analysis now places impacts that could occur in the context of the economics of ranching, and points out that “ranchers often have debts to repay that rely on the current number of AUMs grazed. NMCA states that even small cuts in the number of AUMs grazed by these ranchers can affect the financial stability of those operations.”

(70) *Comment:* One commenter states that estimated impacts on grazing activities are overstated. The commenter states that the economic analysis inappropriately assigns grazing impacts to flycatcher, as opposed to other species or causes.

*Our Response:* Section 5.2.2 of the economic analysis discusses factors that affect the number of permitted and authorized AUMs approved by USFS and BLM for a given Federal grazing allotment. These factors include the presence of endangered species, tree encroachment, fire suppression, forage availability, and forage by other ungulates. The analysis states that “on a particular allotment containing flycatcher habitat, reductions to authorized or permitted AUMs made by USFS or BLM may be: (1) Directly related to flycatcher conservation; (2) indirectly related to flycatcher conservation; (3) not related to flycatcher conservation at all; or (4) resulting from a combination of factors.” The analysis then explains each scenario in detail, and suggests that in most cases, reductions in AUMs result from a combination of factors. The analysis also concludes that because of the spatial and temporal overlap of past reductions in AUMs with flycatcher habitat, it is difficult to separate flycatcher-related causes from other causes of changes that occur in flycatcher critical habitat designation areas. Section 5 acknowledges that the loss of 89,000 AUMs is conservative, that is, estimates are more likely to overstate than understate impacts due to flycatcher.

(71) *Comment:* One comment states that the economic analysis does not consider impacts to ranching activities outside of flycatcher critical habitat designation.

*Our Response:* Ranching activities located outside of the proposed critical habitat designation were not expected to experience direct economic impacts related to the designation, and therefore these activities are not specifically addressed in the analysis. However, to the extent that there are regional economic impacts related to restrictions on grazing activities, these have been captured in the regional economic impact analysis of grazing. This analysis is presented in Section 5 of the final economic analysis.

#### *Transportation Issues*

(72) *Comment:* One comment states that the economic analysis underestimates impacts of flycatcher critical habitat designation on future transportation projects based on the uncertainty associated with these projects; however, the economic analysis should use caveats and assumptions as it does with other activities to estimate future transportation projects. One comment states that the economic analysis does not take into account economic impacts

on the Foothill/Eastern Transportation Corridor Agency and the Corridor.

*Our Response:* The economic analysis analyzes potential impacts transportation activities in Section 8. Conversations with state transportation agency staff, identified 11 transportation projects in NV (1), NM (3), and AZ (7) expected to occur in critical habitat designation areas in the future. No projects were identified in critical habitat designation areas by UT Department of Transportation or the CO Department of Transportation. Using the CA Transportation Investment System, the economic analysis identified 8.4 km (5.2 mi) of highway construction and improvements expected to occur within critical habitat designation areas in the future in CA. The economic analysis relied on the expertise of state transportation agencies to identify future projects that occur within critical habitat designation areas. In addition, major road projects are generally planned and constructed over a very long time horizon. As such, it is reasonable to assume that state transportation agencies will have the best information available regarding future transportation projects.

The economic analysis did not take into account economic impacts to the Foothill/Eastern Transportation Corridor Agency (TCA). Analysis of this project has been added in Section 8.2.1. based on public comments submitted by TCA.

#### *Development Issues*

(73) *Comment:* One comment states that the economic analysis mistakenly assumes that there is no projected development in proposed critical habitat designation in San Diego County.

*Our Response:* As described in section 6 of this analysis, floodplain development is assumed to be most probable in those census tracts that are densely populated and largely devoid of opportunities for new development (thereby necessitating development within the floodplain). Specifically, in CA, those census tracts intersecting flycatcher habitat that are both the most densely populated (*i.e.*, the densest 25 percent of tracts intersecting habitat) and least developable (*i.e.*, the least developable 25 percent of tracts intersecting habitat) are isolated for further analysis. This included the census tract discussed in the comment.

To analyze development projections, GIS maps of the proposed critical habitat designation boundaries were correlated with census tract level data provided by the San Diego Association of Governments (SANDAG). SANDAG is

a quasi-governmental agency responsible for providing official demographic projections for San Diego County. The SANDAG land use projections are used to identify undeveloped acres slated for residential, retail, office, or industrial development. SANDAG provides acreage estimates for these land use categories. At this time, SANDAG does not project growth in proposed critical habitat designation areas in San Diego County.

(74) *Comment:* Two comments raised concerns concerning impacts of flycatcher critical habitat designation on the regional real estate market. One comment states that the DEA incorrectly concludes that critical habitat designation will not have a significant impact on the regional real estate market. Another comment states that the DEA makes unrealistic conclusions about how the critical habitat designation would affect residential real estate downstream of Seven Oaks Dam and along the San Ana River’s tributaries.

*Our Response:* To determine the regional significance of flycatcher conservation activities on the real estate market, the economic analysis compares the reduction in acres slated for development to market-wide demand and supply conditions. Ideally, land set-aside requirements should be compared with the total supply of developable acreage in the region. However, accurate estimates of total regional development potential were not readily available. Consequently, projected acres of growth through 2023 in the three Counties where floodplain development is most probable are used as proxies for regional market supply. Total land development potential is based on SCAG and SANDAG forecasts.

As discussed in Section 10 of the analysis, impacts are estimated to be 0.04 percent of projected real estate supply. Thus, the set-aside land associated with flycatcher protection is not expected to affect the dynamics of the regional real estate market. Hence, housing prices in each County are not likely to be affected. However, regulated landowners will bear the cost associated with flycatcher protection, in the form of lower property values. As this analysis assumes that the total supply of housing will be met, some projects may be distributed to other locations while others may proceed with higher flycatcher protection costs and lower land values. No broader effects on regional real estate prices are anticipated.

### Fire Management Issues

(75) *Comment:* Two comments state that the economic analysis does not consider economic impacts to fire management activities in certain areas. One comment states that the economic analysis failed to consider impacts to the Rio Grande Valley State Park, and specifically the potential impacts to fire management within the park that is undertaken to prevent damage to adjacent residential and commercial areas. The other comment states that the economic analysis does not address potential wildland fire prevention and suppression costs for Arizona counties, including Graham County.

*Our Response:* Section 10 of the revised economic analysis states that fire was probably uncommon in flycatcher habitat. However, fire in some riparian zones (primarily low and mid-elevation areas) has increased as a result of flood suppression, dewatering of rivers, and other manmade effects. These changes to the environment have led to the proliferation of more flammable exotic vegetation such as tamarisk, giant reed, and red brome. Ignition sources have also increased due to greater use of riparian areas from recreation and urbanization.

In areas that are in relatively close proximity to large urban populations, fire management, including exotic species removal and fuels management, is a critical component of urban planning efforts. Thus, local officials in areas proximal to urban areas have understandable concerns with about ongoing and future plans for these activities, particularly exotic species removal (most particularly, tamarisk control). The revised economic analysis includes an expanded discussion of potential impacts on fire management activities.

### Agricultural Issues

(76) *Comment:* Three comments state that the economic analysis does not adequately address the impact of flycatcher critical habitat designation on agricultural activities. One of these comments states that the economic analysis underestimates future consultation requirements because it does not consider the Federal nexuses that are present.

*Our Response:* Section 5 of the economic analysis describes and quantifies potential impacts on ranching activities. Regarding potential impacts on crop agriculture, these are addressed as part of Scenario 2 for water management activities in Section 4. Because several water districts potentially affected under Scenario 2 for

water management provide water for agricultural purposes, reductions in available water to these districts could result in corresponding reductions in irrigated crop acres for end users, if farmers are unable to switch to less water-intensive crops or find substitute water sources. Vail Dam, Isabella Dam, Horseshoe Dam, Roosevelt Dam, and the Lower Colorado systems dams all serve a significant number of agricultural users and are projected to lose water under Scenario 2. As detailed in Exhibit A–4, estimated water losses to districts supplying agricultural end users may reduce irrigated agricultural acreage in the affected counties by up to 12,520 ha (30,938 ac), assuming all reservoir facilities are affected. A cropland reduction of that magnitude would represent approximately 1.05 percent of total irrigated and non-irrigated cropland in the affected areas. Additional detail is provided in Section 4 and Appendix A of the economic analysis.

### Small Business Issues

(77) *Comment:* Numerous comments state that the economic analysis did not adequately estimate impacts of flycatcher critical habitat designation on small businesses. One comment states that the economic analysis does not quantify county-level impacts of AUM reductions, such as lost tax revenues. The other comment states that the economic analysis does not, and should, provide an economic and social analysis of how flycatcher critical habitat designation may impact each rural locality in the designation.

*Our Response:* Appendix A considers the extent to which the analytic results presented in the main body of the economic analysis reflect potential future impacts to small businesses. Appendix A, Small Business Impacts, has been revised to provide additional details about the estimated location of potential impacts by county as well as by water user, where appropriate. The revised economic analysis presents impacts on grazing activities organized by county and on a per ranch basis in Appendix A.

### Recreational Issues

(78) *Comment:* One commenter states that a late spring-early summer drawdown under Scenario 2 could affect recreation, including sport fisheries, at several reservoirs. One comment states that the economic analysis does not provide dollar values for the impacts of forest service closures.

*Our Response:* Facility managers were consulted as to the potential for

flycatcher conservation activities to impact recreational activities at affected reservoirs. To the extent that recreational impacts were identified, recreational impacts are presented in Chapter 10 of the final economic analysis. Section 10 of the revised economic analysis discusses the impacts of closures that have occurred for flycatchers, and quantifies these estimates where possible. Restrictions (primarily already in place) on certain uses of recreation areas in Tonto NF, AZ; San Bernardino NF, CA; and at Lake Isabella, CA, are discussed in detail in Section 10 of the revised economic analysis.

Several studies have investigated how recreational impacts could change with varying reservoir levels (Cordell, K. H. and J. C. Bergstrom. 1993. Comparison of Recreation Use Values Among Alternative Reservoir Water Level Management Scenarios. *Water Resources Research*. 29 (2): 247–258; Huszar *et al.* 1999. Recreational damages from reservoir storage level changes. *Water Resources Research*) However, these studies were case specific, and were conducted in geographic areas distinct from those affected by potential flycatcher conservation activities. Conducting a site specific study of the impact of alternative water management regimes on recreation is beyond the scope of this analysis.

### Summary of Changes From the Proposed Rule

In developing the final designation of critical habitat for the southwestern willow flycatcher, we reviewed public comments received on the proposed designation of critical habitat published on October 12, 2004; the draft economic analysis and draft environmental assessment published on April 28, 2005 (70 FR 21988); conducted further evaluation of lands proposed as critical habitat; refined our mapping methodologies; excluded additional habitat containing features essential to the conservation of the subspecies from the final designation pursuant to section 4(b)(2) of the Act; and exempted those military lands that met the criteria for statutory exemptions pursuant to section 4(a)(3) of the Act. Table 1, included at the end of this section, outlines changes in area for each subunit. Specifically, we are making the following changes to the final rule from the proposed rule published on October 12, 2004:

(1) In AZ, in response to comments, we made further site visits and/or re-evaluated information through habitat models, maps, and reports, and made

changes to Pinto Creek, South Fork Little Colorado River, Big Sandy River, lower Verde River, and Bill Williams River. Further site visits, surveys, and evaluation occurred for Pinto Creek, the South Fork of the Little Colorado River, and lower Verde River segment below Bartlett Dam that resulted in determining that these segments were not essential for inclusion in critical habitat, and therefore we removed these entire segments. We examined habitat models and further analyzed the quality of habitat that resulted in shortening the Big Sandy River segment to more accurately reflect habitat with essential features. Through site-specific habitat evaluation reports, we re-examined the quality of habitat upstream from the Bill Williams National Wildlife Refuge at Planet Ranch, and determined that it contained features important, but not essential, to the conservation of the subspecies, and removed it from critical habitat. More discussion on these segments can be found in the appropriate Unit Descriptions below.

(2) In NV, we identified in our proposal the Muddy River within the boundaries of the Overton State Wildlife Area, as an essential location we may consider for exclusion as a result of assurances, protections, and conservation benefit the flycatcher and its habitat receive from the State of Nevada's ownership and management of the property. We did not identify in the text of the proposed rule that a segment of the Virgin River containing features essential to the conservation of the subspecies also lies within the boundaries of the Overton Wildlife Area. Our maps did however identify this essential segment of the Virgin River within the boundaries of the Overton Wildlife Area. We considered both the Muddy and Virgin River segments within the Overton Wildlife Area for exclusion, and subsequently, as described below under *Relationship of Critical Habitat to State and Federal Wildlife Areas—Exclusions Under Section 4(b)(2) of the Act*, have excluded these river segments from critical habitat.

(3) In NV, we identified a 1.2 km (2 mi) (approximately 158 ha/390 ac) segment of the Virgin River located between two distinct conservation lands on the Overton Wildlife Area, NV. As a result of this segment being surrounded by conservation lands, being detached from a considerably larger designated segment, being a very small piece of an overall large segment, and because a significant portion was purchased for conservation of wildlife, it is our determination that this segment is no longer essential for critical habitat and

was removed from consideration. More discussion on this segment can be found in the appropriate Unit Description below.

(4) In CA, in response to comments and further evaluation, we identify below entire proposed stream segments and portions of segments that we are not including in the final designation. We are not including Cuyamaca Lake in the final designation due to our re-evaluation that the habitat included in the proposed designation provided minimal habitat for flycatchers, metapopulation stability, or prevention against catastrophic loss. Due to Forest Service, Bureau of Land Management, and Southern California Edison comments and our re-evaluation of river segments, portions of the Santa Ana River (below Seven Oaks Dam), Temescal Creek, Temecula Creek, Santa Ysabel River, Oak Glen Creek, and Mill Creek were determined to not be essential and removed. Due to these same comments and our further scrutiny, remaining segments of the San Diego River, San Timoteo Wash, Yucaipa Creek, and Wilson Creek were determined to not be essential which left no remaining designated habitat on those streams. The re-evaluation of these segments resulted in us more accurately reflecting essential habitat in this final rule. We also re-evaluated and removed the segment of Cristianitos Creek proposed upstream of Marine Corps Base, Camp Pendleton, because we determined it was not essential due to it unlikely being able to support flycatcher nesting habitat. More discussion on these segments can be found in the appropriate Unit Descriptions below.

(5) In NM, in response to comments and further evaluation of maps, we removed the middle Gila Box, located primarily on the Gila National Forest upstream of Red Rock and downstream of the Gila Bird Area, because it does not have, nor can it support abundant vegetation and is unlikely to be able to support flycatcher nesting and migration habitat as a result of it being a narrow canyon. Also, four small pieces of vegetation surrounding the San Juan, Santa Clara, and San Ildefonso Pueblos are being removed from this designation. More discussion on this segment can be found in the appropriate Unit Description below.

(6) Although we attempted to remove as many developed areas (areas that have no conservation value as southwestern willow flycatcher habitat) as possible before publishing the proposed rule, we were not able to eliminate all developed areas. Since publication of the proposed rule and the

receipt of more accurate mapping data and information, we were able to further refine the designation, which has resulted in a more precise delineation of essential habitat containing one or more of the primary constituent elements. This resulted in a minor reduction from the total area published in the proposed rule. However, it is not possible to remove each and every one of these developed areas even at the refined mapping scale used; therefore, the maps of the designation may contain areas that do not contain primary constituent elements. Lands within the boundaries of the designation that do not contain one or more of the PCEs are not considered to be critical habitat for the flycatcher.

(7) While mapping the lateral extent of critical habitat, some side drainages, tributaries, and/or washes were included in the Little Colorado, Middle Colorado, Verde, Middle Gila/San Pedro, Upper Gila Management Unit, and Upper Rio Grande Management Units that extend beyond the rivers we described in the proposal. These pieces of habitat sometimes extended about 2 km (3 mi) along a tributary or wash not described in the proposal. We did not describe these segments in the text of the proposed rule. As a result, to the best of our ability, we have truncated these segments, so only those habitats on the rivers described are included in the final designation. We defer to the specific mapped boundaries of the final designation (<http://criticalhabitat.fws.gov>). These areas extending up side drainages, tributaries, and/or washes are not intended to be included as critical habitat and are removed from the designation, leading to a minor reduction in the total area published in the proposed rule.

(8) Due to peer review, comments, and re-evaluation of the PCEs, we re-organized and revised PCE numbers 1 through 5 (as PCE 1, 1a, 1b, 1c, 1d, and 1e) to more accurately reflect the content of our proposal by describing flycatcher uses of riparian habitat, the importance of a dynamic system and succession (*i.e.*, germination and growth of riparian plants), and identifying specific riparian plant species. See the *Primary Constituent Elements* section below for specific language.

(9) To more accurately reflect our proposal, we updated PCE number 6 to include the order Odonata (dragonflies) to the list of flying insects consumed by southwestern willow flycatchers and re-numbered PCE number 6 as PCE number 2. See the *Primary Constituent Elements* section below for specific language.

(10) Due to comments received, we have added two specific sections to this critical habitat rule that describe the geographical area occupied by the southwestern willow flycatcher and the nature of essential habitat not known to be within the geographical area occupied by the species at the time of listing. Please see the: *Geographic Area Occupied by the Species* and *Justification of Including Areas Not Known To Be Within the Geographic Area Occupied by the Species at the Time of Listing* sections below.

(11) We have exempted State Lease lands (primarily Cristianitos Creek) included within the boundary of Marine Corps Base, Camp Pendleton per section 4(a)(3). See the *Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below.

(12) We excluded river segments and reservoir bottoms under section 4(b)(2) of the Act and exempted two Military Areas under section 4(a)(3) of the Act from the final critical habitat designation (see the *Application of Sections 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below). This is the primary

source of reduction in total designated critical habitat area that was identified in the proposed rule. Exemptions under section 4(a)(3) included identified streams within Marine Corps Base, Camp Pendleton and Naval Weapons Station, Seal Beach, Detachment Fallbrook based on their approved INRMPs. Exclusions pursuant to section 4(b)(2) based on approved HCPs include San Diego County MSCP, Western Riverside County MSHCP, City of Carlsbad HMP, Roosevelt Lake HCP, and the Lower Colorado River MSCP. State Wildlife Areas excluded under section 4(b)(2) include the Overton and Key Pittman State Wildlife Areas, NV, and Alamo State Wildlife Area, AZ. Additional Wildlife Conservation Areas excluded include the South Fork Kern River Wildlife Area and Sprague Ranch, Kern River, CA. We excluded, pursuant to section 4(b)(2) of the Act, various Tribal lands and Pueblos that completed approved southwestern willow flycatcher management plans from the final designation. These include the following: Yavapai-Apache, Chemehuevi, Colorado River, Quechan (Fort Yuma), Fort Mohave, Hualapai, and San Carlos Apache Tribes in AZ,

Pueblo of Isleta in NM, and Rincon and La Jolla Tribes in CA. We also excluded, pursuant to section 4(b)(2) of the Act, the San Ildefonso, San Juan, and Santa Clara Pueblos in Northern New Mexico along the Rio Grande due to partnerships associated with southwestern willow flycatcher habitat management. National Wildlife Refuges (NWR) excluded from the final designation under section 4(b)(2) of the Act due to wildlife conservation management include: Alamosa NWR, CO; Sevilleta and Bosque del Apache NWR, NM; Bill Williams, Havasu, Imperial, and Cibola NWR, AZ; and Pahrnagat NWR, NV. Other lands excluded under section 4(b)(2) of the Act due to southwestern willow flycatcher/riparian habitat conservation plans/programs/easements and/or partnerships include: Los Angeles Department of Water and Power, Owens River, CA; San Luis Valley Partnership, Rio Grande and Conejos Rivers, CO; Hafenfeld Ranch, Kern River, CA; Salt River Project—Horseshoe Lake, Verde River, AZ; the City of Albuquerque/Rio Grande Valley State Park, Rio Grande, NM; and U-Bar Ranch, Gila River, NM.

TABLE 1.—CRITICAL HABITAT UNITS FOR THE SOUTHWESTERN WILLOW FLYCATCHER

Critical habitat management units	Final rule ha (ac) / km (mi)
Santa Ynez Management Unit .....	1560 (3855) / 32 (20)
Santa Ana Management Unit .....	1103 (2727) / 97 (60)
San Diego Management Unit .....	1944 (4805) / 102 (64)
Owens Management Unit .....	0
Kern Management Unit .....	1241 (3067) / 15 (10)
Mohave Management Unit .....	1033 (2553) / 55 (34)
Salton Management Unit .....	84 (206) / 11 (7)
Little Colorado Management Unit .....	216 (534) / 35 (22)
Virgin Management Unit .....	3903 (9643) / 119 (74)
Middle Colorado Management Unit .....	0
Pahrnagat Management Unit .....	0
Bill Williams Management Unit .....	1883 (4654) / 30 (19)
Hoover to Parker Management Unit .....	0
Parker to Southerly International Border Management Unit .....	0
Verde Management Unit .....	2191 (5414) / 96 (59)
Roosevelt Management Unit .....	3064 (7572) / 60 (37)
Middle Gila/San Pedro Management Unit .....	9692 (23949) / 170 (106)
Upper Gila Management Unit .....	6897 (17043) / 162 (101)
San Luis Valley Management Unit .....	0
Upper Rio Grande Management Unit .....	664 (1640) / 66 (41)
Middle Rio Grande Management Unit .....	13410 (33137) / 135 (84)

**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) that may require special management

considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. “Conservation” 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 with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse

modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Specific areas within the geographic area occupied by the species at the time of listing may be included in critical habitat only if the essential features may require special management or protection. As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2). When the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but that was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, included in the critical habitat designation.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and our associated Information Quality Guidelines, provides criteria and guidance, and establishes procedures to ensure that our decisions represent the best scientific and commercial data available. Our biologists are required, 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 designated as critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include a recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties or other entities that develop HCPs, scientific status surveys and studies, biological assessments, or other unpublished materials and expert

opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. 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, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted 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 section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that are essential to the conservation of the southwestern willow flycatcher. Our methods for identifying the southwestern willow flycatcher critical habitat included in this final designation are those methods we used to propose critical habitat for the southwestern willow flycatcher, published on October 12, 2004 (69 FR 60706). In addition, we used information and data received during both the October 12, 2004 to May 31, 2005, and July 7 to 18, 2005 public comment periods, the economic analysis, environmental assessment National Environmental Policy Act (NEPA) document, and communications with individuals inside and outside the

Service who are knowledgeable about the species and its habitat needs.

We have also reviewed available information that pertains to the habitat requirements of this species. The material included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles, agency reports, and databases; and regional Geographic Information System (GIS) coverages and habitat models.

A variety of sources were used to determine territory site information and locations. The Recovery Plan (USFWS 2002), the U.S. Geological Survey (USGS 2004) southwestern willow flycatcher rangewide database, and 2002 (Sogge *et al.* 2003) and 2003 (Durst *et al.* 2005) rangewide status report of the flycatcher were the most authoritative and complete sources of information. The database maintained by USGS, Colorado Plateau Research Station, Flagstaff, AZ compiles the results of surveys conducted throughout the bird's range. We had compiled 2004 data from AZ (Munzer *et al.* 2005), but did not have compiled data from other states. A summary of known historical breeding records can be found in the Recovery Plan (USFWS 2002: 8 to 10).

#### Geographic Area Occupied by the Species

The geographic area occupied by the southwestern willow flycatcher is widespread as a result of its behavior, breeding range, known migration and dispersal habits, and the dynamics of its habitat development. Unlike other animals whose habitat changes slowly or where movements are limited, the southwestern willow flycatcher is a neotropical migrant that travels annually between its breeding grounds in the United States of America (U.S.) and wintering grounds in Central and South America. The riparian habitat it uses for breeding, foraging, migrating, dispersing, and shelter can change (is dynamic) in its quality, growth, and location due to its proximity to water and susceptibility to flooding (USFWS 2002; Koronkiewicz *et al.* 2004; Cardinal and Paxton 2005). As a result of the dynamic nature of its habitat, the southwestern willow flycatcher will typically move its breeding location from year-to-year (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell *et al.* 2003, 2005). The bird does not usually exhibit nest fidelity (using the same nest tree year-to-year), but commonly demonstrates site-fidelity (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell

*et al.* 2003, 2005). In other words, flycatchers do not typically return to use the same nest tree or habitat patch for breeding from year-to-year, but commonly returns to or near the general area (or site) where they previously bred or hatched (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002:22; Newell *et al.* 2003, 2005). As result of these factors, the geographical area occupied by the flycatcher is much broader than the specific locations used while nesting.

The southwestern willow flycatcher currently breeds across six southwestern states (southern CA, southern NV, southern UT, southern CO, AZ, and NM) from sea level to about 2438m (8000 feet) above sea level. While the bird occupies a broad area, its breeding locations are irregularly distributed within its range. Genetic studies conducted by Paxton (2000) helped confirm the subspecies and refine the northern boundary of the bird's breeding range (particularly in UT and CO) in the U.S. The current breeding range of the southwestern willow flycatcher is reflected in the maps found in the Recovery Plan (USFWS 2002).

The southwestern willow flycatcher, a neo-tropical migrant, travels between its breeding areas in the U.S. to wintering grounds in Central and South America. During these migrations, it occupies habitat (primarily riparian habitat along river corridors) across a wide geographic area during spring and fall migration. These essential migration stopover habitats are used for shelter, and to forage in order to sustain life, continue migration, and be in appropriate condition for breeding. These stopover areas are used briefly, can differ from year-to-year, are less habitat-specific than areas where nests are placed, but cover a greater geographic area than breeding locations. Birds have even been detected occupying non-riparian areas during migration (USFWS 2002:19). Current work along extensive sections of river drainages has provided the best information on the bird's migration habits (Yong and Finch 1997, 2002; Koronkiewicz *et al.* 2004; McLeod *et al.* 2005).

The most current and comprehensive drainage-wide look at the use of migration habitat by willow flycatchers has occurred along the Lower Colorado River and its major tributaries (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). A total of 15 large study areas (comprised of over 90 smaller survey sites) exist along the length of the Colorado River from the Grand Canyon above Lake Mead to Yuma, AZ (including the lower Virgin and Bill Williams rivers) and also include

separate locations in southern Nevada along other tributaries of the Colorado River (the Pahranaagat River and Meadow Valley Wash) (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). In 2003, willow flycatchers were recorded at 13 of 15 study areas and 54 of 94 survey sites, occupying each large study area along the length of the Colorado River from the Grand Canyon above Lake Mead downstream to Yuma, AZ (Koronkiewicz *et al.* 2004). Also, study areas on the Virgin, Bill Williams, and Pahranaagat rivers were occupied by willow flycatchers (Koronkiewicz *et al.* 2004). Similarly, in 2004, each of the 15 study areas and 72 of 92 survey sites were occupied by willow flycatchers (McLeod *et al.* 2005). This comprehensive view of willow flycatcher migration shows occupancy of a variety of riparian habitats along the entire length of a major drainage (Lower Colorado River) and its significant tributaries (Virgin, Bill Williams, and Pahranaagat rivers), occupancy of different sites from one season to the next, and occupancy of a major drainage and its significant tributaries where breeding locations are interspersed (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). As a result of, (1) the study along the Lower Colorado River and its major tributaries (discussed above), (2) studies of willow flycatchers occurring along the Rio Grande (Yong and Finch 1997, 2002), and (3) detections of willow flycatchers along the same major drainages where breeding occurs throughout AZ (Munzer *et al.* 2005), we expect similar flycatcher migration behavior for the other major drainages where southwestern willow flycatchers breed throughout its range and where these locations are included within this designation.

While southwestern willow flycatchers place their nests in dense riparian habitat (USFWS 2002), occupancy of habitat in river corridors by pre-breeding, breeding, and post-nesting southwestern willow flycatchers extends beyond the dense vegetation where a nest is placed (Cardinal and Paxton 2005). Results from radio-telemetry studies determined that southwestern willow flycatchers explored a variety of riparian habitats of varying quality (Cardinal and Paxton 2005). Mixed (native and exotic) mature habitat was used 53 percent of the time (Cardinal and Paxton 2005). Smaller and younger immature vegetation comprised of willow and salt cedar was used 25 percent of the time (Cardinal and Paxton 2005). Also used were habitats classified as young (17 percent), open (4 percent), and mature exotic (1 percent) (Cardinal

and Paxton 2005). Therefore, while vegetation required for nest placement is the most dense and specific of all habitats used by southwestern willow flycatchers, matrices of open spaces and shorter/sparser vegetation are also used. However, during the entire time southwestern willow flycatchers were tracked, none were found using upland habitat (*i.e.*, habitat that extended outside of the floodplain to non-riparian habitat) (Cardinal and Paxton 2005).

The distances traveled and areas occupied by telemetered breeding and dispersing young-of-the-year fledgling southwestern willow flycatchers varied, but were larger than the nest area (Cardinal and Paxton 2005). Breeding southwestern willow flycatcher home ranges varied from 0.15 ha (0.4 ac) to 360 ha (890 ac) (Cardinal and Paxton 2005). Movements by male southwestern willow flycatchers prior to and after nesting were the farthest, while birds did not travel as far while nesting (Cardinal and Paxton 2005). One post-nesting male traveled through many territories, moving over 500 m (0.31 mi) in one day and collectively over several days, 2 km (1.2 mi). Other post-nesting southwestern willow flycatchers were also observed traveling long distances to exploit a spike in food availability that may indicate staging behavior for migration (Cardinal and Paxton 2005). As a result, Cardinal and Paxton (2005) concluded that previous home ranges estimated for nesting southwestern willow flycatchers underestimated the actual home range of an individual southwestern willow flycatcher throughout the entire nesting season. In addition, to demonstrate how mobile flycatchers can be, a dispersing young-of-the-year fledgling southwestern willow flycatcher was detected traveling over 24 km (15 mi) in a single day (Cardinal and Paxton 2005). Therefore, the use and occupancy of riparian habitat surrounding nesting areas by breeding and dispersing southwestern willow flycatchers is greater than previously believed, and is likely important for flycatchers to seek territories, to detect future nesting areas, search for mates, forage, and/or stage for migration (Cardinal and Paxton 2005).

Therefore, the boundary of the current geographic area occupied by the southwestern willow flycatcher in the U.S. is supported by genetic studies (Paxton 2000) and is reflected in the range map included in the Recovery Plan (USFWS 2002) that describes its breeding range across southern CA, southern NV, southern UT, southern CO, AZ, and NM. Because this bird is a neotropical migrant traveling mainly along riparian areas where habitat

rapidly changes condition and location, its use of riparian habitat within this boundary along migration corridors is widespread (*i.e.*, more extensive than specific breeding locations) and less predictable. However, all studies and surveys support that the flycatcher uses riparian habitat for migration stopover areas along the same major drainages where breeding sites are known to occur. Because of the bird's site fidelity to general breeding areas and the dynamics of its habitat, its nesting and foraging areas will also change over time, but will occur primarily along the same major river drainages where it is currently found in locations that can support the necessary vegetation qualities. Based upon continued surveys and recent telemetry studies on the use of habitat during the nesting season, the extent and diversity of habitat used is more widespread than previously believed. Pre-breeding, breeding, dispersing, and non-territorial flycatchers can use a wide variety of riparian habitats that can encompass hundreds of hectares (acres).

In the methodology section below, we further describe how we address the dynamic aspects of flycatcher habitat, the subspecies biology, and its life history needs (breeding, migration, dispersing, foraging, and shelter) and how we arrived at specific essential river segments for the designation of critical habitat occupied by breeding, non-breeding, migrating, foraging, dispersing, and territorial southwestern willow flycatchers.

#### Primary Constituent Elements

In accordance with section 4(b)(2) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to base critical habitat determinations on the best scientific data available. Critical habitat is defined in section 3(5)(A)(i), in part, as areas occupied by the species at the time of listing and containing those physical and biological features (PCEs) that are essential to the conservation of the species, and that may require special management considerations or protection. These general requirements 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 breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for the southwestern willow flycatcher are derived from the biological needs of the southwestern willow flycatcher. Supporting details are found below and can also be found in the Background section of the October 12, 2004, proposed rule (69 FR 60706) and the Recovery Plan (USFWS 2002). The specific biological and physical features, or PCEs, which are essential to the conservation of the southwestern willow flycatcher, are described below. Identified lands provide aquatic and terrestrial habitat containing the essential PCEs supporting the maintenance of self-sustaining populations and metapopulations (see description below) of southwestern willow flycatchers throughout its range.

The southwestern willow flycatcher currently breeds in relatively dense riparian habitats in all or parts of six southwestern states, from near sea level to over 2438 meters (m) (8000 feet) (USFWS 2002: D-1) (Munzer *et al.* 2005). The southwestern willow flycatcher breeds in riparian habitats along rivers, streams, or other wetlands, where relatively dense growths of trees and shrubs are established, near or adjacent to surface water or underlain by saturated soil. Habitat characteristics such as dominant plant species, size and shape of habitat patch, canopy structure, vegetation height, and vegetation density vary widely among sites. Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft). Lower-stature thickets (2-4 m or 6-13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle and lower elevation riparian forests. Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low dense canopy. Nest sites typically have a dense canopy.

As a neotropical migrant (migrating between Central and South America and the United States), migration stopover areas for the southwestern willow flycatcher, even though not used for breeding, are critically important, (*i.e.*, essential) resources affecting productivity and survival (Sogge *et al.* 1997b; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; and USFWS 2002: E-3 and 19). Use of riparian habitats along major drainages in the Southwest during migration has been documented (Sogge *et al.* 1997; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; Koronkiewicz *et al.* 2004, McLeod *et al.* 2005, Munzer *et al.*

2005). Many of the willow flycatchers found migrating through riparian areas are detected in riparian habitats or patches that would be unsuitable for breeding (*e.g.*, the vegetation structure is too short or sparse, or the patch is too small). Migrating flycatchers use a variety of riparian habitats, including ones dominated by native or exotic plant species, or mixtures of both (USFWS 2002: E-3). Willow flycatchers, like most small passerine birds, require food-rich stopover areas in order to replenish energy reserves and continue their northward or southward migration (Finch *et al.* 2000; USFWS 2002: E-3 and 42).

Southwestern willow flycatchers breeding populations are believed to exist and interact as groups of metapopulations (Noon and Farnsworth 2000; Lamberson *et al.* 2000; and USFWS 2002: 72). A metapopulation is a group of spatially disjunct local southwestern willow flycatcher breeding populations connected to each other by immigration and emigration (USFWS 2002: 72). The distribution of the southwestern willow flycatcher varies geographically and is most stable where many connected sites and/or large populations exist (Coastal CA, Gila, Rio Grande Recovery Units) (Lamberson *et al.* 2000 and USFWS 2002: 72). Metapopulation persistence or stability is more likely to increase by adding more breeding sites (see definition below) rather than adding more territories (see definition below) to existing sites (Lamberson *et al.* 2000; USFWS 2002: 72; and USFWS 2003). This strategy distributes birds across a greater geographical range, minimizes risk of simultaneous catastrophic loss, and avoids genetic isolation (USFWS 2002: 72). In consideration of habitat that is dynamic and widely distributed, flycatcher metapopulation stability, population connectivity, and gene flow can be achieved through: Distributing birds throughout its range; having birds close enough to each other to allow for interaction; having large populations; having a matrix of smaller sites with high connectivity; and establishing habitat close to existing breeding sites, thereby increasing the chance of colonization (USFWS 2002: 75). As the population of a site increases, the potential to disperse and colonize increases; and an increase/decrease in one population affects other populations because populations are affected by the proximity, abundance, and reproductive productivity of neighboring populations (USFWS 2002: 75).

Breeding site and territory are common terms used to describe areas where southwestern willow flycatchers

breed or attempt to breed. A breeding site may encompass a discrete nesting location (*i.e.* territory) or several (USFWS 2002: 72). A territory is defined as a territorial or singing male detected during field surveys and generally equates to an area where both a male and female are present (Sogge *et al.* 1997). For more specific information on southwestern willow flycatcher presence/absence survey protocol, please see Sogge *et al.* (1997) and any subsequent updates at <http://fws.gov/arizonaes> or <http://www.usgs.nau.edu/swwf>. Breeding site and patch (a "patch" is defined as a discrete piece of southwestern willow flycatcher habitat) fidelity and habitat use by adult, nestling, breeding, and non-breeding southwestern willow flycatchers are just beginning to be understood (Kenwood and Paxton 2001; Koronkiewicz and Sogge 2001; USFWS 2002: 17, Cardinal and Paxton 2005).

Southwestern willow flycatchers have higher site fidelity than nest fidelity and can move among sites within drainages and between drainages (Kenwood and Paxton 2001). Within-drainage movements are more common than between-drainage movements (Kenwood and Paxton 2001). From nearly 300 band recoveries, within-drainage movements generally ranged from 1.6 to 29 kilometers (km) (1 to 18 miles (mi)), but were as long as 40 km (25 mi) (E. Paxton, USGS, e-mail). Movements of birds between drainages are more rare, and the distances are more varied. Banding studies have recorded 25 between-drainage movements ranging from 40 km (25 mi) to a single movement of 443 km (275 mi) (average = 130 km or 81 mi) (E. Paxton, USGS, e-mail).

The Recovery Plan for the southwestern willow flycatcher (USFWS 2002) provides reasonable actions believed to be required to recover and protect the bird. The Recovery Plan (USFWS 2002: 105 to 136) provides the strategy for recovering the bird to threatened status and to the point where delisting is warranted. The Recovery Plan states that either one of two criteria can be met in order to downlist the species to threatened (USFWS 2002: 77–78). The first relies on reaching a total population of 1,500 territories strategically distributed among all Recovery Units and maintained for three years with habitat protections (USFWS 2002: 77–78). Habitat protections include a variety of options such as Habitat Conservation Plans, conservation easements, and Safe Harbor Agreements. The second criterion calls for reaching a population of 1,950 territories also strategically

distributed among all Recovery and Management Units for five years without additional habitat protection (USFWS 2002: 77–78). For delisting, the Recovery Plan recommends a minimum of 1,950 territories must be strategically distributed among all Recovery and Management Units, and these habitats must be protected from threats and create/secure sufficient habitat to assure maintenance of these populations and/or habitat for the foreseeable future through development and implementation of conservation management agreements (USFWS 2002: 79–80). All of the delisting criteria must be accomplished and demonstrated their effectiveness for a period of 5 years (USFWS 2002: 79–80).

All the PCEs of critical habitat for the southwestern willow flycatcher are found in the riparian ecosystem within the 100-year floodplain or flood prone area. Southwestern willow flycatchers use riparian habitat for nesting, feeding, and sheltering while breeding, migrating, and dispersing. Because riparian vegetation is prone to periodic disturbance, flycatcher habitat is ephemeral and its distribution is dynamic in nature (USFWS 2002: 17). In other words, riparian trees and shrubs used by flycatchers will be altered by flood waters, drought, or possibly succumb to fire, but will be replaced by new trees or shrubs which grow in their place (but not necessarily in the same location). Sapling riparian trees and shrubs must germinate and grow to reach the appropriate height and structure to be used by flycatchers. After reaching appropriate structure for nesting, flycatcher habitat may become unsuitable for breeding through maturation or disturbance, but suitable for migration or foraging (though this may be only temporary, and patches may cycle back into suitability for breeding) (USFWS 2002: 17). Over a five-year period, southwestern willow flycatcher habitat can, in optimum conditions, germinate, be used for migration or foraging, continue to grow, and eventually be used for nesting. Therefore, the riparian vegetation used by flycatchers is part of a gradually changing system, not only in its rapid growth due to its proximity to water, but its location within the floodplain due to the dynamic riverine environment. As a result of this dynamic riverine environment, it is not realistic to assume that any given breeding habitat patch will remain suitable over the long-term, or persist in the same location (USFWS 2002: 17), or always be used for the same purpose by flycatchers. Feeding sites and migration stopover

areas are essential components of the flycatcher's survival, productivity, and health, and they can also be areas where new breeding habitat develops as established nesting sites are lost or degraded (USFWS 2002: 42). Thus, habitat that is not currently suitable for nesting at a specific time, but useful for foraging and/or migration can be essential to the conservation of the flycatcher. Therefore, the germination and growth of riparian vegetation (*i.e.* succession) in this dynamic environment is integral for developing and maintaining appropriate habitat for use by southwestern willow flycatchers.

Based on our current knowledge of the life history and ecology of the southwestern willow flycatcher and the relationship of its essential life history functions to its habitat, as described below in the text supporting the PCEs, and in more detail in the Recovery Plan (USFWS 2002: Chapter II), it is important to recognize the combined nature of the relationships between river function, water, hydrology, floodplains, soils, aquifers, and plant growth to form and support the vegetation and insect populations (PCEs) important for the conservation of the southwestern willow flycatcher.

The natural hydrologic regime (*i.e.*, river flow frequency, magnitude, duration, and timing) and supply of (and interaction between) surface and subsurface water will be a driving factor in the maintenance, growth, recycling, and regeneration of southwestern willow flycatcher habitat (USFWS 2002:16). As streams reach the lowlands, their gradients typically flatten and surrounding terrain open into broader floodplains (USFWS 2002: 32). Combine this setting with the integrity of stream flow frequency, magnitude, duration, and timing (Poff *et al.* 1997), and conditions will occur that provide for proper river channel configuration, sediment deposition, periodic inundation, recharged aquifers, lateral channel movement, and elevated groundwater tables throughout the floodplain that develop flycatcher habitat (USFWS 2002:16). Maintaining existing river access to the floodplain when overbank flooding occurs is integral to allow deposition of fine moist soils, water, nutrients, and seeds that provide essential material for plant germination and growth. An abundance and distribution of fine sediments extending farther laterally across the floodplain and deeper underneath the surface retains much more subsurface water, which in turn supplies water for the development of flycatcher habitat and micro-habitat conditions (USFWS 2002:16). The interconnected

interaction between groundwater and surface water contributes to the quality of riparian community (structure and plant species), and will influence the germination, density, vigor, composition, and ability to regenerate and maintain itself (AZ Department of Water Resources 1994).

The areas designated as critical habitat provide riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating southwestern willow flycatchers and to sustain southwestern willow flycatchers across their range. No areas are being designated as critical habitat solely because they serve as a migration corridor; rather areas designated serve a variety of functions that include use by southwestern willow flycatchers as migration habitat. The habitat components essential for conservation of the species were determined from studies of southwestern willow flycatcher behavior and habitat use throughout the birds range (USFWS 2002: Chapter II and Appendix D). Due to the natural history of this neotropical migrant and the dynamic nature of the riparian environments in which they are found (USFWS 2002: Chapter II and Appendix D), one or more of the primary constituent elements described below are found throughout each of the specific areas that are being designated as critical habitat.

#### Space for Individual and Population Growth, and for Normal Behavior

Streams of lower gradient and/or more open valleys with a wide/broad floodplain are the geological settings that support willow flycatcher breeding habitat from near sea level to over 2438 m (8000 ft) in southern CA, southern NV, southern UT, southern CO, AZ, and NM (USFWS 2002: 7). Lands with moist conditions which support riparian plant communities are areas that provide habitat for the southwestern willow flycatcher. Conditions like these develop in lower floodplains as well as where streams enter impoundments, either natural (e.g., beaver ponds) or human-made (reservoirs). Low-gradient stream conditions may also occur at high elevations, as in the marshy mountain meadows supporting flycatchers in the headwaters of the Little Colorado River near Greer, AZ, or the flat-gradient portions of the upper Rio Grande in south-central CO and northern NM (USFWS 2002: 32). Sometimes, the low-gradient wider floodplain exists only at the habitat patch itself, on streams that are generally steeper when viewed on the large scale (e.g., percent gradient over kilometers or miles) (USFWS 2002).

Relatively steep, confined streams can also support flycatcher habitats (USFWS 2002: D-13). The San Luis Rey River in CA supports a substantial flycatcher population, and stands out among flycatcher habitats as having a relatively high gradient and being confined in a fairly narrow, steep-sided valley (USFWS 2002: D-13). It is important to note that even a steep, confined canyon or mountain stream may present local conditions where just a portion of a hectare or acre of flycatcher habitat may develop (USFWS 2002; D-13). Such sites are important individually, and in aggregate (USFWS 2002: D-13). Flycatchers are known to occupy very small, isolated habitat patches, and may occur in fairly high densities within those patches.

Many willow flycatchers are found along riparian corridors during migration (McCabe 1991; Yong and Finch 1997, 2002; USFWS 2002; E-3, Koronkiewicz *et al.* 2004; McLeod *et al.* 2005; Munzer *et al.* 2005). Migration stopover areas can be similar to breeding habitat (McCabe 1991) or riparian habitats of less density and abundance than areas for nest placement (*i.e.*, the vegetation structure is too short or sparse or the patch is too small) (USFWS 2002: E-3). For example, many locations where migrant willow flycatchers were detected on the lower Colorado River (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005) and throughout AZ in 2004 (Munzer *et al.* 2005) were areas surveyed for nesting birds, but no breeding was detected. Such migration stopover areas, even though not used for breeding, are critically important resources affecting productivity and survival (USFWS 2002: E-3). The variety of riparian habitats occupied by migrant flycatchers range from smaller patches with shorter/sparser vegetation to larger, more complex breeding habitats.

#### Water

Flycatcher nesting habitat is largely associated with perennial (*i.e.*, persistent) stream flow that can support the expanse of vegetation characteristics needed by breeding flycatchers. However, flycatcher nesting habitat can also persist on intermittent (*i.e.*, ephemeral) streams that retain local conditions favorable to riparian vegetation (USFWS 2002: D-12). The range and variety of stream flow conditions (frequency, magnitude, duration, and timing) (Poff *et al.* 1997) that will establish and maintain flycatcher habitat can arise in different types of both regulated and unregulated flow regimes throughout its range (USFWS 2002: D-12). Also, flow

conditions that will establish and maintain flycatcher habitat can be achieved in regulated streams, depending on scale of operation and the interaction of the primary physical characteristics of the landscape (USFWS 2002: D-12).

In the Southwest, hydrological conditions at a flycatcher breeding site can vary remarkably within a season and between years (USFWS 2002: D-12). At some locations, particularly during drier years, water or saturated soil is only present early in the breeding season (*i.e.*, May and part of June) (USFWS 2002: D-12). At other sites, vegetation may be immersed in standing water during a wet year, but be hundreds of meters from surface water in dry years (USFWS 2002: D-12). This is particularly true of reservoir sites such as the Kern River at Lake Isabella, CA, Roosevelt Lake, AZ, and Elephant Butte Reservoir, NM (USFWS 2002: D-12). Similarly, where a river channel has changed naturally there may be a total absence of water or visibly saturated soil for several years (Sferra *et al.* 1997). In such cases, the riparian vegetation and any flycatchers breeding within it may persist for several years (USFWS 2002: D-12).

In some areas, natural or managed hydrologic cycles can create temporary flycatcher habitat, but may not be able to support it for an extended amount of time, or may support varying amounts of habitat at different points in the cycle. Some dam operations create varied situations that allow different plant species to thrive when water is released below a dam, held in a lake, or removed from a lakebed, and consequently, varying degrees of flycatcher habitat are available as a result of dam operations (USFWS 2002: 33).

The riparian vegetation that constitutes southwestern willow flycatcher breeding habitat requires substantial water (USFWS 2002: D-12). Because southwestern willow flycatcher breeding habitat is often where there is slow moving or still water, these slow and still water conditions may also be important in influencing the production of insect prey base for flycatcher food (USFWS 2002: D-12)

#### Sites for Germination or Seed Dispersal

Subsurface hydrologic conditions may, in some places (particularly at the more arid locations of the Southwest), be equally important to surface water conditions in determining riparian vegetation patterns (Lichivar and Wakely 2004). Where groundwater levels are elevated to the point that riparian forest plants can directly access

those waters it can be an area for both breeding, and non-breeding, territorial, dispersing, foraging, and migrating southwestern willow flycatchers, and elevated groundwater helps create moist soil conditions believed to be important for nesting conditions and prey populations (USFWS 2002: 11 and 18), as further discussed below.

Depth to groundwater plays an important part in the distribution of riparian vegetation (AZ Department of Water Resources 1994) and consequently, southwestern willow flycatcher habitat. The greater the depth to groundwater below the land surface, the less abundant the riparian vegetation (AZ Department of Water Resources 1994). Localized perched aquifers (*i.e.*, a saturated area that sits above the main water table) can and do support some riparian habitat, but these systems are not extensive (AZ Department of Water Resources 1994).

The abundance and distribution of fine sediment deposited on floodplains is critical for the development, abundance, distribution, maintenance, and germination of flycatcher habitat, and possibly conditions for successful breeding (USFWS 2002: 16). Fine sediments provide seed beds for flycatcher habitat. In almost all cases, moist or saturated soil is present at or near breeding sites during wet or non-drought years (USFWS 2002: 11). The saturated soil and adjacent surface water may be present early in the breeding season, but only damp soil is present by late June or early July (Muiznieks *et al.* 1994; USFWS 2002: D-3). Microclimate features (*i.e.*, temperature and humidity) facilitated by moist/saturated soil, are believed to play an important role where flycatchers are detected and nest, their breeding success, and availability/abundance of food resources (USFWS 2002).

#### Reproduction and Rearing of Offspring

Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft) (USFWS 2002: D-3). Lower-stature thickets (2-4 m or 6-13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle- and lower-elevation riparian forests (USFWS 2002: D-2). Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low, dense tree canopy (USFWS 2002: D-3).

Riparian habitat characteristics such as dominant plant species, size and shape of habitat patches, tree canopy structure, vegetation height, and

vegetation density are essential qualities of southwestern willow flycatcher breeding habitat, although they may vary widely at different sites (USFWS 2002: D-1). The accumulating knowledge of flycatcher breeding sites reveals important areas of similarity which constitute the basic concept of what is suitable breeding habitat (USFWS 2002: D-2). These habitat features are generally discussed below.

Regardless of the plant species composition or height, breeding sites usually consist of dense vegetation in the patch interior, or an aggregate of dense patches interspersed with openings (USFWS 2002: 11). In most cases this dense vegetation occurs within the first 3 to 4 m (10 to 13 ft) above ground (USFWS 2002: 11). These dense patches are often interspersed with small openings, open water or marsh, or shorter/sparser vegetation, creating a mosaic that is not uniformly dense (USFWS 2002: 11).

Common tree and shrub species currently known to comprise nesting habitat include Goodings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geysers willow (*Salix geyserana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix lasiandra*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), and Russian olive (*Eleagnus angustifolia*) (USFWS 2002: D-2, 11). Other plant species used for nesting have been buttonbush (*Cephalanthus occidentalis*), cottonwood, stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia*, *Alnus oblongifolia*, *Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia*, *Baccharis glutinosa*), oak (*Quercus agrifolia*, *Quercus chrysolepis*), rose (*Rosa californica*, *Rosa arizonica*, *Rosa multiflora*), sycamore (*Platanus wrightii*), giant reed (*Arundo donax*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitis arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*) (USFWS 2002: D-3, 5, and 9). Other species used by nesting southwestern willow flycatchers may become known over time as more studies and surveys occur.

Nest sites typically have a dense tree and/or shrub canopy (USFWS 2002: D-3). Canopy density (the amount of cover provided by tree and shrub branches measured from the ground) at various nest sites ranged from 50 percent to 100 percent.

Southwestern willow flycatcher breeding habitat can be generally organized into three broad habitat types—those dominated by native vegetation (willow and cottonwood), by exotic (*i.e.*, non-native) vegetation (salt cedar), and those with mixed native and exotic plants (salt cedar and willow). These broad habitat descriptors reflect the fact that southwestern willow flycatchers inhabit riparian habitats dominated by both native and non-native plant species. Salt cedar and Russian olive are two exotic plant species used by flycatchers for nest placement and also foraging and shelter (USFWS 2002: D-4).

The riparian patches used by breeding flycatchers vary in size and shape (USFWS 2002: D-2). They may be relatively dense, linear, contiguous stands or irregularly-shaped mosaics of dense vegetation with open areas (USFWS 2002: D-2 and 11). Southwestern willow flycatchers have been recorded nesting in patches as small as 0.1 ha (0.25 ac) along the Rio Grande (Cooper 1997), and as large as 70 ha (175 ac) in the upper Gila River in NM (Cooper 1997). The mean reported size of flycatcher breeding patches was 8.6 ha (21.2 ac). The majority of sites were toward the smaller end, as evidenced by a median patch size of 1.8 ha (4.4 ac) (USFWS 2002: 17). Mean patch size of breeding sites supporting 10 or more flycatcher territories was 24.9 ha (62.2 ac). Aggregations of occupied breeding patches within a breeding site may create a riparian mosaic as large as 200 ha (494 ac) or more, such as at the Kern River (Whitfield 2002), Roosevelt Lake (Paradzick *et al.* 1999) and Lake Mead (McKernan 1997).

Flycatchers often cluster their territories into small portions of riparian sites (Whitfield and Enos 1996; Paxton *et al.* 1997; Sferra *et al.* 1997; Sogge *et al.* 1997), and major portions of the site may be occupied irregularly or not at all. Recent habitat modeling based on remote sensing and GIS data has found that breeding site occupancy at reservoir sites in AZ is influenced by vegetation characteristics of habitat adjacent to the actual nesting areas (Hatten and Paradzick 2003); therefore, areas adjacent to nest sites can be an important component of a breeding site. How size and shape of riparian patches relate to factors such as flycatcher nest site selection and fidelity, reproductive success, predation, and brood parasitism is unknown (USFWS 2002: D-11).

Flycatchers are generally not found nesting in confined floodplains (*i.e.*, those bound within a canyon) (Hatten

and Paradzick 2003) or where only a single narrow strip of riparian vegetation less than approximately 10 m (33 ft) wide develops (USFWS 2002: D-11). While riparian vegetation too mature, immature, or of lesser quality in abundance and breadth may not be used for nesting, it can be used by breeders for foraging (especially if it extends out from larger patches) or during migration for foraging, cover, and shelter (Sogge and Tibbitts 1994; Sogge and Marshall 2000).

#### Food

The willow flycatcher is somewhat of an insect generalist (USFWS 2002: 26), taking a wide range of invertebrate prey including flying, and ground-, and vegetation-dwelling species of terrestrial and aquatic origins (Drost *et al.* 2003). Wasps and bees (Hymenoptera) are common food items, as are flies (Diptera), beetles (Coleoptera), butterflies/moths and caterpillars (Lepidoptera), and spittlebugs (Homoptera) (Beal 1912; McCabe 1991). Plant foods such as small fruits have been reported (Beal 1912; Roberts 1932; Imhof 1962), but are not a significant food during the breeding season (McCabe 1991). Diet studies of adult southwestern willow flycatchers (Drost *et al.* 1997; DeLay *et al.* 1999) found a wide range of prey taken. Major prey items were small (flying ants) (Hymenoptera) to large (dragonflies) (Odonata) flying insects, with Diptera and Hemiptera (true bugs) comprising half of the prey items. Willow flycatchers also took non-flying species, particularly Lepidoptera larvae. From an analysis of southwestern willow flycatcher diet along the South Fork of the Kern River, CA, (Drost *et al.* 2003) flycatchers consumed a variety of prey from 12 different insect groups. Willow flycatchers have been identified targeting seasonal hatchings of aquatic insects along the Salt River arm of Roosevelt Lake, AZ (E. Paxton, USGS, e-mail).

Southwestern willow flycatcher food availability may be largely influenced by the density and species of vegetation, proximity to and presence of water, saturated soil levels, and microclimate features such as temperature and humidity (USFWS 2002). Flycatchers forage within and above the canopy, along the patch edge, in openings within the territory, over water, and from tall trees as well as herbaceous ground cover (Bent 1960; McCabe 1991). Willow flycatchers employ a "sit and wait" foraging tactic, with foraging bouts interspersed with longer periods of perching (Prescott and Middleton 1988).

Pursuant to our regulations, we are required to identify the known physical and biological features or PCEs, essential to the conservation of the southwestern willow flycatcher, together with a description of any critical habitat that is designated. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the southwestern willow flycatcher's primary constituent elements are:

(1) Riparian habitat in a dynamic successional riverine environment (for nesting, foraging, migration, dispersal, and shelter) that comprises:

(a) Trees and shrubs that include Gooddings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geysers willow (*Salix geeyerana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix lasiandra*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), Russian olive (*Eleagnus angustifolia*), buttonbush (*Cephalanthus occidentalis*), cottonwood (*Populus fremontii*), stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia*, *Alnus oblongifolia*, *Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia*, *Baccharis glutinosa*), oak (*Quercus agrifolia*, *Quercus chrysolepis*), rose (*Rosa californica*, *Rosa arizonica*, *Rosa multiflora*), sycamore (*Platanus wrightii*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitis arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*).

(b) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft). Lower-stature thickets (2 to 4 m or 6 to 13 ft tall) are found at higher elevation riparian forests and tall-stature thickets are found at middle- and lower-elevation riparian forests;

(c) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(d) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.*, a tree or shrub canopy with densities ranging from 50 percent to 100 percent);

(e) Dense patches of riparian forests that are interspersed with small openings of open water or marsh, or shorter/sparser vegetation that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

(2) A variety of insect prey populations found within or adjacent to riparian floodplains or moist environments, including: flying ants, wasps, and bees (Hymenoptera); dragonflies (Odonata); flies (Diptera); true bugs (Hemiptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

The discussion above outlines those physical and biological features essential to the conservation of the southwestern willow flycatcher and presents our rationale as to why those features were selected. The primary constituent elements described above are results of the dynamic river environment that germinates, develops, maintains, and regenerates the riparian forest and provides food for breeding, non-breeding, dispersing, territorial, and migrating southwestern willow flycatchers. Anthropogenic factors such as dams, irrigation ditches, or agricultural field return flow can assist in providing conditions that support flycatcher habitat. Because the flycatcher exists in disjunct breeding populations across a wide geographic and elevation range, and is subject to dynamic events, critical habitat river segments described below are essential for the flycatcher to maintain metapopulation stability, connectivity, gene flow, and protect against catastrophic loss. All river segments designated as southwestern willow flycatcher critical habitat are within the geographical area occupied by the species and contain at least one of the primary constituent elements. It is important to recognize that the PCEs are present throughout the river segments selected (PCE 1a and 2), but the specific quality of riparian habitat for nesting (PCE 1b, 1c, 1d, 1e), migration (PCE 1), foraging (PCE 1 and 2), and shelter (PCE 1) will not remain constant in their condition or location over time due to succession (*i.e.*, plant germination and growth) and the dynamic environment in which they exist.

#### Criteria Used To Identify Critical Habitat

We are designating critical habitat on lands that (1) we have determined are occupied at the time of listing and contain the primary constituent elements of the southwestern willow

flycatcher, and (2) in some instances, designated areas not known to be within the geographical area occupied at the time of listing, but have been determined to be essential to the conservation of the species. See the *Justification of Including Areas Not Known To Be Within the Specific Geographical Area Occupied by the Species at the Time of Listing* section below for our rationale for including such areas. This critical habitat designation focuses on providing riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating southwestern willow flycatchers, thus promoting the conditions for maintaining self-sustaining southwestern willow flycatcher populations and metapopulations across their range in areas of AZ, CA, NM, NV, CO, and UT. Since southwestern willow flycatchers are found in a variety of ecologically and geographically disjunct areas that are prone to disturbance, it is important to preserve metapopulation stability, connectivity, gene flow, and protect against catastrophic loss for populations distributed across a large geographic and elevational range, as well as the variety of ecological environments in which it lives.

To identify areas containing features essential to the conservation of the southwestern willow flycatcher, we first considered the Recovery Plan's strategy, rationale, and science behind the conservation of the flycatcher and removing the threat of extinction (USFWS 2002: 61–95). This led to us to focus on the wide, but irregular distribution of this bird, the dynamic nature of its habitat, and scientific principles behind southwestern willow flycatcher metapopulation stability, gene flow, ecological connectivity among disjunct populations, and prevention of catastrophic losses (USFWS 2002: 61–95). In addition, information provided during the comment periods for this proposed rule and the draft economic and draft NEPA analyses were evaluated and considered in the development of the final designation for southwestern willow flycatcher.

The Recovery Plan (USFWS 2002: 61–95) identifies important factors to consider in minimizing the likelihood of extinction: (1) Populations should be distributed throughout the bird's range; (2) populations should be distributed close enough to each other to allow for movement among them; (3) large populations contribute most to metapopulation stability; smaller populations can contribute to metapopulation stability when arrayed

in a matrix with high connectivity; (4) as the population of a site increases, the potential to disperse and colonize increases; (5) increase/decrease in one population affects other populations; (6) some Recovery/Management Units have stable metapopulations, others do not; (7) maintaining/augmenting existing populations is a greater priority than establishing new populations; and (8) establishing habitat close to existing breeding sites increases the chance of colonization.

The Recovery Plan (USFWS 2002) outlined a recommended recovery strategy for the southwestern willow flycatcher. We reviewed and considered the pertinent information contained in the Recovery Plan (USFWS 2002) in developing this critical habitat designation because it represents a compilation of the best scientific data available to us. We are required to base listing and critical habitat decisions on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). We may not delay making our determinations until more information is available, nor can we be required to gather more information before making our determination (*Southwest Center for Biological Diversity v. Babbitt*, 215 F. 3d 58 (D.C. Cir. 2000)). This critical habitat designation focuses on those Recovery Plan recommendations that we believe are important in determining areas that have essential features for the conservation of the species.

The focus of this designation is a conservation strategy which relies on protecting large populations as well as small populations with high connectivity (USFWS 2002: 74 to 75). Large populations, centrally located, contribute the most to metapopulation stability, especially if other breeding populations are nearby (USFWS 2002: 74). Large populations persist longer than small ones, and produce more dispersers capable of emigrating to other populations or colonizing new areas (USFWS 2002: 74). Smaller populations in high connectivity can provide as much or more stability than a single isolated population with the same number of territories because of the potential to disperse colonizers throughout the network of sites (USFWS 2002: 75). This approach for defining critical habitat areas supports other key central strategies tied to flycatcher conservation identified in the Recovery Plan (USFWS 2002: 74 to 76) such as: (1) Populations should be distributed close enough to each other to allow for movement; (2) maintaining/augmenting existing populations is a greater priority than establishing new populations; and

(3) a population's increase improves the potential to disperse and colonize.

Because large populations, as well as small populations with high connectivity, contribute the most to metapopulation stability (USFWS 2002: 74), we identified these areas to help guide the delineation of areas with features essential to the conservation of the southwestern willow flycatcher (*i.e.*, critical habitat). This rule defines a large population as a single site or collection of smaller connected sites that support 10 or more territories. We chose the baseline survey period as the time from 1993 to 2003 (USFWS 2002: 23; Sogge *et al.* 2003; U.S. Geological Survey 2003; Smith *et al.* 2004; S.O. Williams, NMGFD, e-mail 2004). This includes all known reliable survey information that is available to us. We chose 10 or more territories to identify a large population area because the population viability analysis and the expertise of the Technical Recovery Team indicates a breeding site exhibits greatest long-term stability with at least 10 territories (Lamberson *et al.* 2000; USFWS 2002: 72).

We are designating stream "segments" as critical habitat for the southwestern willow flycatcher. The reaches designated provide for flycatcher habitat (nesting, foraging, migrating, regenerating, etc.) and allows for the changes in habitat locations or conditions from those that exist presently. The actual riparian habitat in these areas is expected to expand, contract, or change as a result of flooding, drought, inundation, and changes in floodplains and river channels (USFWS 2002: 18, D–13 to 15) that result from current flow management practices and priorities. Stream segments include breeding sites in high connectivity and other essential flycatcher habitat components needed to conserve the subspecies. Those other essential components of flycatcher habitat (foraging habitat, habitat for non-breeding flycatchers, migratory habitat, regenerating habitat, streams, elevated groundwater tables, moist soils, flying insects, and other alluvial floodplain habitats, etc.) adjacent to or between sites, along with the dynamic process of riparian vegetation succession and river hydrology, provide current and future habitat for the flycatcher which is dependent upon vegetation succession. As a result, these segments represent the boundaries within which flycatcher habitat of all types currently persist, and due to dynamic river processes, is expected to persist over time. We used expert opinion, location of territories, habitat models, existing dam and river operations, and the physical and

biological features essential to flycatcher conservation to determine the boundaries of each river segment that would be proposed as critical habitat for the subspecies.

In order to determine the degree of connectivity to assign populations, we examined the known between-year within-drainage (same river drainage) and between-drainage (separate river drainages) movements of southwestern willow flycatchers (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell *et al.* 2003, 2005; E. Paxton, USGS, e-mail). Using banding studies from 1997 to 2003 which were focused in central AZ, scientists re-sighted 292 banded southwestern willow flycatchers that, between years, moved within the same river drainage and to different river drainages (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Most recorded between-year movements ( $n = 267$ ) occurred within the same river drainage from 1.6 to 29 km (1 and 18 mi), but movements ranging from 40 km (25 mi) to as far as 440 km (276 mi) were recorded for movements occurring between different river drainages (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Flycatchers are not restricted to within river drainage movements, but longer distance movements were infrequent and would not be indicative of highly connected populations (USFWS 2002: 22, E. Paxton, USGS, e-mail). Therefore, as a result of the known movements of banded southwestern willow flycatchers, the ability of birds to move between drainages, and the intent to capture collections of small separate breeding sites, we chose a 29 km (18 mi) radius as the distance to identify the high connectivity of collections of flycatcher breeding sites.

As a result of defining the degree of connectivity to assign populations, we identified territories (with a minimum of 10 territories) and areas containing features essential to the subspecies' conservation or areas defined as essential habitat within a 29 km (18 mi) radius of each other to include as proposed critical habitat. This approach captures habitat for the persistence of the largest and most stable breeding populations in the best habitat throughout the subspecies' range. These populations within these areas provide metapopulation stability, gene flow, connectivity, and protects against catastrophic losses. The large breeding populations found within these segments provide dispersers that can colonize new breeding sites within and outside of designated critical habitat. These segments also capture habitat

with features essential for non-breeding, dispersing, migrating, and territorial southwestern willow flycatchers. As a result of using this radius to identify areas containing features essential to the subspecies' conservation or areas defined as essential habitat, it accounts for the dynamic aspects of riparian habitat and allows for a change in location, distribution, abundance, and quality of flycatcher habitat over time.

Large populations or small populations with high connectivity did not exist throughout the entire range of the bird (USFWS 2002: 30–33; 84 (Table 9)). For example, in the Amargosa, Santa Cruz, Hassayampa/Agua Fria, San Juan, Lower Rio Grande, and Powell Flycatcher Management Units there are no large sites with 10 or more territories, nor are any known territories in these Units in high connectivity (less than 29 km/18 mi) with a large population (greater than 10 territories). We are not designating these areas as critical habitat because the areas do not meet the criteria that we established for containing essential features or essential habitat.

We adjusted the methodology used to determine essential habitat in the Coastal CA Recovery Unit. Unlike the other Recovery Units in the flycatcher's range, streams in the Coastal CA Recovery Unit are located in closer proximity to each other and territories exist on a greater number of streams. As a result, flycatcher breeding sites in this Recovery Unit are almost all located in close proximity to one another. Because of this, our methodology could not distinguish habitat with essential features for the flycatcher. This caused us to further scrutinize stream segments in these Management Units to determine which had essential features for the flycatcher and which ones did not. In order to do that, we had to rely on Recovery Plan recommendations, distribution and abundance of territories, conservation goals, habitat quality, and expert opinion to determine those segments with essential features for this critical habitat designation.

Our approach in these Coastal CA Management Units was to still target large populations and smaller breeding sites that together equaled a large population. In the Santa Ynez, Santa Ana, and San Diego Management Units we selected segments from streams with large populations (Santa Ynez, Santa Ana, Santa Margarita and San Luis Rey Rivers). In addition to these stream segments with large populations, we selected other nearby stream segments with high quality habitat and smaller numbers of territories to provide for population connectivity,

metapopulation stability, population growth, and protection against catastrophic loss. We however, omitted some locations with lone territories that were not believed to be essential. These omitted locations were, compared to other habitat segments, believed to be of lesser quality and did not contribute as much to connectivity, stability, or protect against catastrophic loss. Consequently, there are stream segments in the Coastal CA Recovery Unit, specifically in the Santa Ana and San Diego Management Units in CA, where lone territories exist that fell within the 29 km (18 mi) radius, but are not being designated as critical habitat because they, when considered within the entire range of habitats and stream segments selected in the Coastal CA Recovery Units, are not believed to be essential for inclusion in this critical habitat designation.

#### Lateral Extent

In order to determine the lateral extent of critical habitat for the flycatcher, we considered the variety of purposes riparian habitat serves the southwestern willow flycatcher, the dynamic nature of rivers and riparian habitat, the relationship between the location of rivers, flooding, and riparian habitat, and the expected boundaries, over time, of these habitats.

Southwestern willow flycatchers use riparian habitat in a variety of conditions for breeding, feeding, sheltering, cover, dispersal, and migration stopover areas. Riparian habitat is dependent on the location of river channels, floodplain soils, subsurface water, floodplain shape, and is driven by the wide variety of high, medium, and low flow events. Rivers can and do move from one side of the floodplain to the other. Flooding occurs at periodic frequencies that recharge aquifers and deposit and moisten fine floodplain soils that create seedbeds for riparian vegetation germination and growth within these boundaries.

Over time, flycatcher habitat is expected to change its location (Dockens and Paradzick 2004) as a result of shifting river channels, flooding, drought, springs, seeps, and other factors such as agricultural run-off, diversions, dam operations, and modifications of riverbeds, etc. The methodology that we used to generate river segments and map the river channel and associated alluvial areas within the riparian zone is intended to identify locations where dynamic river functions exist that create and maintain southwestern willow flycatcher habitat for nesting, feeding, sheltering, cover, dispersal, and migration.

In this designation, we consider the riparian zone to be the area surrounding the select river segment which is directly influenced by river functions. The boundaries of the lateral extent or riparian zone (*i.e.*, the surrogate for the delineation of the lateral boundaries of critical habitat) were derived by one of two methods. The area was either captured from existing digital data sources (listed below) or created through expert visual interpretation of remotely sensed data (aerial photographs and satellite imagery—also listed below). Geographic Information System (GIS) technology was utilized throughout the lateral extent determination. ESRI, Inc. ArcInfo 8.3 was used to perform all mapping functions and image interpretation.

Pre-existing data sources used to assist in the process of delineating the lateral extent of the riparian zones for this designation included: (1) National Wetlands Inventory (NWI) digital data from the mid 1980's, 2001, 2002; (2) Federal Emergency Management Agency (FEMA) 1995, Q3 100 year flood data; (3) U.S. Census Bureau Topologically Integrated Geographic Encoding and Referencing; and (4) (TIGER) 2000 digital data.

Where pre-existing data may not have been available to readily define riparian zones, visual interpretation of remotely sensed data was used to define the lateral extent. Data sources used in this included: (1) Terraserver online Digital Orthophoto Quarter Quads (DOQQs), black & white, 1990's era and 2001 (2) U.S. Geological Survey (USGS) DOQQs 1997: (3) USGS aerial photographs, 1 meter, color-balanced, and true color, 2002; (4) Landsat 5 and Landsat 7 Thematic Mapper, bands 4, 2, 3, 1990–2000 (5) Emerge Corp, 1 meter, true color imagery, 2001; (6) Local Agency Partnership, 2 foot, true color, 2000; and (7) National Wetlands Inventory aerial photographs, 2001–2002.

We refined all lateral extents for this designation by creating electronic maps of the lateral extent and attributing them according to the following riparian sub-classifications. Riparian developed areas, as defined below, are not included in our critical habitat designation since these areas do not contain the primary constituent elements (see "Primary Constituent Elements" section above) and, therefore, do not meet the definition of critical habitat.

(1) Riparian Vegetated: This class is used to describe areas which can still support southwestern willow flycatcher habitat and features essential to the subspecies' conservation (*i.e.*, riparian forest, vegetated and unvegetated

wetlands, water bodies, any undeveloped or unmanaged lands within the approximate riparian zone). Some of these areas may encompass man-made features which support flycatcher habitat such as ditches or canals.

(2) Riparian Developed: This class is used to describe all developed areas found within the boundary of critical habitat with existing physical infrastructure features that do not contain the PCEs to support southwestern willow flycatcher habitat. Developed lands include, urban/suburban development, agricultural fields, utility structures, roads, mining/extraction pits, cement pads, and landscaped residential areas which no longer contain the ability to develop the PCEs.

### Critical Habitat Designation

Critical habitat for the southwestern willow flycatcher is being designated across a wide portion of the subspecies' range and is organized in Management Units (as described in the Recovery Plan). We are designating stream segments in 15 Management Units found in 5 Recovery Units as critical habitat for the southwestern willow flycatcher and excluding or exempting from this designation various river or stream segments previously proposed as critical habitat within many of those units. For those areas that have been excluded or exempted, a brief description of the segment is included and why it is being excluded or exempted. More thorough discussions are provided in the Exclusions under Section 4(a)(3) and 4(b)(2) of the Act and Summary of Changes from the Proposed Rule portions of this rule. The stream segments designated occur in southern CA, southern NV, southwestern UT, AZ, and NM. Lands we are designating are under private, local agency, county, State, Tribal, and Federal ownership.

In the development of southwestern willow flycatcher critical habitat, we determined which lands have features essential to the conservation of the species by defining the physical and biological features essential to the species' conservation and delineating the specific areas containing them. We then evaluated those lands determined to have essential features to ascertain if any specific areas are appropriate for exemption or exclusion from critical habitat pursuant to either sections 4(a)(3) or 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding certain approved HCPs, lands owned and managed by the Department of Defense, State and Federal Wildlife Areas,

National Wildlife Refuges, and Tribal and private lands under appropriate management for the southwestern willow flycatcher outweighs the benefits of their inclusion. We have subsequently excluded those lands from southwestern willow flycatcher critical habitat pursuant to section 4(a)(3) and 4(b)(2) of the Act (refer to *Exclusions under Section 4(b)(2) of the Act* section below).

The resulting designation, after exclusions and exemptions, is a subset of lands that have features essential to the conservation of the southwestern willow flycatcher or lands determined to be essential to the conservation of the subspecies. Following exclusions and exemptions some proposed river segments are completely removed, some are effectively divided in half, and others had a variety of sections removed. In a few cases, after exclusion or exemption, such a small piece of the segment is left, that it was removed from critical habitat because in the context of the protected segment, it was no longer essential. In those instances, we provide an explanation below of those small sections.

The value and purpose of each segment to flycatcher conservation are shared throughout the designation; segments provide riparian habitat for breeding, migrating, non-breeding, territorial, and dispersing southwestern willow flycatchers. This is especially true due to the dynamic nature of riparian habitat and the variety of purposes and conditions that are used by the flycatcher for life-history needs. A location in these segments that has a specific purpose today, such as a breeding site, foraging location, or areas used for migration or dispersal, can change over time (sometimes within a year or over a few years). Changes can occur due to flooding, drought, fire, or choices in land management. These changes can result in an increase or decrease in habitat suitability, growth, and location depending on which influence is exercised. Current breeding site locations, with few exceptions, are described in the Recovery Plan with a code describing (USFWS 2002: Figs. 3–11, 67–71) its general location. In this designation's proposal (69 FR 60706), we described each segment and the most recent known distribution of sites and territories.

The critical habitat areas described below constitute our best assessment of the areas: (1) With essential habitat features within the geographical area occupied by the species at the time of listing; (2) that contain the PCEs; and (3) that may require special management. Although all of the segments are within

the geographical area occupied by the species, we are not designating all of the areas known to be occupied by the southwestern willow flycatcher. We provide separate discussions on (1) the reasons why these segments contain features essential for the conservation of the southwestern willow flycatcher; (2) special management considerations for these Units; and (3) if a unit was not known to be occupied at the time of listing, we have described why we have determined the segment to be essential to the conservation of the species.

#### *Special Management Considerations or Protection*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we then evaluate lands defined by those features to assess whether they may require special management considerations or protection. As discussed throughout this rule, the southwestern willow flycatcher and its habitat are threatened by a multitude of factors occurring at once. Threats to those features that define essential habitat (PCEs) are caused by various factors.

We believe the areas designated as critical habitat will require some level of management and/or protection to address the current and future threats to southwestern willow flycatchers and maintain the PCEs essential to its conservation in order to ensure the overall conservation of the species. Areas in need of management include not only the immediate locations where the species may be present, but additional areas adjacent to these that can provide for normal population fluctuations and/or habitat succession that may occur in response to natural and unpredictable events. The southwestern willow flycatcher may be dependent upon habitat components beyond the immediate areas where individuals of the species occur if they are important in maintaining ecological processes such as hydrology; stream flow; hydrologic regimes; plant germination, growth, maintenance, regeneration (succession); sedimentation; groundwater elevations;

plant health and vigor; or maintenance of prey populations. The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the flycatcher. Federal activities outside of critical habitat are still subject to review under section 7 of the Act if they may affect the flycatcher or its critical habitat (such as groundwater pumping, developments, watershed condition, etc.). Prohibitions of section 9 of the Act also continue to apply both inside and outside of designated critical habitat.

A detailed discussion of threats to the southwestern willow flycatcher and its habitat can be found in the final listing rule (60 FR 10694, February 27, 1995), the previous critical habitat designation (62 FR 39129, July 22, 1997), and the final Recovery Plan (August 2002). Special management that may be needed for the southwestern willow flycatcher is briefly summarized below:

(1) Manage fire to maintain and enhance habitat quality and quantity. Suppress fires that occur. Restore groundwater, base flows, flooding, and natural hydrologic regimes to prevent flammable exotic species from developing and reducing fire risk. Reduce recreational fires.

(2) Manage biotic elements and processes. Manage livestock grazing to increase flycatcher habitat quality and quantity by determining appropriate areas, seasons, and use constituent within the natural historical norm and tolerances. Reconfigure grazing units, improve fencing, and improve monitoring and documentation of grazing practices. Manage wild and feral ungulates to restore desired processes to increase flycatcher habitat quality and quantity. Manage keystone species such as beaver to restore desired processes to increase habitat quality and quantity.

(3) Manage exotic plant species such as tamarisk or Russian olive by reducing conditions that allow exotics to be successful, and restoring or re-establishing conditions that allow native plants to thrive. To a large extent, abundance of exotic plants is a symptom of land management (groundwater withdrawal, surface water diversion, dam operation, over grazing) that has created conditions favorable to exotics over native plants. Eliminate or reduce dewatering stressors such as surface water diversion and groundwater pumping to increase stream flow and groundwater elevations. Reduce salinity levels by modifying agricultural practices and restoring natural hydrologic regimes and flushing flood flows. Restore natural hydrologic regimes that favor germination and growth of native plant

species. Improve timing of water draw down in lake bottoms to coincide with the seed dispersal and germination of native species. Restore ungulate herbivory to intensities and levels under which native riparian species are more competitive.

(4) Retain native riparian vegetation in the floodplain. Prevent clearing channels for flood flow conveyance or plowing of flood plains. Manage projects to minimize clearing of native vegetation will help ensure that the desired native species persist.

(5) Exotic plant species removal and native plant restoration should be evaluated and conducted on a site-by-site basis. If habitat assessment reveals sustained increase in exotic abundance, conduct habitat evaluation of underlying causes and conduct restoration pursuant to measures described in the Plan. Remove exotics only if: Underlying causes for dominance have been addressed; there is evidence that exotic species will be replaced by vegetation of higher functional value; and the action is part of an overall restoration plan. Restoration plans should include at least: a staggered approach to create mosaics of different aged successional stands; and consideration of whether the sites are presently occupied by nesting flycatchers. Biocontrol agents should not be used within the occupied range of the southwestern willow flycatcher.

(6) Protect riparian areas from recreational impact. Manage items such as trails, campsites, off-road vehicles, fires, etc. to prevent habitat degradation in order to maintain, protect, and develop flycatcher habitat.

#### *Justification of Including Areas Not Known To Be Within the Specific Geographical Area Occupied by the Species at the Time of Listing*

The areas included in this designation not known to be within the specific geographic area occupied by the species at the time of listing are portions of the bird's range associated with the large populations in CA, NV, UT, and AZ. In the Santa Ana Management Unit, breeding southwestern willow flycatchers were not known from streams associated with the Santa Ana Drainage including the: Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Creek. In the San Diego Management Unit, breeding southwestern willow flycatchers were not known from the Santa Margarita River, Temecula Creek, Agua Hedionda Creek, Santa Ysabel River, and Temescal Creek. In the Mohave Management Unit, breeding southwestern willow

flycatchers were not known from the Deep Creek, Holcomb Creek, and Mohave River. In the Virgin Management Unit, breeding southwestern willow flycatchers were not known from the Virgin River in NV and UT. And finally, breeding southwestern willow flycatchers were not known from the East Fork of the Little Colorado River and the Little Colorado River in AZ.

The river segments listed above are essential because they represent areas with large breeding populations or a collection of smaller breeding populations that together equals a large population. Together with other areas known to be occupied at the time of listing, these segments provide for a wide distribution of flycatcher populations and other essential habitat needs such as migration, dispersal, foraging, shelter, etc. As a result of targeting these large populations, these segments represent the highest quality flycatcher habitat, protection against simultaneous catastrophic loss, maintenance of gene flow, prevention of isolation and extirpation, and colonizers to new areas.

The known geographical area historically occupied by the subspecies was once much larger (USFWS 2002). Historical records described nesting birds in CA, NV, UT, CO, AZ, NM, and TX. At the time of listing in February 1995 (USFWS 1995), the distribution and abundance of nesting southwestern willow flycatcher populations, its habits, and areas occupied by non-breeding, migrating, and dispersing southwestern willow flycatchers were not well known. At the time of listing in February 1995, 359 territories (from limited 1994 survey data) were known only from CA, AZ, and NM. Unitt (1987) estimated the entire population was "well under a 1000 pairs, more likely 500," and 200 to 500 territories were estimated to exist in the proposal to list the flycatcher (USFWS 1993).

Since listing, the known distribution and abundance of flycatcher territories has increased primarily due to increased survey effort (Durst *et al.* 2005). Population increases have also been detected at specific areas where habitat improved. As a result of re-establishing occupancy of nesting areas (especially in NV, UT, and CO) and from more extensive surveys and research, the extent of riparian corridors currently occupied by migrating, non-breeding, and dispersing southwestern willow flycatchers has also expanded. As of the 2003 breeding season (Durst *et al.* 2005), 1137 territories were known in CA, NV, UT, CO, AZ, and NM. Territories have still not been detected

in TX. However migrant southwestern willow flycatchers may still move through TX.

At the time of listing, breeding areas in CA, NV, UT, and CO described by Unitt (1987) were adopted as the subspecies northern boundary. However, the collection of genetic material across this part of the bird's range has since refined this boundary (Paxton 2000). The results of the DNA work reduced the extent of the northern boundary of the southwestern subspecies. Territories once believed to be occupied by southwestern willow flycatchers in UT and CO, now are more accurately known to be of a different subspecies of the willow flycatcher that is not currently listed. This genetic work also confirmed the southwestern willow flycatcher subspecies throughout the rest of its range.

As discussed above, southwestern willow flycatchers are believed to exist and interact as groups of metapopulations (Lamberson *et al.* 2000; Noon and Farnsworth 2000; USFWS 2002). A meta-population is a group of spatially disjunct local willow flycatcher populations connected to each other by immigration and emigration (USFWS 2002). The distribution of willow flycatchers varies geographically (currently over a six-state region) and is most stable where many connected sites and/or large populations exist (Lamberson *et al.* 2000; USFWS 2002).

Most southwestern willow flycatcher breeding sites contain small numbers of territories (Durst *et al.* 2005). Eighty-two percent of all breeding sites between 1993 and 2003 contained five or fewer flycatcher territories (Durst *et al.* 2005). Some locations no longer contain flycatcher territories which can largely be attributed to a variety of reasons that can in some cases be inter-related such as: Site isolation; small numbers of territories; degraded habitat conditions; habitat loss due to inundation, fire or drought; and the overall small rangewide population size of this endangered subspecies.

Our methodology focused on identifying those areas with large populations and those populations in high connectivity that together constitute a large population. In areas such as the Santa Ana and San Diego Management Units, where habitat was more fragmented and nearly all territories were in close proximity, we had to be more selective, because we did not believe all habitat was essential and thus should be designated as critical habitat. We therefore targeted the largest populations surrounding the Santa Margarita, Santa Ana, and San

Luis Rey river drainages (including adjacent tributaries). A by product of targeting river segments with the largest populations is that they also have the highest quality flycatcher habitat, the greatest chance of long-term persistence, and the greatest source of dispersers. Also as a result of the flycatcher's site fidelity, migration, and dispersal behaviors, these habitats are reasonably certain to be used for migrating and dispersing, and offer the greatest opportunity for growth in the breeding population.

There are also many areas occupied at the time of listing that we are not considering for inclusion in the critical habitat proposal. We did not propose critical habitat along Bluewater Creek, Rio Chama, San Francisco River, the lower Rio Grande, and the Little Colorado River drainage in NM, the upper Santa Ynez River and Santa Clara River in CA, and the Colorado River in Grand Canyon and San Francisco River in AZ. Our methodology for identifying critical habitat segments only included large populations or small populations that in high connectivity were large, and these areas did not meet our criteria.

Because flycatcher habitat is dynamic, distribution of populations throughout the bird's range is important to retain meta-population stability, gene flow, prevention of simultaneous catastrophic loss, and therefore prevention of local extirpation. For example, in central AZ in early 2005, flooding caused the temporary loss or alteration of habitat for approximately 200 pairs of flycatchers (about 42 percent of the state's population) and about 15 percent of the entire subspecies due to inundation and other flood related damages. While river flows caused some significant change to nesting areas along the Verde, Salt, Tonto, and Big Sandy river drainages, river flow was not as severe on the San Pedro, Gila, Lower Colorado, and Bill Williams river drainages. Habitat on these drainages that were not as severely changed will be important for existing and displaced flycatchers. In turn, the critical habitat designation will be important in those areas which were disturbed in order for them to recover. This scenario is expected to occur across the subspecies range in any given year and over time.

Conservation of the flycatcher is largely focused on increasing the number of populations and decreasing the distance between them (USFWS 2002). Meta-population persistence or stability is more likely to increase by adding more sites rather than adding more territories to existing sites (Lamberson *et al.* 2000; USFWS 2002). Because riparian habitat is dynamic and

is widely, but sparsely distributed, flycatcher meta-population stability, population connectivity, gene flow, and avoidance of simultaneous catastrophic loss can be achieved by: Birds being distributed throughout its range, birds being close enough to each other to allow for interaction; having large populations and a matrix of smaller sites with high connectivity; and establishing habitat close to existing breeding sites, thereby increasing the chance of colonization (USFWS 2002). As the population at a site increases, the potential to disperse and colonize new areas increases (Lamberson *et al.* 2000).

The segments not known to be occupied at the time of listing are essential individually to the stability and persistence of a local breeding population, metapopulation, and connectivity of the entire subspecies, plus habitat for migrating, dispersing, and nonbreeding southwestern willow flycatchers.

**Critical Habitat Unit Descriptions**

Below are tables, lists, and descriptions of the critical habitat segments. In order to help further understand the location of these stream segments please see the associated maps

found within this rule and examine additional maps at <http://www.fws.gov/arizonaes/>. These additional maps will show areas that have been excluded from this final designation. To determine with specificity, the lateral extent boundaries of critical habitat, please see the electronic data layers found at <http://criticalhabitat.fws.gov>. The following tables describe: (1) Lands being excluded and exempted from this critical habitat designation pursuant to section 4(b)(2) and 4(a)(3) of the Act (Table 2); (2) approximate area designated by land ownership per State (Table 3).

**TABLE 2.—APPROXIMATE AREA HA (AC)/KM (MI) EXCLUDED AND EXEMPTED FROM SOUTHWESTERN WILLOW FLYCATCHER CRITICAL HABITAT PURSUANT TO SECTION 4(B)(2) AND 4(A)(3) OF THE ACT**

	AZ	CA	CO, NM, NV, UT
Exempted and Excluded Area Totals .....	36871 (91111) / 303 (188)	18884 (46563) / 361 (224)	38875 (96063) / 267 (166)

**TABLE 3.—SOUTHWESTERN WILLOW FLYCATCHER CRITICAL HABITAT BY LAND OWNERSHIP PER STATE IN HA (AC)/KM (MI)**

	Federal	State	Private	Other	Totals
AZ .....	5296 (13087) / —	1136 (2806) / —	15856 (39182) / —	89 (221) —	22377 (55296) / 519 (323)
CA .....	846 (2092) / —	333 (823) / — / —	— / —	5658 (17212) / —	6966 (17212) / 313 (195)
CO .....	— / —	— / —	— / —	— / —	— / —
NM .....	2596 (6416) / —	86 (214) / —	14052 (34724) / —	16735 (41353) / —	16735 (41353) / 510 (317)
NV .....	1118 (2763) / —	— / —	495 (1223) — /	— / —	1613 (3986) / 30 / (19)
UT .....	195 (483) / —	10 (26) / —	999 (2468) —	— / —	1205 (2977) / 37 (23)
Totals .....	10052 (24840) / —	1566 (3869) / —	31403 (77598) / —	5875 (14518) / —	48896 (120824) / 1186 (737)

The 5 Recovery and 15 Management Units, and designated stream segments are:

- Coastal California Recovery Unit
  - (1) Santa Ynez Management Unit—Santa Ynez River
  - (2) Santa Ana Management Unit—Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Canyon.
  - (3) San Diego Management Unit—Santa Margarita River, San Luis Rey River, Pilgrim Creek, Agua Hedionda Creek, San Ysabel River, Temescal Creek, and Temecula Creek.
- Basin and Mohave Recovery Unit in California
  - (4) Kern Management Unit—South Fork Kern River
  - (5) Mohave Management Unit—Deep Creek, Holcomb Creek, and Mohave River
  - (6) Salton Management Unit—San Felipe Creek

- Lower Colorado Recovery Unit—Nevada, California/Arizona Border, Arizona, Utah
- (7) Little Colorado Management Unit—Little Colorado River, and West and East Forks of the Little Colorado River, AZ
- (8) Virgin Management Unit—Virgin River, NV/AZ/UT
- (9) Bill Williams Management Unit—Big Sandy River, AZ
- Gila Recovery Unit in Arizona and New Mexico
  - (10) Verde Management Unit—Verde River, AZ
  - (11) Roosevelt Management Unit—Salt River and Tonto Creek, AZ
  - (12) Middle Gila/San Pedro Management Unit—Gila and San Pedro River, AZ
  - (13) Upper Gila Management Unit—Gila River in AZ/NM

- Rio Grande Recovery Unit in New Mexico
  - (14) Upper Rio Grande Management Unit—Coyote Creek, Rio Grande, and Upper Rio Grande del Rancho, NM
  - (15) Middle Rio Grande Management Unit—Rio Grande, NM
- Coastal California Recovery Unit
 

The Coastal CA Recovery Unit stretches along the coast of southern CA from just north of Point Conception south to the Mexico border. In 2003, there were an estimated 165 southwestern willow flycatcher territories in this Recovery Unit (15 percent of the rangewide total) (Durst *et al.* 2005). A total of 149 territories were estimated in the three Management Units included in this designation (Santa Ynez: n = 8 territories, Santa Ana: n = 41 territories, San Diego: n = 100 territories). No critical habitat is being designated in the Santa Clara

Management Unit. In 2001, territories were distributed along 15 watersheds, mostly in the southern third of the Recovery Unit (USFWS 2002: 64). The largest number of territories are within the San Luis Rey ( $n = 67$ ), Santa Margarita ( $n = 19$ ), and Santa Ana ( $n = 40$ ) watersheds (Durst *et al.* 2005). In 2001, all territories occurred in native or native-dominated habitats; over 60 percent were on government-managed lands (Federal, State, and/or local) (USFWS 2002: 64). This Recovery Unit contains designated segments within the Santa Ynez, Santa Ana, and San Diego Management Units. The stream segments designated as critical habitat are described below in their appropriate Management Units.

#### Santa Ynez Management Unit

We are designating a 32 km (20 mi) Santa Ynez River segment in Santa Barbara County, CA. This is the only stream in the Santa Ynez Management Unit to have nesting southwestern willow flycatchers and is northernmost along coastal CA. While a total of three sites are known along the length of the Santa Ynez River, our designated segment holds a single breeding site. A high of 28 territories were detected at this breeding site in 2000. In 2003, four territories were known at this site. Southwestern willow flycatchers have been detected nesting on the Santa Ynez River since 1994.

#### Santa Ana Management Unit

The Santa Ana River is the single largest river system in southern CA with flycatchers distributed throughout the stream from its headwaters/tributaries in the San Bernardino Mountains in San Bernardino County, CA, downstream to Riverside County. We are designating two segments (an upper 40.8 km/25.3 mi segment and a 13.6 km/ 8.5 mi lower segment) of the Santa Ana River in San Bernardino County (after removing a non-essential approximate 18 km/11 mi segment immediately below Seven Oaks Dam through the Santa Ana wash—see justification below) and other segments with high connectivity near its headwaters. In San Bernardino County we are designating 14.2 km (8.8 mi) of Bear Creek, 19.2 km (11.9 mi) of Mill Creek, 4.1 km (2.6 mi) of Waterman Creek, and 4.5 km (2.8 mi) of Oak Glen Creek.

The combination of these streams provides riparian habitat for breeding, migrating, dispersing, non-breeding and territorial southwestern willow flycatchers, metapopulation stability, gene flow, connectivity, population growth, and prevention against catastrophic loss. There are seven

breeding sites known along the Santa Ana River, one breeding site on Bear Creek, three breeding sites on Mill Creek, one breeding site on Waterman Creek, one breeding site on Oak Glen Creek, one breeding site on San Timoteo Wash, and no breeding sites on Wilson or Yucaipa creeks (USGS 2004). Durst *et al.* (2005) estimated 40 territories were on the Santa Ana River drainage in 2003.

Portions of the Santa Ana Watershed in Riverside County identified as having features essential for the southwestern willow flycatcher (the lower Santa Ana River, Yucaipa Creek, Temecula Creek, and Vail Lake on Temecula Creek) that lie within the boundaries of the Western Riverside MSHCP are being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

We have re-evaluated an approximate 18 km (11 mi) portion of the Santa Ana River immediately below Seven Oaks Dam, and portions of San Timoteo Wash, Yucaipa Creek, Wilson Creek, Oak Glen Creek, and Mill Creek. The portion of the Santa Ana Wash has little riparian habitat, is dry, and is not expected to develop riparian vegetation that can support nesting southwestern willow flycatchers due to the lack of surface water flow and the long-term establishment of Riversidean alluvial fan sage scrub vegetation in this area. Therefore, we have removed this approximate 18 km (11 mi) wash segment of the Santa Ana River to more accurately define the essential boundary of the critical habitat designation. To further more accurately define the essential boundaries of critical habitat, we reviewed and also removed segments of San Timoteo Wash, Yucaipa Creek, and Wilson Creek, and the lower portion of Mill Creek. Through further analysis of habitat, we have determined that these segments do not have areas with the appropriate topography, vegetation, or water that we would expect to support nesting southwestern willow flycatcher habitat, and therefore, we have removed them from this designation.

#### San Diego Management Unit

The longest two streams in the San Diego Management Unit, the San Luis Rey and Santa Margarita Rivers, contain the largest numbers of flycatcher territories within this Management Unit. In addition to these two streams, we are designating a collection of smaller streams within the Unit. Collectively, these segments contain essential features for breeding, non breeding,

territorial, migrating, and dispersing southwestern willow flycatchers and help provide metapopulation stability, population growth, gene flow, connectivity, and protection against catastrophic losses. In 2003, Durst *et al.* (2005) estimated a total of 100 territories for the entire San Diego Management Unit, with 86 territories on these two river drainages.

We are designating an 9 km (5.6 mi) segment of the Santa Margarita River and a 1.6 km (1 mi) segment of De Luz Creek in San Diego County, CA, upstream of Camp Pendleton. Territories have been detected on the Santa Margarita River at Camp Pendleton since 1994. A high of 22 territories in 2002 and 19 in 2003 were detected at the two known breeding sites on the Santa Margarita River on Camp Pendleton. The segment upstream from Camp Pendleton maintains a diversity of riparian vegetation used by dispersing and migrating southwestern willow flycatchers and the ability to develop breeding habitat for population growth or discovery of undetected territories.

We are designating six segments of the San Luis Rey River and the lowest 5 km (3.1 mi) portion of Pilgrim Creek in San Diego County, CA. Five separate segments of the San Luis Rey River are located upstream (7.5 km/4.7 mi), adjacent to (0.75 km/0.5 mi, 1 km/0.6 mi), between (1.7 km/1 mi), and immediately (3 km/1.9 mi) below the La Jolla and Rincon and Indian Tribes. The lowest 51.3 km/32 mi segment of the San Luis Rey River is a contiguous segment extending to the ocean. A total of eight breeding sites (seven on San Luis Rey River and one on Pilgrim Creek) are spread along the length of these streams. Breeding sites have been detected since 1994. Durst *et al.* (2005) reported 67 territories from the San Luis Rey River drainage with a single site on the upper San Luis Rey River holding 44 territories. A single breeding site exists on Pilgrim Creek where one to two territories were detected in 1994, 1995, and 1999.

We are designating a short 3.2 km (2 mi) portion of Agua Hedionada Creek in San Diego County, CA. A single territory was detected from 1998 to 2000. No territories were detected from 2001 to 2003.

We are designating joining segments of Temescal Creek (7 km/4.4 mi) and Santa Ysabel River (6 km/3.7 mi) in San Diego County, CA. Both segments are found upstream of known breeding sites that are being excluded due to their inclusion in the San Diego County MSCP. As a result, these two segments currently provide habitat for dispersing

and migrating flycatchers and locations for population growth and/or discovery of undetected territories.

We are designating a 5.1 km (3.2 mi) segment of Temecula Creek in San Diego County, CA. Two breeding sites are known from Temecula Creek, with one occurring on the designated segment. Territories were first detected in 1997, and Durst *et al.* (2005) reported a single territory for 2003.

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of the San Diego MSCP on the San Dieguito River (including Lake Hodges), San Diego River, and a portion of Santa Ysabel River is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of Marine Corps Base, Camp Pendleton on Cristianitos, San Mateo, San Onofre, Los Flores/Las Pulgas, Pilgrim, and DeLuz Creeks, and the Santa Margarita River are being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher on portions of the Santa Margarita River located within the boundaries of the Seal Beach Naval Weapons Station, Fallbrook Detachment, is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of the City of Carlsbad's HMP at Agua Hedionda Lagoon and Agua Hedionda Creek is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher was identified within the boundaries of Rincon and La Jolla Tribal Lands along the San Luis Rey River. These Tribes developed, completed, and are implementing actions described in their Southwestern Willow Flycatcher Management Plans. As result, we are excluding these tribal lands from the critical habitat designation (*see*

*Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

We have re-evaluated our determination of the essential nature of the habitat features at Cuyamaca Lake. We determined that the small amount of habitat and disjunct nature from any other locations in the Santa Ana or Salton Management Units provided minimal habitat for metapopulation stability or prevention against catastrophic loss. As a result, this segment is no longer considered essential habitat and we have removed it from this designation.

We have re-evaluated our determination of the essential nature of the habitat features associated with a short segment of Cristianitos Creek upstream of Camp Pendleton. Further evaluation concluded that there was little riparian habitat due to the lack of flowing water. As a result, we no longer consider this segment as essential habitat and we have removed it from this designation.

We have re-evaluated our determination of the essential nature of the most upstream portions of the Santa Ysabel River, Temescal Creek, Temecula Creek, and San Diego River. The Cleveland National Forest provided comments describing specific portions that they believe do not provide the appropriate habitat for southwestern willow flycatchers because the vegetation is not dense, water is intermittent, understory (*i.e.* vegetation below the tree canopy) is absent, and could not improve for flycatchers as a result of Forest Service management. The Forest provided pictures and more accurate boundaries for these habitat segments. We agree with their assessment and have shortened these four segments to more accurately reflect in our designation the essential habitat on these river segments.

#### **Basin and Mohave Recovery Unit**

This unit is comprised of a broad geographic area including the arid interior lands of southern CA and a small portion of extreme southwestern NV. For 2003, Durst *et al.* (2005) estimated 61 flycatcher territories at 16 sites (5 percent of the rangewide total) were distributed among widely separated drainages. Almost all sites had less than five territories; the exception was the largest breeding sites on the Kern and Owens River drainages (USFWS 2002:64). In 2002, all territories were in native or native-dominated riparian habitats, and approximately 70 percent were on privately owned lands (USFWS 2002:64). The Recovery Unit

contains the Owens, Kern, Mohave, Salton, and Amargosa Management Units. Stream segments designated in this proposal are found in the Kern, Mohave, and Salton Management Units.

#### **Owens Management Unit**

Habitat with features essential for the southwestern willow flycatcher identified along the Owens River are being managed by the Los Angeles Department of Water and Power (LADWP) and are being conserved through implementation of their Southwestern Willow Flycatcher Conservation Strategy. LADWP entered into a Memorandum of Understanding with the Service to implement these conservation actions. As a result, the entire 82.6 km (51.3 mi) Owens River, with 5 known breeding sites holding 28 territories as of 2003 (Durst *et al.* 2005) in Inyo and Mono Counties, CA, is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

#### **Kern Management Unit**

We are designating a 15.5 km (9.6 mi) segment of the South Fork of the Kern River in Kern County, CA. This is the only stream segment in the Kern Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at two sites along this reach of the Kern River since 1993. In 1997, a high of 37 territories were detected at a single location. In 2003, 20 territories were reported from a single site (Durst *et al.* 2005).

Habitat with features essential for the southwestern willow flycatcher identified on the Haffenfeld Ranch along the South Fork of the Kern River is being excluded due to a conservation easement established with the National Resource Conservation Service (NRCS) specific to protecting habitat needs of the southwestern willow flycatcher. As a result of the protections provided through this easement, this property is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

Two pieces of Federal land (Sprague Ranch and South Fork Kern Wildlife Area) with habitat features essential for the southwestern willow flycatcher within the Kern Management Unit are being excluded due to protections assured by their long-term commitments

to management programs specific to the riparian habitat and needs of the flycatcher. The Sprague Ranch was recently purchased specifically for the conservation needs of the southwestern willow flycatcher and is co-managed by the U.S. Army Corps of Engineers (Corps), the California Department of Fish and Game (CDFG), and the National Audubon Society (Audubon). The South Fork Kern River Wildlife Area, located at the upper end of Lake Isabella and Kern River immediately above the lake is co-managed by the Corps and the U.S. Forest Service to protect riparian habitat values. Both of these properties are managed in accordance with a long-term biological opinion and are being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Federal Conservation Programs—Exclusions Under Section 4(b)(2) of the Act* section below).

#### *Mohave Management Unit*

We are designating a 16.1 km (10 mi) portion of the Mojave River, a 18.8 km (11.7 mi) section of Holcomb Creek, and a 20.3 km (12.6 mi) section of Deep Creek (including the uppermost portion of Mohave River Forks Reservoir) in San Bernardino County, CA, near the Town of Victorville. Since 1995, southwestern willow flycatchers have been detected nesting at three sites along this reach of the Mojave River, one site on Holcomb Creek, and zero sites on Deep Creek. Deep Creek connects Holcomb Creek with the Mohave Forks Reservoir and provides riparian habitat for dispersal and migration, and areas for population growth. In 2002, a high of 13 territories were detected at all 5 sites within these segments; however in 2003, 10 territories were recorded (Durst *et al.* 2005).

#### *Salton Management Unit*

We are designating an 11 km (6.8 mi) portion of San Felipe Creek in San Bernardino County, CA. This is the only stream in the Salton Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at a single site since 1998. In 1998 and 1999, a high of four territories were detected on this stream segment. In 2003, two territories were estimated from this site (Durst *et al.* 2005). This stream and the territories on it have high connectivity with other smaller populations in the adjacent San Diego Management Unit in the Coastal CA Recovery Unit raising the collective population above 10 territories.

#### *Lower Colorado Recovery Unit*

This is a geographically large and ecologically diverse Recovery Unit, encompassing the Colorado River and its major tributaries from the high elevation streams in the White Mountains of East/Central Arizona to the main stem Colorado River through the Grand Canyon and continuing downstream through the arid lands along the lower Colorado River to the Mexico border (USFWS 2002:64). In 2003, despite its size, the Unit was estimated to have only 150 known flycatcher territories (13 percent of the rangewide total) (Durst *et al.* 2005), most of which occur away from the main-stem Colorado River (Sogge *et al.* 2003). The largest populations are found on the Bill Williams, Virgin, and Pahranaagat River drainages (USFWS 2002:64). In 2002, approximately 69 percent of territories are found on government-managed lands, and 8 percent are on Tribal lands (USFWS 2002:64). Habitat characteristics range from purely native (including high-elevation and low-elevation willow) to exotic (primarily tamarisk) dominated stands (USFWS 2002:64). This Recovery Unit contains the Little Colorado, Middle Colorado, Virgin, Pahranaagat, Bill Williams, Hoover to Parker, and Parker to Southerly International Border Management Units. Stream segments are being designated within the Little Colorado, Virgin, and Bill Williams Management Units.

#### *Little Colorado Management Unit*

We are designating a portion of the Little Colorado River and portions of the East and West Forks of the Little Colorado River in Apache County, AZ. The 11.2 km (7 mi) segment of the East Fork of the Little Colorado River extends from Forest Service Road 113 downstream to its confluence with the West Fork of the Little Colorado River and Little Colorado River. The 8 km (5 mi) section of the West Fork of the Little Colorado goes from just upstream of Forest Service Road 113 downstream to its confluence with the East Fork Little Colorado River and Little Colorado River. The Little Colorado River segment extends for 15.8 km (9.8 mi) downstream from the confluence of the East and West Forks to the diversion ditch near the Town of Greer.

Southwestern willow flycatchers have been detected nesting at single sites on both the Little Colorado and West Fork of the Little Colorado since 1993. In 1996, a high of 11 territories were detected at both locations on the West Fork and Little Colorado Rivers. In 2003, two territories were detected on

these segments. Due to its close proximity, the East Fork of the Little Colorado River is currently expected to be used for dispersing and migrating southwestern willow flycatchers and have the features to develop breeding habitat for southwestern willow flycatchers for population growth and stability.

We re-evaluated the 7 km (4 mi) segment of the South Fork of the Little Colorado River extending from Joe Baca Draw downstream to its confluence with the Little Colorado River and removed it from this designation. We visited the South Fork of the Little Colorado River on September 22, 2004, with Forest Service personnel and determined that the floodplain is not wide enough to support habitat currently known to be used by breeding southwestern willow flycatchers. While it is expected to be used by migrating southwestern willow flycatchers, our approach was to target stream segments that would serve a combination of purposes, including breeding habitat. Therefore, because it did not have nesting habitat, nor did we believe the topography allowed it to be able to develop nesting habitat, we no longer believe it is essential habitat and we have removed it from the designation.

#### *Middle Colorado Management Unit*

The upper most portion of the conservation space of Lake Mead, including the Colorado River to river mile 243, was identified as having features essential to the flycatcher in Mohave County, AZ. Southwestern willow flycatchers have been detected nesting at 14 sites along this reach of the Colorado River since 1993. In 1998, a high of 15 territories at 8 breeding sites were detected within this segment (USGS 2004). In 2003, no territories were detected on this stream segment, and in 2004, two territories were found (Munzer *et al.* 2005). The conservation space of Lake Mead and the Colorado River immediately upstream is covered under the Lower Colorado River Multi-Species Conservation Plan (LCR MSCP) up to full pool elevation of Lake Mead. The full pool elevation is defined by water surface elevation 1,229 feet National Geodetic Vertical Datum which extends up to near river mile 235 at Separation Canyon. As a result of upper portion of Lake Mead and Colorado River through river mile 235 being covered under the LCR MSCP, this entire segment is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

The Colorado River above Lake Mead on the Hualapai Nation was identified as having features essential to the southwestern willow flycatcher. The Nation developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, and in conjunction with coverage under the LCR MSCP, the southern bank of the Colorado River on Hualapai Lands is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

#### Virgin Management Unit

We are designating a contiguous segment of the Virgin River in UT, AZ, and NV. The segment extends for 118.7 km (73.8 mi) from the Washington Field Diversion Impoundment in Washington County, UT, downstream through the Town of Littlefield, AZ, and ends in NV at the upstream boundary of the Overton State Wildlife Area in Clark County, NV. This segment exists for 36.7 km (22.8 mi) in UT, approximately 52 km (32.3 mi) through AZ, and 30 km (18.6 mi) in NV. The Virgin River is the only stream within this Management Unit and within UT known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting in 1995 at three sites in the NV segment, a single site in the AZ segment since 2001, and two sites in the UT segment since 1995. In 2001, a high of 40 territories were detected at 5 of the 6 sites within the proposed designation (36 in NV, 1 in AZ, and 3 in UT). In 2003, 37 territories were detected at 4 of the 6 sites (Durst *et al.* 2005).

The Overton State Wildlife Area encompasses a segment of the Virgin River where it enters into Lake Mead. This segment of the Virgin River was identified as having features essential to the southwestern willow flycatcher. As a result of the State of Nevada's management of this property for wildlife and riparian habitat for the flycatcher, this segment is being excluded from this designation (see *Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* section below).

A 1.2 km (2 mi) (approximately 158 ha/390 ac of riparian habitat) segment of the Virgin River exists between two excluded areas of the Overton State Wildlife Area. About 61ha (150 ac) of this area was purchased by the Bureau of Reclamation for conservation of wildlife and riparian habitat, with the possibility of turning management over to the State of Nevada. As a result of this

remaining 1.2 km (2 mi) segment being surrounded by conservation lands, being detached from a considerably larger designated segment, being a very small piece of an overall larger segment that is being excluded from critical habitat, and because a significant portion was purchased for the conservation of wildlife, it is our determination that this segment is no longer essential habitat and we have removed it from the final designation.

#### Pahrnagat Management Unit

The Pahrnagat River, within the Pahrnagat National Wildlife Refuge and Key Pittman State Wildlife Area in Lincoln County, NV, and the Muddy River within the boundaries of the Overton State Wildlife Area in Clark County, NV, were identified as having features essential to the southwestern willow flycatcher. Durst *et al.* (2005) reported 21 territories from these three locations in 2003. As a result of the Service's management of this National Wildlife Refuge and the State of Nevada's management of the Key Pittman and Overton Wildlife Areas for wildlife and riparian habitat for the flycatcher, all of the three segments proposed in this Management Unit are being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act and Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* sections below).

#### Bill Williams Management Unit

We are designating a 30.4 km (18.9 mi) segment of the Big Sandy River from the Town of Wikieup to Groom Peak Wash, in Mohave County, AZ. This segment contains a known breeding site (15 territories in 2003 and 28 in 2004), habitat for dispersing, migrating, and non-breeding southwestern willow flycatchers, as well as areas for population growth.

We re-evaluated the upper most portion of the Big Sandy River segment, examined habitat models (Dockens and Paradzick 2004), consulted local experts, and determined that due to the intermittent surface flow of this stream, there is a limited amount of riparian habitat that is able to support nesting habitat for southwestern willow flycatchers. Thus, we shortened this segment to more accurately reflect the essential nature of this segment for the flycatcher by removing the northernmost (12.9 km/20.8 mi) portion from the designation.

The Alamo Lake State Wildlife Area, which includes the Big Sandy, Santa Maria, and Bill Williams River confluence area (included within upper Alamo Lake), in Mohave and La Paz Counties, AZ, was identified as having features essential to the southwestern willow flycatcher. A total of 31 territories were detected in 2004. As a result of the State of AZ's management of this Area for wildlife and riparian habitat for the flycatcher, all of the river segments within this Wildlife Area are being excluded from this designation (see *Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* section below).

The Bill Williams River within the Bill Williams National Wildlife Refuge was identified as having features essential to the southwestern willow flycatcher. A total of two territories were detected on the refuge in 2004. As a result of the Service's management of the refuge for wildlife and riparian habitat for the flycatcher, the Bill Williams River within the refuge boundary is being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

We re-evaluated the remaining approximately 1.6 km (1 mi) section of habitat along the Bill Williams River above the Bill Williams NWR (primarily occurring on Planet Ranch). This location is dominated by farm fields associated with the Ranch, and subsequently has little habitat for the southwestern willow flycatcher (U.S. Bureau of Reclamation 2005). There is potential for habitat improvement for the southwestern willow flycatcher but it would take a significant change in land operations, money, time, and effort, and may be more likely to develop habitat for yellow-billed cuckoos (U.S. Bureau of Reclamation 2005). We encourage continued management of the resources of this Ranch with respect to downstream riparian values, and toward developing future habitat for the southwestern willow flycatcher. But due to the present condition and the changes required to convert existing locations to flycatcher habitat, we have concluded it is not essential habitat, and have therefore removed it from the designation.

#### Hoover to Parker Management Unit

A 107 km (66.5 mi) segment of the Colorado River from Davis Dam to Parker Dam (including the Havasu National Wildlife Refuge, Fort Mohave Tribe, and Chemehuevi Tribe) in

Mohave and La Paz County, AZ, and San Bernardino County, CA, was identified as having features essential to the southwestern willow flycatcher and proposed as critical habitat. Six breeding sites are known from this segment, with the largest at Topock Marsh having 34 territories in 2004. As a result of the completion of the Lower Colorado River MSCP, Service management of Havasu National Wildlife Refuge for riparian habitat, and implementation of completed Southwestern Willow Flycatcher Management Plans by the Chemehuevi and Fort Mohave Tribes, this entire river segment is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act, and Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* sections below).

#### *Parker to Southerly International Border Management Unit*

A 24.1 km (15 mi) Colorado River segment in La Paz and San Bernardino Counties, CA, and another 74.4 km (46.2 mi) Colorado River segment in La Paz and Yuma, Counties, AZ, and Imperial CA (including Cibola and Imperial National Wildlife Refuges, Colorado River and Fort Yuma (Quechan) Tribes) were identified as having features essential to the southwestern willow flycatcher and proposed as critical habitat. A high of 13 territories at 10 sites were detected on this segment in 1996, and 2 were detected in 2003. As a result of the Lower Colorado River MSCP, Service management of Cibola and Imperial National Wildlife Refuges, and implementation of completed Southwestern Willow Flycatcher Management Plans by the Colorado River and Fort Yuma (Quechan) Tribes these two river segments are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act, Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act, and Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* sections below).

#### **Gila Recovery Unit**

This unit includes the Gila River watershed, from its headwaters in southwestern NM downstream to near the confluence with the Colorado River (USFWS 2002: 65). In 2002, the 588 known flycatcher territories (51 percent of the rangewide total) were distributed primarily on the Gila and lower San Pedro Rivers (Sogge *et al.* 2003). A total of 505 territories were detected in 2003 within the segments proposed in this Management Unit. Many sites are small (less than five territories), but sections of the upper Gila River, lower San Pedro River (including its confluence with the Gila River), and the Tonto Creek and Salt River inflows within the high water mark of Roosevelt Lake support the largest sites known within the subspecies' range. In 2001, private lands hosted 50 percent of the territories, including one of the largest known flycatcher populations in the Cliff-Gila Valley, NM (USFWS 2002: 65). Approximately 50 percent of the territories were on government-managed lands (USFWS 2002: 65). While 58 percent of territories were in native-dominated habitats, flycatchers in this Recovery Unit also make extensive use of exotic (77 territories) or exotic-dominated (108 territories) habitats (primarily tamarisk).

#### *Verde Management Unit*

We are designating two separate segments of the upper Verde River in Yavapai County, AZ. The first segment occurs in the Verde Valley and extends for 23.1 km (14.4 mi) from near the Town of Cottonwood (2 miles north of Highway 89A/260 intersection) downstream to the upstream end of Yavapai-Apache Tribal lands. The second segment extends for 29.2 km (18.1 mi) from the downstream boundary of Yavapai-Apache lands through the town of Camp Verde to Beasley Flat on the Prescott National Forest. A small (less than 1 km/0.6 mi) non-Tribal section of critical habitat separates two segments of excluded Yavapai—Apache Tribal lands.

Two segments occur in the middle Verde River in Yavapai and Maricopa Counties, AZ. A 37 km (23 mi) segment begins at the East Verde/Verde River confluence in Yavapai County on the Tonto National Forest and extends downstream to the conservation space boundary of Horseshoe Lake. The second segment begins immediately below Horseshoe Dam and extends for 6.5 km (4.1 mi) to the USGS gauging station in Maricopa County.

Since 1993, southwestern willow flycatchers have been confirmed at three

breeding sites on the upper Verde River (Tuzigoot to Beasley Flat), with additional sightings in 2005 of about seven unsolicited singing flycatchers near the West Clear Creek confluence downstream to Beasley Flat (E. Paxton, USGS, e-mail). In 1997, 10 territories were the highest recorded on the upper Verde River segment. In 2003, 13 territories were detected at 2 sites within the Middle Verde River section (Smith *et al.* 2004, and in 2004, 17 territories were detected at Horseshoe Lake (Munzer *et al.* 2005).

The Verde River within the conservation space of Horseshoe Reservoir was identified as having features essential to the southwestern willow flycatcher. As a result of the partnership developed with Salt River Project, and their continued effort toward managing Horseshoe Lake to maintain flycatcher habitat for the long-term, and formalizing management and appropriate mitigation in a HCP, we are excluding the lake from this designation (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

Three separate areas in the Verde River within the boundary of Yavapai-Apache Tribal lands were identified as having features essential to the southwestern willow flycatcher. The Tribe developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segments identified on Yavapai-Apache Tribal Lands are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

We re-evaluated the lowest 8 km (5 mi) segment of the Verde River located on the Tonto National Forest in Maricopa County, AZ, from Needle Rock to near the Fort McDowell Indian Tribal Boundary. While habitat here may be used in the future for breeding and migrating flycatchers, the results of recent surveys (Smith *et al.* 2004 and Munzer *et al.* 2005) did not detect flycatchers. We therefore concluded that due to the disconnected nature of this segment to upstream occupied areas, the short distance of the segment, and the lack of detections during surveys that it is not essential and we have removed from the designation. We encourage management of the Verde River below Bartlett Dam for flycatchers due to appropriate features to develop and maintain habitat.

*Roosevelt Management Unit*

We are designating a contiguous segment of lower Tonto Creek and the Salt River immediately upstream from the conservation space of Roosevelt Lake in Gila and Pinal Counties, AZ. A 31.7 km (19.7 mi) segment of Tonto Creek begins at the confluence of Tonto Creek and Rye Creek and extends to the high water mark of Roosevelt Lake in Gila County, AZ. The 28.3 km (17.6 mi) segment of the Salt River extends from the Cherry Creek confluence on the Tonto National Forest and travels downstream to the high water mark of Roosevelt Lake in Gila County, AZ. Outside of the conservation space of Roosevelt Lake, 10 territories were detected along Tonto Creek in 2004 (Munzer *et al.* 2005), and approximately 30 in 2005 (R. Ockenfels, AGFD, e-mail).

We re-evaluated the 34 km (21 mi) Pinto Creek segment and removed it from the designation because it does not have the essential habitat features identified for the flycatcher. The Arizona Game and Fish Department, U.S. Bureau of Reclamation, Tonto National Forest, and the Service identified Pinto Creek as habitat that could provide nesting locations for displaced flycatchers following inundation of habitat at Roosevelt Lake as a result of its proximity and habitat quality. Surveys in 2004 (Munzer *et al.* 2005), and particularly in 2005 (A. Smith, AGFD, e-mail) after flycatcher habitat was inundated at Roosevelt Lake, found no migrant or breeding flycatchers. While habitat may be used in the future for breeding and migrating flycatchers, the results of these surveys determined that it is not reasonably certain to be used by displaced Roosevelt flycatchers for nesting or migration, and therefore, we conclude that this segment is not essential habitat and we have removed it from the designation. We encourage continued management and monitoring of this segment for use by flycatchers.

The riparian habitat within the conservation space of Roosevelt Lake has features essential for the conservation of the southwestern willow flycatcher. In 2004, a total of 209 territories were found at Roosevelt Lake. The Roosevelt HCP covers the conservation space and as a result of protections provided from this HCP and management by the Tonto National Forest, this area is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

*Middle Gila/San Pedro Management Unit*

We are designating a segment of the middle and lower San Pedro River, and a segment of the Gila River near the San Pedro/Gila River confluence in Pinal, Pima, and Cochise Counties, AZ. The middle/lower San Pedro River segment extends for 97.4 km (60.5 mi) to the Gila River. The Gila River segment begins at Dripping Springs Wash and extends for 72.4 km (45 mi) downstream past the San Pedro/Gila confluence and the Towns of Winkleman and Kelvin to the Ashehurst Hayden Diversion Dam near the Town of Cochran in Gila and Pinal Counties, AZ. Flycatchers have been detected nesting along these segments since 1993. In 2003, a high of 167 territories from 19 sites (12 on San Pedro and 7 on the Gila) were detected on the stream segments proposed for critical habitat within this Management Unit. In 2004, a total of 157 territories were detected from these sites (Munzer *et al.* 2004). Dripping Springs Wash had one to two territories detected in 2005 (R. Ockenfels, AGFD, e-mail). Degradation of habitat quality due to an apparent reduction in river flow has dropped the number of territories on the Gila River segment from 68 in 1999, 26 in 2003, to 14 in 2004. This location, along with populations at Roosevelt Lake, AZ, and in the Cliff-Gila Valley, NM, have the most southwestern willow flycatcher territories throughout its range.

*Upper Gila Management Unit*

We are designating four distinct southwestern willow flycatcher critical habitat segments along the Upper Gila River from the Turkey Creek/Gila River confluence on the Gila National Forest, NM, downstream to San Carlos Apache Tribal Land, AZ. There are three full segments we are designating as southwestern willow flycatcher critical habitat on the upper Gila River in southwestern NM (Grant and Hidalgo Counties) and immediately across the AZ State line into Greenlee County. We are also designating four small parcels of land that are interspersed within an excluded portion of the U-Bar Ranch in the Cliff/Gila Valley, NM. A fourth full segment occurs in AZ through the Safford Valley in Gila, Graham, and Pinal Counties.

The first full segment extends for 15.5 km (9.7 mi) from the Turkey Creek/Gila River confluence on the Gila National Forest, NM, downstream to the upstream boundary of the U-Bar Ranch in the Cliff/Gila Valley, NM. We are excluding the U-Bar Ranch from this point downstream for approximately 6

km (3.7 mi) to near the Highway 180 Bridge. Along this approximate 6 km (3.7 mi) stretch of river are four small distinct parcels of land not owned by the U-Bar Ranch which are being designated as critical habitat. The second full segment extends from the downstream boundary of the U-Bar Ranch exclusion near where Highway 180 crosses the Gila River for 21.1 km (13.1 mi) through the Cliff/Gila Valley to the upstream entrance of the middle Gila Box on the Gila National Forest, NM (the middle Gila Box is being removed, see below). The third full segment begins at the gauging station above the Town of Red Rock in Grant County, NM, at the downstream end of the middle Gila Box and extends for 54.7 km (34 mi) into Hidalgo County, NM, and across the NM/AZ State line through the town of Duncan in Greenlee County, AZ.

A fourth full segment on the Gila River in AZ in Gila, Graham, and Pinal Counties extends for 69.2 km (43 mi) from the upper end of Earven Flat in AZ, above the Town of Safford, through the Safford Valley to the San Carlos Apache Tribal Boundary.

Southwestern willow flycatchers have been detected nesting along these stream segments in the Upper Gila Management Unit since 1993. A total of 16 breeding sites (7 in NM and 9 in AZ) are known in the Upper Gila Management Unit. In 1999, a high of 262 territories at 8 sites were detected. A single site, the U-Bar Ranch in the Cliff/Gila Valley, had 209 territories. In 2003, 191 territories at 8 sites were detected on the Gila River stream segments that we proposed as critical habitat within this Management Unit. The U-Bar Ranch had 123 of these territories in 2003, many nesting in the canopy of mature boxelder trees along maintained irrigated ditches.

The U-Bar Ranch, located in the Cliff/Gila Valley in Grant County, NM, was identified as having features essential to the conservation of the southwestern willow flycatcher. Since the mid-1990s, the U-Bar Ranch has been the focus of studies and research by the Forest Service's Rocky Mountain Research and Experiment Station in Albuquerque, NM. The number of territories detected has fluctuated between approximately 110 and 210 territories. The U-Bar exists at approximately 1372 m (4500 feet) above sea level. Dense stands of boxelder trees are found along irrigation canals. As a result, nearly 75 percent of the flycatcher territories are found nesting in the canopies of these boxelders, approximately 60 feet above the ground. No where else throughout this subspecies range are southwestern

willow flycatchers found nesting at this elevation, in this type of environment, in these types of trees, at this density. The combination of anthropogenic influence, elevation, and boxelder canopy structure has helped create a unique situation that is beneficial for nesting flycatchers. The result of these southwestern willow flycatcher studies has fostered the maintenance and management of one of the three largest known breeding populations. As a result of the stewardship demonstrated by the U-Bar Ranch and the commitment to future management of this population and its habitat, we are excluding the U-Bar Ranch from southwestern willow flycatcher critical habitat (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

We re-evaluated an 11.3 km (7 mi) segment of the Gila River downstream of the Gila Bird Area in NM, located primarily on the Gila National Forest in Grant County, known as the middle Gila Box. While flycatchers could use this location for migration and/or dispersal habitat, this section of river is bordered by canyon walls without the floodplain characteristics to develop the vegetation for nesting habitat. Therefore, we conclude that it is not essential habitat and we have removed it from the designation.

The Gila River immediately above San Carlos Lake and within the conservation space of the lake on San Carlos Apache Tribal Land was identified as having features essential to the southwestern willow flycatcher. The Tribe developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segments identified as critical habitat on San Carlos Tribal Lands are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

#### **Rio Grande Recovery Unit**

This Recovery Unit encompasses the Rio Grande watershed from its headwaters in southwestern CO downstream to the Pecos River confluence in southwestern Texas, although no flycatcher breeding sites are currently known along the Rio Grande in Texas. Also included in the Recovery Unit is the Pecos River watershed in NM and Texas (where no breeding sites are known) and one site on Coyote Creek, in the upper Canadian River watershed. In 2003 (Durst *et al.* 2005), the Rio Grande Recovery Unit had grown to 229

territories (20 percent of the rangewide total). This is a large increase from the 128 territories detected in 2001 (USFWS 2002). Breeding sites along the Rio Grande in the San Luis Valley, CO, and at the upper end of Elephant Butte Reservoir, NM, accounted for the majority of this increase. In 2001, government-managed lands accounted for 63 percent of the territories in this unit; Tribal lands supported an additional 23 percent (USFWS 2002). This Recovery Unit contains the San Luis Valley, Upper Rio Grande, Middle Rio Grande, and Lower Rio Grande Management Units. Only river segments in the Middle and Upper Rio Grande are being designated as critical habitat.

#### **San Luis Valley Management Unit**

The upper Rio Grande in Costilla, Conejos, Alamosa, and Rio Grande Counties, CO, and a segment of the Conejos River in Conejos, County, CO, were identified as having features essential to the southwestern willow flycatcher. In 2003, Durst *et al.* (2005) estimated a total of 73 flycatcher territories known from this Management Unit. The five counties surrounding these streams in south-central Colorado along with the Rio Grande Water Conservation District has a developed partnership with the Service and other Federal agencies for conservation of riparian areas on private lands in combination with Federal partners including and extending beyond the river segments identified in our proposed designation. Additionally, the Service is implementing management on the Alamosa National Wildlife Refuge specific to protecting riparian habitat values for the southwestern willow flycatcher. As a result, the Rio Grande and Conejos River segments identified as proposed critical habitat in the San Luis Valley Management Unit are being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act, and Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* sections below).

#### **Upper Rio Grande Management Unit**

We are designating single segments of the upper Rio Grande in Taos and Rio Arriba Counties, NM; the Rio Grande del Rancho in Taos County, NM; and Coyote Creek in Mora County, NM. The upper Rio Grande segment extends for 45.9 km (28.5 mi) from the Taos Junction Bridge (State Route 520) downstream to the upstream boundary

of the San Juan Pueblo. The 10.4 km (6.5 mi) of the Rio Grande del Rancho extends from Sarco Canyon downstream to the Arroyo Miranda confluence. The 9.3 km (5.8 mi) Coyote Creek segment travels from about 2 km/1 mi above Coyote Creek State Park downstream to the second bridge on State Route 518, upstream from Los Cocas.

Flycatchers have been detected nesting along these upper Rio Grande River segments since 1993. Eleven breeding sites are known to exist on these segments (seven on the Rio Grande, one on the Rio Grande del Rancho, and three on Coyote Creek). On the Rio Grande in 2002, 16 territories were detected at a single site. On the Rio Grande del Rancho in 2003, a high of six territories were detected at a single site. On Coyote Creek in 2000, a high of 17 territories at 3 sites were detected, however only 3 territories (from 2 sites) were detected in 2002, and no surveys occurred in 2003.

The Pueblos of San Juan, Santa Clara, and San Ildefonso were identified as having features essential to the southwestern willow flycatcher along the Rio Grande. These three Pueblos have established a history of habitat management conducive to fostering the development and maintenance of riparian vegetation for the southwestern willow flycatcher, including restoration of native vegetation in order to reduce catastrophic fire to the riparian area. All three Pueblos have developed partnerships with the Service toward management of flycatcher habitat, and through those partnerships will be finalizing riparian habitat management plans that specifically address the habitat needs of breeding, migrating, and dispersing flycatchers. As a result, the Rio Grande on the Pueblos of San Juan, Santa Clara, and San Ildefonso is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

Four extremely small sections of riparian vegetation exist between and adjacent to the San Juan, Santa Clara, and San Ildefonso Pueblos that we have determined are not essential and are removing from this designation. A small piece of non-Pueblo habitat less than 1 km (0.6 mi) long exists between the San Juan and Santa Clara Pueblos. Additionally, a piece of non-Pueblo habitat, less than 0.5 km/0.3 mi long exists to west, adjacent to the Santa Clara Pueblo. Another two small pieces (each less than 0.5 km/0.3 mi long) exist between the San Ildefonso and Santa Clara Pueblos. As a result of these segments being located adjacent to

appropriate management by the Pueblos for the southwestern willow flycatcher, and because of their disjunct location and small size, we have determined that these four pieces are not essential habitat and are being removed from this designation.

#### *Middle Rio Grande Management Unit*

We are proposing three separate segments of the middle Rio Grande in Valencia and Socorro Counties, NM. These segments are separated by the Sevilleta and Bosque del Apache NWRs that are being excluded from this designation as explained below. The most northern Rio Grande segment extends from the southern boundary of the Isleta Pueblo for 71.1 km (44.2 mi) to the northern boundary of the Sevilleta NWR. The middle Rio Grande segment extends for 44 km (27.3 mi) from the southern boundary of the Sevilleta NWR to the northern boundary of the Bosque del Apache NWR. The most southern Rio Grande segment extends for 20.1 km (12.5 mi) from the southern boundary of the Bosque del Apache NWR to the overhead powerline near Milligan Gulch at the northern end of Elephant Butte State Park.

Southwestern willow flycatcher territories have been detected on the middle Rio Grande since 1993. In 2002, 98 territories at 7 sites were detected. In 2003, a high of 107 territories at 6 of 7 different breeding sites were detected. A total of 85 territories were detected at the San Marcial site in 2003.

Habitat with features essential for the southwestern willow flycatcher identified along the Middle Rio Grande within the Rio Grande Valley State Park (City of Albuquerque) is being conserved through implementation of their Bosque Action Plan. This plan describes preservation and conservation of vegetation and wildlife communities, including the flycatcher and the habitat upon which it depends. As a result of this management, the Rio Grande Valley State Park is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

The Rio Grande on Pueblo of Isleta land immediately downstream of Rio Grande Valley State Park (City of Albuquerque) was identified as having features essential to the southwestern willow flycatcher. The Pueblo developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segment identified on Pueblo of Isleta

land is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified along the Middle Rio Grande within the Sevilleta and Bosque del Apache NWRs is being conserved by the Service. Goals and objectives of both refuges are the protection and restoration of riparian habitat for the southwestern willow flycatcher. A total of 11 territories as of 2003 were known from both NWRs (USGS 2004). As a result of the Service's management of the refuge for wildlife and riparian habitat for the flycatcher, the Rio Grande within the Sevilleta and Bosque del Apache NWRs boundaries is being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

#### **Exclusions of Military Lands Under Section 4(a)(3)**

Section 318 of fiscal year 2004 the National Defense Authorization Act (Public Law No. 108–136) amended the Endangered Species Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

The Sikes Act required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an INRMP by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on military lands. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for the ecological needs of listed species; and a monitoring and adaptive management plan. We consult with the military on the development

and implementation of INRMPs for installations with listed species.

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 on the military installation, including conservation provisions for listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan.

We identified in the proposed critical habitat rule for the southwestern willow flycatcher possible exclusion of Camp Pendleton and Fallbrook Naval Weapons Station from critical habitat under section 4(b)(2) of the Act. After re-evaluation, we have exempted lands owned by Camp Pendleton and Fallbrook Naval Weapons Station from the final critical habitat designation pursuant to section 4(a)(3) of the Act based on legally operative INRMPs that provide a benefit to the southwestern willow flycatcher. Detailed discussions of the exemptions and exclusion of military lands are discussed by installation below.

#### *Marine Corps Base, Camp Pendleton (MCBCP)*

Areas or habitat containing features essential to the conservation of the southwestern willow flycatcher within the boundaries of MCBCP occur along portions of Cristianitos (6 km/4 mi), San Mateo (5 km/3 mi), San Onofre (6 km/4 mi), Los Flores (8 km/5 mi), Las Pulgas (2 km/1 mi), and DeLuz Creeks (10 km/6 mi), and the Santa Margarita River (45 km/28 mi); however, as discussed below, these areas are being exempted from critical habitat for the flycatcher. The exemption includes lands leased to the California Department of Parks and Recreation. Southwestern willow flycatcher populations within these watersheds on Camp Pendleton contain features essential to the conservation of the species because these watersheds retain relatively natural hydrological processes and functions. The Santa Margarita watershed is one of the least altered major watersheds occupied by the species throughout its range.

Camp Pendleton's INRMP was completed and signed by the Commanding General on November 9, 2001. The INRMP provides conservation measures that will directly and indirectly benefit the southwestern willow flycatcher and other listed species found on the Base. According to Camp Pendleton's May 26, 2005,

comment letter, the Base annually reviews and updates its INRMP with cooperation of the Service and California Department of Fish and Game to verify that: (1) The Base has sufficient professionally trained natural resources management staff available to implement the INRMP; (2) there have not been significant changes to the installation's mission requirements or its natural resources; (3) planned actions are implemented in an adaptive manner, adjusting management priorities and methodologies to accommodate changing natural resource and mission requirements; and (4) the required Federal, State, and installation coordination has occurred.

Actions undertaken by Camp Pendleton that have directly or indirectly benefited the flycatcher include: (1) Removal of non-native plant and animal species from riparian habitats, including *Arunda donax*, a major invasive plant species, (2) control of brown-headed cowbirds (a nest parasite), for over the past ten years, (3) programmatic impact avoidance and minimization measures through the Riparian Biological Opinion (see below) and, (4) flycatcher surveys and monitoring. In addition to the above benefits, Camp Pendleton has hosted or funded the following research efforts in partnership with USGS-BRD: (1) Southwestern willow flycatcher demographic studies using banded flycatchers; (2) examination of vegetation characteristics at flycatcher nest sites; (3) riparian habitat use by birds (including southwestern willow flycatchers) with an emphasis on habitats dominated by exotic vegetation; (4) response of southwestern willow flycatchers to removal of exotic vegetation; (5) use of exotic riparian vegetation as nesting substrate; and, (6) use of non-listed birds as indicators of suitable southwestern willow flycatcher habitat.

Camp Pendleton manages listed species, including the southwestern willow flycatcher, in its riparian areas, such as Santa Margarita River, within the framework of programmatic management plans, approved in a biological opinion issued by the Service on October 30, 1995 (USFWS 1995a). The biological opinion discusses ongoing and planned training activities, infrastructure maintenance activities, several construction projects, and a Riparian and Estuarine Ecosystem Conservation Plan and assesses potential impacts to six federally-listed species, including the southwestern willow flycatcher. The Conservation Plan is designed to maintain and enhance the biological diversity of the

riparian ecosystem on Camp Pendleton and includes promoting the growth of sensitive species, including the southwestern willow flycatcher. Actions to assist in promoting conservation of the southwestern willow flycatcher on MCBCP include maintaining connectivity of riparian habitats; eradicating exotic plant communities to further establishment of successional stages of riparian scrub and riparian woodland habitat; and continuing to implement brown-headed cowbird management. The terms and conditions of the biological opinion for the Conservation Plan form the basis for portions of MCBCP's INRMP that was completed in 2001. Therefore, since the Conservation Plan provides a benefit to the species as outlined above, and since the INRMP is based on this plan, we have determined that the INRMP does provide a benefit for the southwestern willow flycatcher.

Camp Pendleton has demonstrated ongoing funding of their INRMP and management of endangered and threatened species. According to their May 26, 2005, comment letter, in fiscal year 2003, Camp Pendleton spent approximately \$5 million to fund INRMP-driven projects and to assure its implementation. During fiscal year 2004, they applied over \$3.5 million toward projects, programs, and activities that provide direct and indirect benefit to the management and conservation of Base natural resources. Moreover, in partnership with the Service, Camp Pendleton is funding two Service biologists to assist in implementing their Sikes Act program and buffer lands acquisition initiative.

Based on Camp Pendleton's past history for listed species and their Sikes Act program, we believe that there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Camp Pendleton on a variety of endangered and threatened species issues, including the southwestern willow flycatcher. The management programs and Base directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Camp Pendleton. Therefore, we find that the INRMP for Camp Pendleton provides a benefit for the southwestern willow flycatcher and are exempting from critical habitat all lands on Camp Pendleton, including lands leased to the State, pursuant to section 4(a)(3) of the Act.

#### *Fallbrook Naval Weapons Station*

Fallbrook Naval Weapons Station (NWS), located in northern San Diego

County, is approximately 8,850 ac (3,581 ha). Fallbrook Naval Weapons Station contains high quality habitat for the southwestern willow flycatcher within the Santa Margarita watershed.

In 1996, Fallbrook NWS completed an INRMP to address conservation and management recommendations within the scope of the installation's military mission. The INRMP provides conservation measures that will directly and indirectly benefit the southwestern willow flycatcher and other listed species found on the Naval Station. The 1996 INRMP was prepared with input from the Service and incorporates conservation measures outlined in several previously completed consultations between the Service and Fallbrook NWS. Fallbrook NWS is currently working with the Service to revise and update their INRMP.

Additionally, Fallbrook NWS has completed a formal section 7 consultation with the Service to revise their Fire Management Plan (FMP) to provide more effective fuels management and wildfire control, while minimizing impacts to listed species on the installation, including the southwestern willow flycatcher. This plan is a primary component of the installation's effort to develop and implement an updated INRMP. The revised FMP incorporates fuels management and fire suppression activities with habitat management needs of the southwestern willow flycatcher and other listed species to promote conservation and recovery of these species on Fallbrook NWS. This has resulted in minimal effects to surrounding habitat, including portions of the Santa Margarita River. Based on information provided in the FMP, breeding and/or territorial flycatchers have not been detected on Fallbrook NWS since the listing of the flycatcher under the Act, with all recent sightings determined to be transient birds. Measures to offset, avoid or minimize effects to the least Bell's vireo—another riparian dependent species—as described in our biological opinion on the FMP are also adequate to avoid effects on transient southwestern willow flycatchers. Additionally, Fallbrook NWS has agreed to provide information to us regarding any future sightings of southwestern willow flycatchers and will conduct follow-up surveys to determine their breeding status. If breeding or territorial flycatchers are detected on the Fallbrook NWS, the U.S. Navy and we will cooperate to determine whether additional measures to avoid and minimize the effects of fire management activities on the

southwestern willow flycatcher are necessary.

The Fallbrook NWS has also provided private researchers and the general public with opportunities for scientific and educational pursuits on the installation while controlling access to sensitive habitat areas to avoid causing inadvertent harm to species, including the southwestern willow flycatcher.

Based on Fallbrook NWS's Sikes Act program, we believe there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Fallbrook Naval Weapons Station on a variety of endangered and threatened species issues, including the southwestern willow flycatcher. The management programs and Station's directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Fallbrook NWS. Therefore, we find that the INRMP for Fallbrook NWS provides a benefit for the southwestern willow flycatcher and are exempting from critical habitat all lands on Fallbrook NWS pursuant to section 4(a)(3) of the Act.

#### *Exclusions Under Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

In our critical habitat designation we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas on which are found physical and biological features essential to the conservation of the species to determine which areas to propose and subsequently finalize (*i.e.*, designate) as critical habitat. On the

basis of our evaluation, we have determined that the benefits of excluding certain lands from the designation of critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this designation pursuant to section 4(b)(2) of the Act as discussed below.

Areas excluded pursuant to section 4(b)(2) included areas with: (1) Legally operative HCPs that cover the subspecies and provide assurances that the conservation measures for the subspecies will be implemented and effective; (2) draft HCPs that cover the subspecies, have undergone public review and comment, and provide assurances that the conservation measures for the subspecies will be implemented and effective (*i.e.*, pending HCPs); (4) Tribal conservation plans/programs that cover the subspecies and provide assurances that the conservation measures for the subspecies will be implemented and effective; (5) State and Federal conservation plans/programs that provide assurances that the conservation measures for the subspecies will be implemented and effective; (6) National Wildlife Refuges with Comprehensive Conservation Plans (CCPs) or programs that provide assurances that the conservation measures for the subspecies will be implemented and effective; and (7) Partnerships, conservation plans/easements, or other type of formalized relationship/agreement where a conservation plans/program provide assurances that the conservation measures for the subspecies will be implemented and effective. The relationship of critical habitat to these types of areas is discussed in detail in the following paragraphs.

Within the areas containing features essential to the conservation of the southwestern willow flycatcher across six states there are private lands with legally operative HCPs, State and Federal Wildlife Areas with conservation plans/programs, Tribal lands, National Wildlife Refuges, and other private lands with management plans, partnerships, and/or programs in place for the southwestern willow flycatcher.

We have considered, but are excluding from critical habitat for the southwestern willow flycatcher pursuant to section 4(b)(2) of the Act, lands containing essential features in the following areas. The following lands are covered by the completed HCPs: Western Riverside Multiple Species Habitat Conservation Plan, San Diego

County Multiple Species Conservation Plan, City of Carlsbad Habitat Management Program, Lower Colorado River Multiple Species Conservation Plan, Roosevelt Habitat Conservation Plan (only Roosevelt Lake). The following Tribes and Pueblos have completed and are implementing Southwestern Willow Flycatcher Management Plans: Hualapai, Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Yavapai-Apache, San Carlos, Isleta Pueblo, La Jolla, and Rincon. The following Northern New Mexico Pueblos have established southwestern willow flycatcher management partnerships with the Service: San Ildefonso, Santa Clara, and San Juan. The following NWRs have completed CCPs or have developed management programs and implementing management strategies specific to southwestern willow flycatcher habitat: Pahrnagat, Havasu, Cibola, Imperial, Bill Williams, Alamosa, Bosque del Apache, and Sevilleta. The following State and Federal Wildlife Areas have completed management plans/programs that are being implemented for the protection of southwestern willow flycatcher habitat: Overton and Key Pittman State Wildlife Areas, NV; Alamo State Wildlife Area, AZ; South Fork Kern River Wildlife Area, CA, Sprague Ranch, Kern River, CA. Other lands excluded under section 4(b)(2) of the Act due to southwestern willow flycatcher/riparian habitat conservation plans/programs/easements and/or partnerships include: Los Angeles Department of Water and Power, Owens River, CA; San Luis Valley Partnership, Rio Grande and Conejos Rivers, CO; Hafenfeld Ranch, Kern River, CA; Salt River Project—Horseshoe Lake, Verde River, AZ, the City of Albuquerque/Rio Grande Valley State Park, Rio Grande, NM, and U-Bar Ranch, Gila River, NM. See below for a detailed discussion of our exclusion of these lands under section 4(b)(2) of the Act.

#### **General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process**

The most direct, and potentially largest regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat.

Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation should be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. The Court ruled that the Service could no longer equate the two standards and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

#### **Educational Benefits of Critical Habitat**

The benefit of including lands in critical habitat is that the designation of

critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for the southwestern willow flycatcher. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit; in that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are making in this rule because these areas were included in the proposed rule as having features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat. Additionally, the purpose normally served by the designation of informing State agencies and local governments about areas which would benefit from protection and enhancement of essential features and habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies in those areas which we are excluding in this rule on the basis of HCPs, and other existing habitat management protections.

As noted elsewhere in this rule, the southwestern willow flycatcher is migratory and thus may receive some additional benefit from a critical habitat designation in that it is not present year-round in the U.S. However, we believe that based on the educational benefits already being provided as to the importance of these areas, as described above, and the fact that effects to flycatchers as a result of impacts to habitat are consulted upon regardless of what time of year impacts may occur, minimal if any additional benefits would result.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

#### *Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*

Another process for long term habitat protection is available under section 10(a)(1)(B) of the Act, which authorizes us to issue permits allowing the take of listed wildlife species incidental to otherwise lawful activities to non-Federal entities such as private landowners and State and local governments. The incidental take permit can not be issued until the permittee establishes habitat protection pursuant to the terms of an HCP. The HCP must identify conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take, and must have funding for these conservation measures assured before the take permit is issued. Frequently, as is the case with the HCPs for the southwestern willow flycatcher discussed below, the habitat protections, inclusive of protections for essential features, are long term management actions which assist in providing significant conservation benefit to the essential features, the habitat mosaic, and the subspecies.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally-listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Some areas occupied by the southwestern willow flycatcher involve several complex HCPs that address multiple species, cover large areas, and are important to many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally-listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place. The State of California also has a Natural Communities Conservation Program (NCCP) process that is very similar to the Federal HCP process and is often completed in conjunction with the HCP

process. We recognize that many of the projects with HCPs also have state issued NCCPs.

In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (e.g., those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the southwestern willow flycatcher, a primary goal of these regional plans is to provide for the protection and management of features essential for the species' conservation and thus habitat necessary for conservation, while directing development to other areas. In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (e.g., those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the southwestern willow flycatcher, a primary goal of these regional plans is to provide for the protection and management of habitat essential for the species' conservation, while directing development to other areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the southwestern willow flycatcher. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks that provide for its biological needs.

We believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. HCPs cause permittees to consider, evaluate, and commit resources to implement long-term management to particular habitat for at least one and possibly other listed or sensitive species. HCPs undergo analysis under NEPA, involve public participation, and go through intra-Service section 7 consultation for issuance of the permit. In contrast, section 7 consultations for critical habitat only consider listed species in the project area evaluated and Federal agencies are only committed to prevent adverse modification to critical habitat caused by the particular project and are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any management plan or HCP which considers enhancement or recovery as the management standard will always provide as much or more benefit than a consultation for critical habitat designation conducted under the

standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Below we provide our specific 4(b)(2) discussions for each of the HCPs that we are excluding from this final designation.

#### *Santa Ana Management Unit, CA*

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

The Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) was finalized and approved on June 22, 2004. Participants in this HCP include 14 cities; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; the California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside MSHCP is a subregional plan under the State's NCCP and was developed in cooperation with the California Department of Fish and Game. Within the 510,000 ha (1.26 million ac) planning area of the MSHCP, approximately 62,000 ha (153,000 ac) of diverse habitats are being conserved. The conservation of 62,000 ha (153,000 ac) complements other existing natural and open space areas that are already conserved through other means (e.g., State parks, USFS, and County park lands). An important objective of the MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the southwestern willow flycatcher that occurs within the plan's boundaries.

The MSHCP Conservation Area will include at least 4,282 ha (10,580 ac) of flycatcher habitat (breeding and migration habitat) including six core areas of high quality habitat and interconnecting linkages, including the segments of the Santa Ana River, San Timoteo Canyon/Yucaipa Creek, and Temecula Creek (including Vail Lake). The plan aims to conserve 100 percent of breeding habitat for the southwestern willow flycatcher, including buffer areas 100 m (328 ft) adjacent to breeding areas. In addition, the MSHCP requires compliance with a Riparian/Riverine Areas and Vernal Pool policy that contains provisions requiring 100 percent avoidance and long-term management and protection of breeding habitat not included in the conservation areas, unless a Biologically Equivalent or Superior Preservation Determination

can demonstrate that a proposed alternative will provide equal or greater conservation benefits than avoidance. We completed an internal consultation on the effects of the plan on the southwestern willow flycatcher and its essential habitat that is found within the plan boundaries, and determined that implementation of the plan provides for the conservation of the species because it provides for the conservation of breeding and migration flycatcher habitat, the conservation of dispersal habitat and adjacent upland areas, surveys for undiscovered populations, and the maintenance and potential restoration of suitable habitat areas within the conservation area.

We are excluding portions of the Santa Ana Watershed, including the Santa Ana River, San Timeteo Canyon/Yucaipa Creek, and Temecula Creek (including Vail Lake) containing features essential to the conservation of the flycatcher from the final designation of critical habitat for the southwestern willow flycatcher pursuant to section 4(b)(2) of the Act because it is within the planning area boundary for the Western Riverside MSHCP.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the MSHCP because, as explained above, these lands are already managed for the conservation of species covered by the MSHCP, including this subspecies.

As discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the MSHCP on June 22, 2004, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or

would result in take would be required even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the Western Riverside County MSHCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any non-Federal lands within existing public/quasi public lands, proposed conceptual reserve design lands, and lands targeted for conservation within the Western Riverside County MSHCP Plan Area, would provide little additional educational and Federal regulatory benefits for the species. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Western Riverside County MSHCP and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species (e.g., County of Riverside Regional Parks and Open Space District). In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the MSHCP within the designation because this area was

included in the proposed rule as having lands containing features essential to the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the MSHCP to provide protection and enhancement of habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

## (2) Benefits of Exclusion

As mentioned above, the Western Riverside MSHCP provides for the conservation of breeding and migration flycatcher habitat, the conservation of dispersal habitat and adjacent upland areas, surveys for undiscovered populations, and the maintenance and potential restoration of suitable habitat areas within the conservation area. The Western Riverside MSHCP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of essential features and habitat. Designation of critical habitat would therefore be redundant on these lands, and would not provide additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of benefits if participants abandon the voluntary HCP process because it may result in requiring additional regulations compared to other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP

participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act due to the presence of the species. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP "No Surprises" regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

## (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Western Riverside MSHCP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits

of including this area in critical habitat. We find that including the Western Riverside MSHCP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the Western Riverside MSHCP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this species pursuant to the Western Riverside County MSHCP. The Western Riverside MSHCP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the Western Riverside County MSHCP will not result in extinction of the southwestern willow flycatcher.

#### *San Diego Management Unit*

#### San Diego Multiple Species Conservation Program (MSCP)

Below we first provide some general background information on the San Diego Multiple Species Conservation Plan/Habitat Conservation Plan (MSCP/HCP), followed by an analysis pursuant to section 4(b)(2) of the Act of the benefits of including San Diego MSCP/HCP land within the critical habitat designation, an analysis of the benefits of excluding this area, and an analysis of why we believe the benefits of exclusion are greater than those of inclusion.

In southwestern San Diego County, the MSCP effort encompasses more than 236,000 ha (582,000 ac) and involves the participation of the County of San Diego and 11 cities, including the City of San Diego. This regional HCP is also a regional subarea plan under the NCCP program and has been developed in cooperation with California Department of Fish and Game. The MSCP provides for the establishment of approximately 69,573 ha (171,000 ac) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species over the life of the permit (50 years), including the southwestern willow flycatcher. We have determined that portions of lands within the boundaries of the San Diego Multiple MSCP contain features essential to the conservation of the southwestern willow flycatcher, including areas along portions of the San Dieguito (including Lake Hodges), Santa Ysabel, and San Diego Rivers. These particular areas lie within the boundaries of approved subarea plans.

Conservation measures specific to the southwestern willow flycatcher within the San Diego MSCP/HCP include the preservation and management of 3,845 ha (9,500 ac) (81 percent) of the riparian habitat within the planning area, as well as eight of the nine known breeding locations at the time of the plan's development. Surveys are required for projects potentially affecting this species, and breeding habitat will be identified and avoided. Specific management directives include measures to provide appropriate flycatcher habitat, upland buffers for all known flycatcher populations, cowbird control, specific measures to protect against detrimental edge effects, and monitoring.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the San Diego MSCP/HCP because, as explained above, these lands

are already managed for the conservation of covered species, including this subspecies.

As discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the County of San Diego subarea plan within the San Diego MSCP/HCP on May 12, 1998, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the subspecies. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the subspecies, consultation for Federal activities which might adversely impact the subspecies or would result in take would be required even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the subspecies consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the San Diego MSCP/HCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any lands within the San Diego MSCP/HCP Plan

Area would provide little additional educational and Federal regulatory benefits for the subspecies. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the San Diego MSCP/HCP Plan Area and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species. In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the San Diego MSCP/HCP Plan Area within the designation because this area was included in the proposed rule as having lands that contain features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the San Diego MSCP/HCP to provide protection and enhancement of habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

## (2) Benefits of Exclusion

As mentioned above, the San Diego MSCP/HCP provides for the conservation of occupied and historic habitat, the removal of non-native predators, and the avoidance of impacts if a population were to be found. The San Diego MSCP/HCP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of habitat. Designation of critical habitat would therefore be redundant on these lands, and would not provide additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent

with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of benefits to the subspecies if participants abandon the voluntary HCP process because it may result in additional regulations requiring more of them than other parties who have not voluntarily participated in conservation efforts for the subspecies. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act due to the presence of the species. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species, features essential to its conservation, and its habitat. In addition, funding for

such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP "No Surprises" regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

## (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the San Diego MSCP/HCP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including these lands in critical habitat. We find that including the San Diego MSCP/HCP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the San Diego MSCP/HCP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this subspecies pursuant to the San Diego MSCP/HCP. The San Diego MSCP/HCP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation, inclusive of that following a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged

from those that would exist if the excluded areas were designated as critical habitat, inclusive of that following a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the San Diego MSCP/HCP will not result in extinction of the southwestern willow flycatcher.

#### *San Diego Management Unit*

##### City of Carlsbad's Habitat Management Plan

The City of Carlsbad's Habitat Management Plan (HMP) was approved October 15, 2004. This plan is one of seven subarea plans being developed under the umbrella of the North County Multiple Habitat Conservation Plan (MHCP) in northern San Diego County. Participants in this regional conservation planning effort include the cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista. The subarea plans in development are also proposed as subregional plans under the State's NCCP and are being developed in cooperation with the California Department of Fish and Game (CDFG). We have determined that portions of lands within the boundaries of the HMP contain lands with features essential to the conservation of the southwestern willow flycatcher, including all of Agua Hedionda Lagoon and a portion of Agua Hedionda Creek.

Approximately 9,943 ha (24,570 ac) of land are within the Carlsbad HMP planning area, with about 3,561 ha (8,800 ac) remaining as natural habitat for species covered under the plan. Of this remaining habitat, the Carlsbad HMP proposes to establish a preserve system for approximately 2,746 ha (6,786 ac). Conservation measures specific to the southwestern willow flycatcher within the Carlsbad HMP

include the conservation of 200 ha (494 ac) (86 percent) of the riparian vegetation in the city and 10 ha (25 ac) (86 percent) of oak woodland. Preserved lands include the four highest quality habitat areas for flycatchers identified within the plan area, including lands along Agua Hedionda Creek. For proposed projects in or adjacent to suitable habitat outside of preserve areas, mandatory surveys will be conducted, with impacts to breeding flycatchers completely avoided or reduced, as described in the paragraph below. Flycatcher habitat will be managed to restrict activities that cause degradation, including livestock grazing, human disturbance clearing or alteration of riparian vegetation, brown-headed cowbird parasitism, and insufficient water levels leading to loss of riparian habitat and surface water. Area-specific management directives shall include measures to provide appropriate flycatcher habitat, cowbird control, and specific measures to protect against detrimental edge effects, and removal of invasive exotic species (e.g., *Arundo donax*). Human access to flycatcher-occupied breeding habitat will be restricted during the breeding season (May 1–September 15) except for qualified researchers or land managers performing essential preserve management, monitoring, or research functions. Projects that cannot be conducted without placing equipment or personnel in or adjacent to sensitive habitats shall be timed to ensure that habitat is removed prior to the initiation of the breeding season.

Projects having direct or indirect impacts to the southwestern willow flycatcher shall adhere to the following measures to avoid or reduce impacts: (1) The removal of native vegetation and habitat shall be avoided and minimized to the maximum extent practicable; (2) For temporary impacts, the work site shall be returned to pre-existing contours and revegetated with appropriate native species; (3) Revegetation specifications shall ensure creation and restoration of riparian woodland vegetation to a quality that eventually is expected to support nesting southwestern willow flycatchers, recognize that it may take many years (depending on type of activity and timing of flood events, etc.) to achieve this state; (4) Construction noise levels at the riparian canopy edge shall be kept below 60 dBA Leq (measured as Equivalent Sound Level) from 5 a.m. to 11 a.m. during the peak nesting period of March 15 to July 15. For the balance of the day/season, the noise levels shall not exceed 60

decibels, averaged over a 1-hour period on an A-weighted decibel (dBA) (i.e., 1 hour Leq/dBA); (5) Brown-headed cowbirds and other exotic species which prey upon the flycatcher shall be removed from the site; (6) For new developments adjacent to preserve areas that create conditions attractive to brown-headed cowbirds, jurisdictions shall require monitoring and control of cowbirds; (7) Biological buffers of at least 30 m (100 ft) shall be maintained adjacent to breeding flycatcher habitat, measured from the outer edge of riparian vegetation. Within this 30 m (100 ft) buffer, no new development shall be allowed, and the area shall be managed for natural biological values as part of the preserve system; (8) Suitable unoccupied breeding habitat preserved within the FPA shall be managed to maintain or mimic effects of natural stream or river processes (e.g., periodic substrate scouring and depositions); and (9) Natural riparian connections with upstream riparian habitat shall be maintained to ensure linkage to suitable occupied and unoccupied breeding habitat.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Carlsbad HMP because, as explained above, these lands are already managed for the conservation of covered species, including this subspecies.

As discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the Carlsbad HMP on November 9, 2004, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or would result in take would be required even without the critical habitat

designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the Carlsbad HMP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any lands within the Carlsbad HMP would provide little additional educational and Federal regulatory benefits for the species. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Carlsbad HMP and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species. In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the Carlsbad HMP within the designation because this area was included in the proposed rule as having lands containing features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the Carlsbad HMP to provide protection and enhancement of habitat for the

southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

#### (2) Benefits of Exclusion

As mentioned above, the Carlsbad HMP provides for the conservation of occupied and historic habitat, the removal of non-native predators, and the avoidance of impacts if a population were to be found. The Carlsbad HMP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of habitat. Designation of critical habitat would therefore be redundant on these lands, and would provide little, if any, additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species benefits if participants abandon the voluntary HCP process because it may result in requiring additional regulations compared to other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and

address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP "No Surprises" regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

#### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Carlsbad HMP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including these lands in critical habitat. We find that including the Carlsbad HMP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the Carlsbad HMP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this species pursuant to the Carlsbad HMP. The Carlsbad HMP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the Carlsbad HMP will not result in extinction of the southwestern willow flycatcher.

#### *Roosevelt Management Unit, AZ*

##### Roosevelt Lake HCP

A HCP for Salt River Project (SRP) was completed for the operation of Roosevelt Dam in Gila and Maricopa Counties, which included as the action area the perimeter of Roosevelt Lake's high water mark (ERO 2002). The Record of Decision for the HCP was dated February 27, 2003. The land within the Roosevelt Lake perimeter is Federal land withdrawn by the U.S. Bureau of Reclamation and managed by the U.S. Forest Service. The flycatcher population at Roosevelt Lake, depending on the year, can be the largest population of nesting southwestern willow flycatchers across the subspecies range (approximately 150

territories, plus an unknown number of unmated floating/non-breeding flycatchers and fledglings). Operation of Roosevelt Dam during low water years can yield as much as 506 ha (1,250 ac) of occupied flycatcher habitat within the perimeter of the high water mark. Annually, the total available habitat varies as reservoir levels fluctuate depending on annual precipitation with dry years yielding proportionally more habitat. We anticipated that creation and loss of habitat would occur over the 50 year life of the HCP. Flycatcher habitat at Roosevelt Lake varies depending on how and when the lake recedes as a result of water in-flow and subsequent storage capacity and delivery needs. As the lake recedes, flat-gradient, fine moist soils are exposed which provide seed beds for riparian vegetation. The size of Roosevelt Lake, and therefore the amount and location of flycatcher habitat, can vary greatly due to dam operations, floods, and drought. However, even in the expected high-water years, we determined that some flycatcher habitat would persist at Roosevelt Lake providing a net benefit to the bird. Species covered in this HCP were the southwestern willow flycatcher, bald eagle (*Haliaeetus leucocephalus*), and yellow-billed cuckoo (*Coccyzus americanus*).

The HCP covers Roosevelt Dam operations for 50 years and involves the conservation of a minimum of 607 ha (1,500 ac) of flycatcher habitat off-site, outside of the Roosevelt Management Unit, on the San Pedro, Verde, and/or Gila rivers, and possibly other streams in AZ, and implementation of conservation measures to protect up to an additional 304 ha (750 ac) of flycatcher habitat. Measures in the HCP to protect habitat at Roosevelt Lake include having the Forest Service hire a Forest Service employee (USFS) to patrol and improve protection of flycatcher habitat in the Roosevelt lakebed from adverse activities such as fire ignition from human neglect, improper vehicle use, etc., and to develop habitat at the Rock House Farm Site.

The conclusion provided in our biological opinion, required in order to issue the HCP permit, was based upon the persistence of varying degrees of occupied southwestern willow flycatcher habitat that, at a minimum, could possibly reach the numerical (50 territories) and distribution goals (within Roosevelt Management Unit) established in the Recovery Plan, under full operation of Roosevelt Dam with an HCP. The permittee (ERO 2002) estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat

(thus about 60 to 81 ha/150 to 200 ac of occupied habitat) would be present during the life of the permit, which could support 45 to 90 territories. Even in a worse case flood event, 15 to 30 territories are expected to persist. Under more favorable habitat conditions, the area between the existing pool and the high water mark has supported the largest local population of flycatchers throughout the subspecies range (approximately 150 pairs). The basis for the full-time USFS employee is to minimize the effects of on-the-ground actions (trespass livestock, recreation, fire, habitat clearing, development, roads, fencing, boating, gravel collection, off-highway vehicles, etc.), not at the discretion or under the control of SRP. While it is not possible to fully protect these areas with an on-the-ground officer, the HCP provides an additional level of protection that would not otherwise be available to the habitat absent the HCP.

Currently, a collection of properties have been acquired as required by the HCP along the lower San Pedro and Gila River (Middle Gila/San Pedro Management Unit), and a single property along the Verde River (Verde Management Unit). Some of these properties were identified as essential habitat in the critical habitat proposal, but were proposed for exclusion under section 4(b)(2). In their comments on the proposed rule, SRP specifically requested that the mitigation properties identified in the proposal and others they acquired since publication of the proposal, that were part of the proposal, be included in the critical habitat designation. Therefore, due to the discretion of the Secretary under section 4(b)(2) of the Act, and based upon the comments received from SRP, the mitigation properties acquired by SRP are included in the final designation as critical habitat.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the conservation space of Roosevelt Lake, because, as described below, the location is occupied by many southwestern willow flycatchers and therefore, its habitat is already under evaluation under section 7 of the Act, and operations of Roosevelt Dam (resulting in the periodic rise and fall of water across the land at the edges of the lake) is integral to the long-term persistence of flycatcher habitat at Roosevelt Lake. Therefore, while flycatcher habitat will vary in quality and quantity over time due to the different lake levels within the

conservation space of Roosevelt Lake, it will persist.

With respect to operations of Roosevelt Dam, we determined in our jeopardy analysis for our intra-Service section 7 consultation for issuance of the Roosevelt HCP permit that dam operations would not result in jeopardy to the southwestern willow flycatcher. As stated in our proposal, one of the primary conservation values of proposed critical habitat is to sustain existing populations. The threshold for reaching destruction or adverse modification at Roosevelt Lake would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Because of the importance of the conservation space at Roosevelt Lake plays for water storage, there is no reasonable reason to believe that there would be any development or change that would result in this piece of land being unavailable for riparian vegetation. This is because the dam operates in a way that continues moves water out of the reservoir to downstream lakes and canals. Thus, dam operators are continuously in the process of creating conservation space at Roosevelt Lake, and therefore, places for riparian vegetation (*i.e.*, flycatcher habitat) to grow. Constant lake levels, which are not the desired condition at Roosevelt Lake, will not result in the creation of the hundreds of acres of flycatcher habitat that occurred between 1995 and 2004. On the contrary, dynamic lake levels (like Roosevelt Dam is operated), similar to river systems, are important for the creation and maintenance of abundant southwestern willow flycatcher habitat at this location.

The threshold for reaching destruction or adverse modification of critical habitat at Roosevelt Lake would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. We concluded in our intra-Service opinion for issuance of Roosevelt Dam HCP permit, that dam operations would sustain populations over time (and similar to all flycatcher locations are subject to disturbances such as flooding and drought and an increase and decrease in populations), and therefore, would not jeopardize the flycatcher. Therefore, the outcome of consultation under section 7 of the Act on Roosevelt Lake Dam operations with critical habitat designated would not

likely be materially different compared to the listing of the species alone. Similarly, we concluded in our 4(b)(8) determination in the proposed and final rules that dam operations, like those of Roosevelt Lake, would not result in adverse modification of critical habitat, because normal operations resulted in conditions that allows flycatcher habitat to persist over time.

However, dam operations are not the only possible impact to flycatcher habitat at Roosevelt Lake, once water recedes and uncovers the ground where flycatcher habitat can grow; the Forest Service is the land manager. Livestock grazing and recreation, two activities that occur in and around Roosevelt Lake, have the ability to adversely affect critical habitat. These activities have previously occurred in the dry conservation space of the lake. But since the mid-1990s, the Tonto National Forest has prevented grazing from the lake bottom and fenced habitat to limit the effects of recreation and adjacent trespass cattle. Through the Roosevelt HCP, a Forest Protection Officer has been hired in order to help monitor and regulate unauthorized activities that could affect flycatcher habitat. Therefore, there is existing management by the Forest Service and additional protections through the HCP to protect the development, growth, and maintenance of flycatcher habitat from unauthorized activities.

The draft environmental assessment found that minor changes in livestock grazing or recreation through section 7 consultations, due to a critical habitat designation, may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. If Roosevelt Lake was designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for actions under the discretion of the Forest Service. But, since the location is currently occupied by breeding flycatchers, dispersing young-of-the-year flycatchers, migrating, foraging, and non-breeding flycatchers; habitat is already considered in consultations under section 7 of the Act and current management emphasizes habitat growth and persistence. For these reasons and because formal consultations will likely result in only discretionary conservation recommendations due to existing appropriate management, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated

critical habitat for the southwestern willow flycatcher at Roosevelt Lake.

We believe that there would be little educational and informational benefit gained from including Roosevelt Lake within the designation, because this area was included in the proposed rule as essential habitat, is discussed in this final rule, and has been the focus of flycatcher research and water storage issues since the mid-1990s. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the importance of Roosevelt Lake for conservation of the flycatcher, its importance to the Roosevelt Management Unit, and to the population of flycatchers in the state of Arizona has already been realized by managing agencies, including the public, State and local governments, and Federal agencies.

## (2) Benefits of Exclusion

A benefit of excluding Roosevelt Lake from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However, because the flycatcher occupies the margins of Roosevelt Lake, consultations are expected to occur regardless of a critical habitat designation, and those costs to perform the additional analysis are not expected to be significant.

The Roosevelt HCP and exclusion from critical habitat can also facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Continued cooperative relations with SRP and its stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations. The benefits of excluding lands within the Roosevelt Lake HCP area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP.

The Roosevelt HCP has and will continue to help generate important status and trend information for flycatcher recovery. In addition to specific flycatcher conservation actions, the development and implementation of this HCP provides regular monitoring of flycatcher habitat, distribution, and abundance over the 50 year permit.

Failure to exclude Roosevelt Lake could be a disincentive for other entities contemplating partnerships as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the "No Surprises" assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for the southwestern willow flycatcher that additional consultation will not be necessary.

HCP permittees and stakeholders have submitted comments and spoke during public hearings discussing that they view critical habitat designation at Roosevelt Lake as unwarranted and an unwelcome intrusion to the operation of Roosevelt Dam, and an erosion of the regulatory certainty that is provided by their incidental take permit and the "No Surprises" assurances. We received other public comments disapproving of our identification of the conservation space of Roosevelt Lake as essential habitat, believing designation of critical habitat at Roosevelt Lake would limit fishing, camping, water storage, etc. There is a concern by SRP and stakeholders that designation of critical habitat at Roosevelt Lake has the potential to threaten the storage and delivery of water to the greater Phoenix metropolitan area (as described in the Economic Analysis). Should this ever come to pass, the results could be significant, however we do not believe

that scenario is reasonably foreseeable (see discussion above). Having applicant's understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs.

A related benefit of excluding lands within this HCP is the continued ability by the Service to seek new partnerships. Permittees who trust and benefit from the HCP process discuss the benefits with others who may become future HCP participants, such as States, counties, local jurisdictions, conservation organizations, and private landowners. New HCPs would result in implementation of conservation actions that we would be unable to accomplish otherwise. By excluding areas covered by HCPs from critical habitat designation, we preserve these partnerships and promote more effective conservation actions in the future.

Our collaborative relationships with the Roosevelt Lake HCP permittees clearly make a difference in our partnership with the numerous stakeholders involved and influence our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher at Roosevelt Lake are relatively small in comparison to the benefits of exclusion. We find that including Roosevelt Lake would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. In making this finding, we have weighed the benefits of including these lands as critical habitat with an operative HCP and management by the Forest Service, and without critical habitat. Excluding Roosevelt Lake would eliminate some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding Roosevelt Lake would continue to help foster development of future HCPs and strengthen our relationship with Roosevelt HCP permittees and stakeholders. Roosevelt Dam operations will continue to foster the maintenance, development, and necessary recycling of

habitat for the flycatcher in the long-term due to the dynamic nature of water storage and delivery. Forest Service management fosters the presence of flycatcher habitat, and there is virtually no risk of development within the conservation space of Roosevelt Lake. Excluding Roosevelt Lake eliminates regulatory uncertainty associated with the permittees HCP, and any possible risk to water storage and delivery to the greater Phoenix metropolitan area. We have concluded that the benefits of the Roosevelt Dam operations underneath the coverage of the Roosevelt HCP and Forest Service management outweigh those that would result from the designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because the operation of Roosevelt Dam, maintenance of the conservation space of the lake, and Forest Service management will ensure the long-term persistence and protection of flycatcher habitat at Roosevelt Lake. We determined in our intra-Service section 7 biological opinion for the issuance of the Roosevelt HCP permit that operations would not result in jeopardy. Our 4(b)(8) determination in this proposal indicated that we did not believe dam operations, like Roosevelt Dam, would result in adverse modification. We determined that while incidental take will occur, and habitat will fluctuate in its abundance and quality, reservoir operations resulting in a dynamic environment were necessary for the long-term persistence of habitat. It was estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat (thus about 60 to 81 ha/150 to 200 ac of occupied habitat) would be present during the life of the permit, which could support 45 to 90 territories. Even in a worse case flood event, 15 to 30 territories are expected to persist. Under more favorable habitat conditions, the area between the existing pool and the high water mark has supported the largest local population of flycatchers throughout the subspecies range (approximately 150 pairs). The best case scenario and average estimated amount of available habitat can far surpasses the amount needed to support the 50 territory numerical goal recommended in the Recovery Plan (USFWS 2002).

*Hoover to Parker, Parker to Southerly International Border, and Middle Colorado Management Units, CA/AZ/NV*

Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

The LCR MSCP was developed for areas along the lower Colorado River along the borders of AZ, CA, and NV from the conservation space of Lake Mead to Mexico, in the Counties of La Paz, Mohave, and Yuma in AZ; Imperial, Riverside, and San Bernardino Counties in CA, and Clark County in NV. The LCR MSCP primarily covers activities associated with water storage, delivery, diversion, and hydroelectric production. The Record of Decision was signed by the Secretary of Interior on April 2, 2005. Discussions began on the development of this HCP in 1994, but an important catalyst was a 1997 jeopardy biological opinion for the southwestern willow flycatcher issued to the Bureau of Reclamation for lower Colorado River operations (USFWS 1997).

The Federal agencies involved in the LCR MSCP include the Bureau of Reclamation, Bureau of Indian Affairs, National Park Service, Bureau of Land Management, Western Area Power Administration, and U.S. Fish and Wildlife Service. The permittees covered in AZ are: The Arizona Department of Water Resources; Arizona Electric Power Cooperative Inc.; Arizona Game and Fish Department; Arizona Power Authority; Central Arizona Water Conservation District; Cibola Valley Irrigation and Drainage District; City of Bullhead City; City of Lake Havasu City; City of Mesa; City of Somerton; City of Yuma; Electrical District No. 3, Pinal County, Arizona; Golden Shores Water Conservation District; Mohave County Water Authority; Mohave Valley Irrigation and Drainage District; Mohave Water Conservation District, North Gila Valley Irrigation and Drainage District; Salt River Project Agricultural Improvement and Power District; Town of Fredonia; Town of Thatcher; Town of Wickenburg; Unit "B" Irrigation and Drainage District; Wellton-Mohawk Irrigation and Drainage District; Yuma County Water Users' Association; Yuma Irrigation District; and Yuma Mesa Irrigation and Drainage District. The permittees covered in CA are: The City of Needles, the Coachella Valley Water District, the Colorado River Board of California, the Imperial Irrigation District, the Los Angeles Department of Water and Power, the Palo Verde Irrigation District, the San Diego County Water Authority, the Southern California Edison Company, the Southern California Public Power

Authority, Bard Water District, and The Metropolitan Water District of Southern California. The permittees covered in NV are: The Colorado River Commission of Nevada, the Nevada Department of Wildlife, Basic Water Company, and the Southern Nevada Water Authority.

The Southwestern Willow Flycatcher Management Units primarily encompassed in the LCR MSCP are the Hoover to Parker and Parker to Southerly International Border Management units. Streams in the Middle Colorado (Colorado River/Lake Mead), Virgin (Virgin River), and Pahranaagat (Muddy River) Management units in AZ, UT, and NV, are briefly represented where they surround Lake Mead (including the conservation space of Lake Mead which extends up the Colorado River to Separation Canyon). The southwestern willow flycatcher is a key species in the LCR MSCP where the permittees will create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit (2005 to 2055). Additional research, management, monitoring, and protection of flycatchers and flycatcher habitat will occur from fire, nest predators, and brood parasites. The development of flycatcher habitat will occur specifically throughout the Hoover to Parker and Parker to Southerly International Border Management units, and is expected to meet conservation goals of the flycatcher identified in the Recovery Plan by increasing numbers of territories in appropriate Management Units. Management and tasks associated with the HCP will result in improving and maintaining essential migration stopover habitat, improving metapopulation stability, and reducing the risk of catastrophic losses due to fire. In addition to creation and subsequent management of flycatcher habitats, provision is made in the LCR MSCP to provide funds to ensure the maintenance of existing flycatcher habitats within the Management Units. The LCR MSCP will also cover 26 species, including 5 more federally listed animals: Yuma clapper rail (*Rallus longirostris yumanensis*), Desert Tortoise (*Gopherus agassizii*), razorback sucker (*Xyrauchen texanus*), bonytail (*Gila elegans*), humpback chub (*Gila cypha*).

As a result of the development of the LCR MSCP, and in conjunction with (see *Relationship of Critical Habitat to National Wildlife Refuge Management Plans—Exclusions Under Section 4(b)(2) of the Act*, and *Relationship of Critical Habitat to Tribal Management Plans—Exclusions Under Section 4(b)(2) of the Act* sections below) Southwestern

Willow Flycatcher Tribal Management Plans and conservation of southwestern willow flycatcher habitat on National Wildlife Refuges (NWR) along the Lower Colorado River, there is significant conservation of existing flycatcher habitat and development of new flycatcher habitat throughout the length of the LCR MSCP planning area (Lake Mead to Mexico). The LCR MSCP and management of NWR and Tribal Lands will result in thousands of acres of restored, protected, and managed flycatcher habitat for nesting, migrating, foraging, territorial, non-breeding, and dispersing birds capable of reaching conservation goals established in the Recovery Plan. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat, we are excluding the length of the Lower Colorado River from the conservation space of Lake Mead (which extends up to Separation Canyon) downstream to the Southerly International Border from designation as flycatcher critical habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher along the length of the lower Colorado River from Lake Mead to Mexico, because as described above, the LCR MSCP commits to developing, managing, and protecting thousands of acres of flycatcher habitat. Additionally, over a thousand acres of riparian habitat that can be used by flycatchers will collectively be restored, managed, and maintained on NWRs (Havasus, Cibola, and Imperial) and Tribal Lands (Hualapai, Colorado River, Chemehuevi, Fort Mohave, and Quechan—Fort Yuma) along the lower Colorado River within the area covered by the LCR MSCP. The culmination of these efforts is anticipated to surpass recovery goals recommended in the Recovery Plan; maintain, develop and improve migration, dispersal, sheltering, and foraging habitat; develop metapopulation stability; and protect against catastrophic losses.

Under section 7, critical habitat designation will provide little additional benefit to the southwestern willow flycatcher within the boundaries of the LCR MSCP. The catalyst for the LCR MSCP was largely a result of a jeopardy biological opinion (USFWS 1997) for the southwestern willow flycatcher to the Bureau of Reclamation for its lower Colorado River operations. As a result, the LCR MSCP and its Implementing Agreement are designed to ensure the conservation of the flycatcher within the plan area and

include management measures to protect, restore, enhance, manage, and monitor habitat to benefit the conservation of flycatcher. The adequacy of plan measures to protect the flycatcher and its habitat has undergone thorough evaluation in the section 7 consultations completed prior to approval of the plans, and therefore, the benefit of including these areas to require section 7 consultation for critical habitat is negated.

This HCP involved public participation through public notices and comment periods associated with the NEPA process prior to being approved. Additionally, this HCP is one of the largest HCPs in the country, with an immense list of stakeholders and permittees from CA, AZ, and NV that took about a decade to complete. Therefore, managing agencies, States, counties, cities, and other stakeholders are aware of the importance of the lower Colorado River for the southwestern willow flycatcher. For these reasons, we believe that designation of critical habitat would provide little additional educational benefit the area covered by this approved HCP. Federal actions that may affect the flycatcher will still require consultation under section 7 of the Act.

With respect to lower Colorado River operations covered under the LCR MSCP, we determined in our jeopardy analysis for our intra-Service section 7 consultation for issuance of the HCP permit that operations with the included protections, mitigation and management would not result in jeopardy to the southwestern willow flycatcher. As stated in our proposal, one of the primary conservation values of proposed critical habitat is to sustain existing populations. The threshold for reaching destruction or adverse modification along the Lower Colorado River would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Because of the development, restoration, and protection of riparian habitat attributed to the LCR MSCP, NWRs, and Tribes, flycatcher habitat will be more abundant, more widespread, and of higher quality than conditions today and the recent past.

Covered activities under the LCR MSCP are not the only possible impacts to flycatcher habitat along the Lower Colorado River. There are continued projects developed, carried out, funded, and permitted by Federal agencies such as Bureau of Reclamation and Bureau of

Land Management that are not covered by the LCR MSCP. Fire management, restoration, recreation, and other activities have the ability to adversely affect the flycatcher and critical habitat. The draft environmental assessment for this proposed rule found that minor changes in restoration, fire management, and recreation could occur as result of a critical habitat designation in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. Therefore, if the lower Colorado River was designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for actions not covered by the LCR MSCP. But, since the proposed river segments are occupied by breeding flycatchers, dispersing young-of-the-year flycatchers, migrating, foraging, and non-breeding flycatchers; habitat is already considered in consultations under section 7 of the Act. For these reasons and because formal consultations will likely result in only discretionary conservation recommendations due to existing restoration and management efforts along the length of the Lower Colorado River due to the LCR MSCP and restoration and management occurring on NWRs and Tribal Lands, we believe there is a low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the southwestern willow flycatcher along the Lower Colorado River from Lake Mead to Mexico.

## (2) Benefits of Exclusion

A benefit of excluding the lower Colorado River from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However, because the flycatcher occupies the lower Colorado River for a variety of life history needs, consultations are expected to occur regardless of a critical habitat designation, and those costs to perform the additional analysis are not expected to be significant.

The exclusion of the lower Colorado River from critical habitat as a result of the LCR MSCP can help facilitate other cooperative conservation activities with

other similarly situated dam operators or landowners. Continued cooperative relations with the three states and myriad of stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project efforts, and associated section 7 consultations. The benefits of excluding lands within the LCR MSCP plan area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP.

The LCR MSCP will also help generate important status and trend information for flycatcher recovery. In addition to specific flycatcher conservation actions, the development and implementation of this HCP provides regular monitoring of flycatcher habitat, distribution, and abundance over the 50-year permit.

Failure to exclude the lower Colorado River covered under the LCR MSCP could be a disincentive for other entities contemplating partnerships as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It has taken considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for listed and sensitive species additional consultation will not be necessary.

HCP permittees and stakeholders submitted comments and spoke during public hearings discussing that they

view critical habitat designation along the lower Colorado River as unwarranted and an unwelcome intrusion to river operations, and an erosion of the regulatory certainty that is provided by their incidental take permit and the No Surprises assurances. There is a concern by agencies and stakeholders that designation of critical habitat along the lower Colorado River has the potential to threaten the storage, delivery, and diversion of water and hydroelectric production for AZ, CA, and NV. Should this ever come to pass, the economic results would be the most significant throughout the bird's range (see Economic Analysis), however we do not believe this scenario is reasonably foreseeable (see discussion above). Having applicants understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs.

Our collaborative relationships with the LCR MSCP permittees clearly make a difference in our partnership with the numerous stakeholders involved and influence our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners.

The benefits of excluding this HCP from critical habitat designation include relieving Federal agencies, State agencies, landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. This HCP took many years to develop and, upon completion, became a river long conservation plan that is consistent with the recovery objectives for the flycatcher within the plan area. Additionally, this HCP provides conservation benefits to 20 unlisted sensitive species. Imposing an additional regulatory review after the HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if future participants abandon the voluntary HCP process. Designation of critical habitat along the lower Colorado River could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. The benefit of excluding the lower Colorado River within the approved LCR MSCP from critical

habitat outweighs the benefits of its inclusion.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher along the Lower Colorado River (Lake Mead to Mexico) are relatively small in comparison to the benefits of exclusion. We find that including the Lower Colorado River would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. In making this finding, we have weighed the benefits of including these lands as critical habitat with an operative HCP and management by NWRs and Tribal Lands, and without critical habitat. Excluding the Lower Colorado River would eliminate some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding the Lower Colorado River would continue to help foster development of future HCPs and strengthen our relationship with AZ, CA, and NV permittees and stakeholders. Excluding the Lower Colorado River eliminates regulatory uncertainty associated with permittees and stakeholders. Excluding the lower Colorado River eliminates any possible risk to water storage, delivery, diversion and hydroelectric production to AZ, NV, and CA, and therefore significant potential economic costs due to a critical habitat designation. We have therefore concluded that the benefits to the flycatcher and its habitat as a result of the restoration, maintenance, and management activities attributed to the LCR MSCP, NWR and Tribes outweigh those that would result from the addition of a critical habitat designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of the lower Colorado River from Lake Mead to Mexico (Southerly International Border) will not lead to the extinction of the subspecies, nor hinder its recovery, because restoration, maintenance, and management of southwestern willow flycatcher habitat due to the LCR MSCP, and by NWRs and Tribes will ensure the long-term persistence and protection of flycatcher habitat along the lower Colorado River. The LCR MSCP provides for a greater conservation benefit to the flycatcher than consultations pursuant to section 7 of the Act because this HCP assures the long-term protection and management of a flycatcher habitat, and funding for

this management. Such assurances are typically not provided by consultations under section 7 of the Act that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP provides. We determined in our intra-Service section 7 biological opinion for the issuance of the LCR MSCP permit that the lower Colorado River operations would not result in jeopardy. The southwestern willow flycatcher is a key species in the LCR MSCP where the permittees will create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit (2005 to 2055). As a result of appropriate placement of flycatcher habitat developed through the LCR MSCP along with the restoration, management and maintenance of flycatcher habitat on NWRs and Tribes, we expect to meet and possibly surpass the 50 territory goal for the Hoover to Parker Management Unit, and 150 territory goal for the Parker to Southerly International Boundary Management Unit. We are therefore excluding the area covered under the LCR MSCP (Lake Mead to Southerly International Border) from critical habitat designation, because under section 4(b)(2) of the Act, we find that the benefits of exclusion exceed the benefits of inclusion, and exclusion would not result in extinction of the subspecies.

### Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act

#### *State Wildlife Areas (SWA)*

#### *Pahranagat Management Unit, NV*

#### *Key Pittman State Wildlife Area*

The Key Pittman Wildlife Area is located in Lincoln County, NV, and contains a wide diversity of habitats within its 539 ha (1,332 ac). The Pahranagat River travels through portion of the Key Pittman Wildlife Area, including Nesbitt Lake, an impounded area along the river. The State of Nevada's Department of Wildlife owns and manages this property. The Nevada Fish and Game Commission purchased portions of the area in 1962 and 1966, primarily for waterfowl hunting, and as a secondary goal, habitat for other wetland species. A draft management plan was completed in November 2003 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the entire stretch of the Pahranagat River, through this

Wildlife Area, is essential to the conservation of the southwestern willow flycatcher. A total of 4 to 10 southwestern willow flycatcher territories have been detected from 1999 to 2002, 9 were detected in 2002. The State of Nevada fences the known flycatcher habitat in order to protect it from livestock grazing, manages water to maintain habitat, monitors the status of flycatchers, and is actively planting riparian plants to improve the distribution of riparian habitat. While the plan has not been finalized it is being implemented. In addition, the area has been under management for wildlife since the 1960s with conservation efforts targeted towards waterfowl, wetland species, and specifically the southwestern willow flycatcher. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Key Pittman State Wildlife Area, we are excluding this area from critical habitat. Our 4(b)(2) analysis is provided below.

*Pahranagat and Virgin Management Units, NV*

*Overton State Wildlife Area*

The Overton Wildlife Area is located in Clark County, NV, and contains a wide diversity of habitats within its 7,146 ha (17,657 ac). The Muddy River and Virgin River travel through a small portion of the State Wildlife Management Area near Lake Mead. The State of Nevada's Department of Wildlife owns and manages this property. A management plan was completed in December 2000 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the stretches of the Muddy and Virgin rivers through the boundaries of the Overton Wildlife Area are essential to the conservation of the southwestern willow flycatcher. A total of one to two southwestern willow flycatcher territories have been detected within the Overton Wildlife Area from 1997 to 2002. Riparian habitat is being enhanced and protected for neotropical migratory birds including southwestern willow flycatchers. A minimum of a quarter-acre willow patch and varying amount of cottonwood, mesquite, and hackberry will be planted annually in locations able to support native riparian trees, and water is being managed to improve and maintain riparian habitat. Riparian habitat is protected from livestock grazing, because no grazing occurs in the Wildlife Area. This Wildlife Area was developed for wetland habitat and waterfowl activities

(including hunting). As a result, flycatcher-related riparian habitat maintenance activities described in the management plan are consistent with the management goals of the Wildlife Area. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Overton Wildlife Area, we are excluding this area from critical habitat. Our 4(b)(2) analysis is provided below.

*Bill Williams Management Unit, AZ*

*Alamo Lake State Wildlife Area*

The Alamo State Wildlife Area (AWA) in La Paz and Mohave counties was created under provisions of the Fish and Wildlife Coordination Act (16 U.S.C. 661–66c), Public Land Order 492 (PLO 492), and the General Plan agreement between the Secretary of the Army, Secretary of the Interior, and Director of AZ Game and Fish, signed January 19, 1968 (Arizona Game and Fish Department-Arizona State Parks 1997). A lease agreement between the Arizona Game and Fish Department Commission and the U.S. Army Corps of Engineers was signed in 1970 establishing the AWA for fish and wildlife conservation and management purposes (Arizona Game and Fish Department—Arizona State Parks 1997). The present lease area encompasses approximately 9,140 ha (22,586 ac). Public input was solicited and addressed in development of the AWA Management Plan through scoping and the NEPA (Arizona Game and Fish Department—Arizona State Parks 1997).

The AWA Management Plan describes the unique riparian, wetland, and aquatic aspects of the area for a variety of species, specifically identifying the southwestern willow flycatcher. As a result, two of the specific resources that management emphasizes are directed toward the habitat needs of the flycatcher: (1) Maintain and enhance aquatic and riparian habitats to benefit wildlife; and (2) restore, manage, and enhance habitats for wildlife of special concern. In order to accomplish this goal, no cattle grazing is allowed in the riparian areas on the upper end of Alamo Lake and the lower portions of the Santa Maria and Big Sandy Rivers. Also, recreation (i.e. off-road vehicles) is identified as important management objective. The number of territories at Alamo Lake within the AWA has varied annually between 4 and 32 territories from 1994 to 2003 (USGS 2004).

We determined that the segments of the Big Sandy, Santa Maria, and Bill Williams Rivers at the upper end of Alamo Lake within the AWA are essential to the conservation of the

southwestern willow flycatcher. The AWA has been in existence for over 30 years under the management of Arizona Game and Fish Department. The AWA was developed for wildlife conservation. The current AWA Management Plan specifically emphasizes the importance of riparian habitat management for southwestern willow flycatchers. Management has fostered an increasing population, with the number of territories exceeding 20 in all but one season since 1999. The AWAs goals are consistent with the habitat needs of the flycatcher. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Alamo Wildlife Area, we are excluding this area from critical habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher on these State Wildlife Areas because, as explained in detail above, these lands are already managed for the conservation of wildlife, including the southwestern willow flycatcher.

Inclusion of lands as critical habitat can provide a benefit due to the improved educational aspect it provides land managers/owners. However, in this case, due to the conservation aspect of these lands specifically for wildlife and management there is an educational focus already being provided for southwestern willow flycatchers. In addition, these areas were identified as essential habitat for the southwestern willow flycatcher in our proposed rule. A critical habitat designation would not likely result in improved educational benefits beyond what is being provided.

As stated in the draft environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on SWAs would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Consequently, the outcome of the section 7 consultations on SWAs may not be materially different with designation of critical habitat compared to the listing of the species alone. In addition, given that these lands are managed for the conservation of wildlife, and specifically have established measures for southwestern willow flycatchers, it is highly unlikely that the SWAs would consider undertaking any projects that

would result in a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring within SWAs are specifically for the benefit of wildlife, with management being conducted for the restoration, improvement, and protection of flycatcher habitat.

As described above, all of SWA lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. Therefore, because formal consultations will likely result in only discretionary conservation recommendations on these SWA lands, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

The environmental assessment found that minor changes through section 7 consultation may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. For activities that SWAs are anticipated to engage in, those are expected to primarily be projects focused on habitat restoration, protection, and fire management. No formal consultation for habitat restoration has occurred on SWAs. Both restoration and fire management activities were anticipated in the environmental assessment to possibly have short-term adverse impacts to PCEs, but long-term beneficial effects from protections and improvement of habitat quality, quantity, and persistence. However, as discussed above, consultations on these activities would be similar to existing conditions, where consultations already address potential affects to the southwestern willow flycatcher because these river segments are occupied by nesting and migrating southwestern willow flycatchers. The outcome of the section 7 consultations on these SWAs may not be materially different with designation of critical habitat compared to the listing of the species alone due to

the threshold for reaching destruction or adverse modification on proposed critical habitat. Moreover, we note that while additional conservation recommendations may result for projects of this nature, they would be discretionary on the part of the Federal agency.

#### (2) Benefits of Exclusion

The benefits of excluding SWAs include a reduction in administrative costs associated with engaging in section 7 consultations for critical habitat. Administrative costs include additional time spent in meetings and preparing letters, and in the case of biological assessments and informal and formal consultations, the development of those portions of these documents that specifically address the critical habitat designation. SWA and FWS staff can, more appropriately, use these limited funds toward continuing to manage and improve SWA lands for their stated purpose, wildlife conservation (and southwestern willow flycatcher conservation). In the future, SWAs will likely engage in low effort informal section 7 consultations periodically, and less frequently formal consultations, to address impacts of activities on the southwestern willow flycatcher (primarily those associated with habitat restoration, protection, and fire management). Potential project modifications are likely to be minimal, given the beneficial nature of the SWA activities and projects.

#### (3) Benefits of Exclusion Outweigh Benefits of Inclusion

In summary, we believe that the benefits of excluding these SWAs from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including them in critical habitat. We find that including these SWAs would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. Because these areas are being managed by SWA staff familiar with wildlife-related issues, there is no reason to believe that the designation would result in an increased education benefit to land managers. Including SWAs in the designation could require some additional administrative effort and cost during the section 7 consultation process. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, however, it would require the SWA to use limited additional resources that may otherwise be used towards beneficial projects for

wildlife (and the southwestern willow flycatcher).

We also find that the exclusion of these SWAs will not lead to the extinction of the southwestern willow flycatcher, nor hinder its recovery because these lands are specifically managed for the protection of wildlife and there is an emphasis at each SWA to protect and enhance habitat specifically for the southwestern willow flycatcher.

#### Federal Wildlife Conservation Areas

##### *Kern Management Unit, CA*

##### *Sprague Ranch*

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. The Sprague Ranch included in the Kern Management Unit warrants exclusion from the final designation of critical habitat under section 4(b)(2) of the Act because we have determined that the benefits of excluding Sprague Ranch from southwestern willow flycatcher critical habitat designation will outweigh the benefits of including it in the final designation based on the long-term protections afforded for southwestern willow flycatcher habitat. The following represents our rationale for excluding the Sprague Ranch from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The Sprague Ranch is an approximately 1,003 ha (2,479 ac) parcel which includes approximately 395 ha (975 ac) of floodplain located along the south fork of the Kern River. The Sprague Ranch was purchased by the U.S. Army Corps of Engineers (Corps) as a result of biological opinions for the long-term operation of Lake Isabella Dam and Reservoir (Service File Nos. 1-1-96-F-27; 1-1-99-F-216; and 1-1-05-F-0067) specifically to provide habitat and conservation for the southwestern willow flycatcher. During the periods of time flycatcher habitat is not available as a result of short-term inundation from Isabella Dam operations, habitat at the Sprague Ranch is expected to provide habitat for the flycatcher. The dominant vegetation in the Kern Management Unit is mature willows (*Salix* sp.) and Fremont cottonwood. Other plant communities of the Kern Management Unit include open water, wet meadow, and riparian uplands.

As a result of the expertise of the National Audubon Society (Audubon) and the California Department of Fish and Game (CDFG) in management of flycatcher habitat on adjacent and

nearby properties along the Kern River, management of the Sprague Ranch is a joint venture between these two parties and the Corps. The Sprague Ranch is located immediately north and adjacent to the Kern River Preserve (KRP), which is owned and operated by Audubon, and shares a common border with the KRP of over 4.8 km (3 mi). The CDFG manages the Canebrake Preserve located upstream of the critical habitat designation.

The southwestern willow flycatcher occurs throughout the Kern Management Unit, which includes portions of the Sprague Ranch. The Sprague Ranch contains existing riparian forest that can support and maintain nesting territories and migrating and dispersing southwestern willow flycatcher. But other portions of the Ranch are believed to require restoration and management in order to become nesting flycatcher habitat. Activities such as cowbird trapping, exotic vegetation control, and native tree plantings are other management activities expected to occur. The Ranch is currently being managed in accordance with the terms and conditions of the biological opinions (cited above) specifically for the benefit of the southwestern willow flycatcher.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Sprague Ranch because, as explained above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the Sprague Ranch property would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed specifically for the benefit of the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

As described above, the Sprague Ranch may have additional conservation value above sustaining existing populations, because it is being managed to not only maintain existing habitat, but also to improve, protect, and

possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, and as further discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not a proposed activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat. As mentioned above, this property was purchased specifically for the southwestern willow flycatcher, therefore, we do not believe it is likely that actions will be proposed that would be counter to the purpose of this habitat and result in adverse modification, using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

We believe the conservation measures for the flycatcher that are occurring or will be used in the future on the Sprague Ranch (*i.e.*, demographic surveys, cowbird trapping, non-native vegetation removal, livestock exclusion, hydrologic restoration, planting of native vegetation, monitoring, and reporting) provide as much, and possibly more benefit than would be achieved through section 7 consultations involving consideration of critical habitat. This is because management that is occurring or that is planning to occur will be the same activities which would be implemented in order to maintain or restore flycatcher habitat.

As discussed in the "Educational Benefits of Critical Habitat" section above, we believe that there would be little additional informational benefit gained from including these portions of the Sprague Ranch within the designation because this area was included in the proposed rule as having essential flycatcher habitat. Further, the Kern River in this area was previously designated as critical habitat, numerous public meetings and hearings have occurred in Lake Isabella concerning the

flycatcher and the designation of its critical habitat, and the population of flycatchers along the Kern River is one of the most studied throughout the subspecies range due to its proximity to the Kern River Reserve and an on-going research and monitoring project for the flycatcher. Consequently, we believe that the informational benefits that could be provided through a designation of critical habitat in this area are already provided because of the rationale mentioned above and the fact that this property was purchased specifically for the conservation of the southwestern willow flycatcher. Additionally, since this area is already being jointly managed by Federal, State, and private entities for the benefit of the flycatcher, its importance to flycatcher conservation is already well established.

#### (2) Benefits of Exclusion

The southwestern willow flycatcher occurs on public and private lands throughout the Kern Management Unit. Proactive voluntary conservation efforts by private or non-Federal entities are necessary to prevent the extinction and promote the recovery of the southwestern willow flycatcher in the Kern Management Unit.

We have determined that the southwestern willow flycatcher using habitat located within properties covered by management plans or conservation strategies that protect or enhance the conservation of the subspecies will benefit substantially from voluntary landowner management actions due to an enhancement and creation of riparian and wetland habitat and a reduction in risk of loss of riparian habitat. The conservation benefits of critical habitat are primarily regulatory or prohibitive in nature. Where consistent with the discretion provided by the Act, the Service believes it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996). Thus, we believe it is essential for the recovery of the southwestern willow flycatcher to build on continued conservation activities such as these with proven partners, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

The Sprague Ranch is jointly managed by the Corps, CDFG, and Audubon in accordance with the terms and conditions of the Biological Opinions

which require actions for the conservation of flycatchers, including: demographic surveys, cowbird trapping, non-native vegetation removal, livestock exclusion, hydrologic restoration, planting of native vegetation, noxious weed control activities, flood irrigating low lying areas, upgrading of fencing, upgrading irrigation systems, monitoring, and reporting. These measures will assist in restoration and conservation of southwestern willow flycatcher habitat. Two habitat assessments have been performed on the property which concluded that approximately 168 ha (414 ac) of land are currently available as potential breeding habitat through restoration and management, and another approximately 227 ha (561 ac) were identified as potentially restorable to support a mosaic of habitat that could be used by southwestern willow flycatchers during post-breeding dispersal and migration. By using the available water supply and distribution system, modifying or eliminating current grazing practices, removing invasive non-native plant species, and planting riparian vegetation, the Sprague Ranch has the potential for restoration of approximately 395 ha (975 ac) into a mosaic of habitat similar to the KRP and the South Fork Wildlife Area (SFWA). In addition, the water supply and distribution system of the Sprague Ranch has a beneficial effect on the hydrology that supports the riparian habitats within the KRP and the SFWA.

Therefore, while the Sprague Ranch possesses habitat for the flycatcher, future management of flycatcher habitat is needed in order to restore this property to its full potential for the bird. The implementation of these actions or others for the flycatcher may require further section 7 consultation between the Corps and the Service. As a result, there would be an additional use of time and money by the Corps and the Service, or possibly our non-Federal partners (Audubon and CDFG for the Corps) to develop sections of biological assessments and analyses in biological opinions specific to a critical habitat designation. These costs, added to already limited funds for the Corps for wildlife habitat restoration and maintenance, would be an additional time and cost burden above that which would be required for section 7 consultations without critical habitat. It could also cause delays to implementing beneficial actions for the flycatcher. If due to those limited budgets, the cost of developing these assessments are passed to our non-Federal partners, then this could be an even greater burden due to

the more limited funding and personnel of Audubon and the State. The result could, in the most extreme cases, prevent or severely delay implementation of needed management actions. The use of time and effort on evaluation of projects on critical habitat could take away time, money, and effort by our non-Federal partners that could not only be used for implementing beneficial flycatcher management on the Sprague Ranch, but it could extend to other properties they own along the Kern River important to the flycatcher. Therefore, we believe there would be a benefit to exclusion of Sprague Ranch which could be of greater significance if passed on to our non-Federal partners if consultation was needed in order to implement beneficial projects for the flycatcher.

### (3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations we have determined that the benefits of excluding the Sprague Ranch from critical habitat in the Kern Management Unit outweigh the benefits of including it as critical habitat for the southwestern willow flycatcher.

The Sprague Ranch was purchased specifically for the southwestern willow flycatcher and is jointly managed by the Corps, CDFG, and Audubon in accordance with the terms and conditions of the Biological Opinions. Therefore, the strategy of the managing partners is to implement conservation and management measures to achieve conservation goals for the southwestern willow flycatcher. There are little to no additional educational or regulatory benefits of including these lands as critical habitat. The Kern River is well known by the public and managing agencies for its value and importance to the southwestern willow flycatcher. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Sprague Ranch will be negatively affected to any significant degree by Federal activities that were not consulted on in the existing Biological Opinions pursuant to section 7 consultation requirements, and (b) the Sprague Ranch is being managed in accordance with the terms and conditions of the Biological Opinions and we believe that based on ongoing management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat. We believe there could be a small additional administrative cost as a result of designation of critical habitat to the Service, and a cost that could be more significant to the Corps and

potentially non-Federal partners. If the Corps administrative costs are passed on to our non-Federal partners to conduct assessments and analyses, this could delay, or in worse case scenario prevent important management from being implemented on the Sprague Ranch or other properties managed for riparian values along the Kern River.

We believe that exclusion of these lands will not result in the extinction of the subspecies because the flycatcher already occupies this segment of the Kern River, including the Sprague Ranch. Actions which might adversely affect the subspecies are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7 and routine implementation of habitat preservation through the section 7 process provide assurance that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, the subspecies occurs on lands protected and managed either explicitly for the subspecies, or indirectly through more general objectives to protect natural habitat values. This provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

In conclusion, we find that the exclusion of critical habitat on the Sprague Ranch would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to these species of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with the Corps, CDFG, and Audubon, and it will set a positive example and could provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the flycatcher

without designated critical habitat than there would be with designated critical habitat on the Sprague Ranch.

#### South Fork Kern River Wildlife Area

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. The South Fork Wildlife Area (SFWA) in the Kern Management Unit warrants exclusion from the final designation of critical habitat under Section 4(b)(2) of the Act because we have determined that the benefits of excluding the SFWA from southwestern willow flycatcher critical habitat designation will outweigh the benefits of including it in the final designation based on the special management considerations and protections afforded for southwestern willow flycatcher habitat. The SFWA is an approximately 514 ha (1,270 ac) parcel of mature willow-cottonwood riparian forest located along the south fork of the Kern River, west of historic Patterson Lane, including a portion of upper Lake Isabella. The SFWA is jointly managed by the Corps and the U.S. Forest Service (Forest Service). Isabella Dam and southwestern willow flycatcher habitat in the SFWA is managed as a result of long-term biological opinions for Corps operation of Lake Isabella Dam and Reservoir (Service File Nos. 1-1-96-F-27; 1-1-96-F-150; 1-1-99-F-216; and 1-1-05-F-0067) and on-the-ground management by the Forest Service. These opinions resulted in the long-term management of Lake Isabella Dam that maintains the dynamic processes to establish flycatcher habitat over the long-term and resulted in the acquisition of the Sprague Ranch (immediately upstream of the SFWA) to compensate for short-term losses in habitat, and management of SFWA for southwestern willow flycatchers. The following represents our rationale for excluding the SFWA from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The management of Lake Isabella Dam is similar to other reservoirs (*i.e.*, Roosevelt, Horseshoe, Mead) that develop nesting southwestern willow flycatcher habitat. As a result of fluctuating lake elevations, the broad floodplain of the upper portion of the lake bottom is periodically covered in water, which once the water recedes, provides conditions for the germination and development of large patches of riparian habitat for the flycatcher. Periodic inundation is subsequently needed in order to prevent the drying and loss of habitat so that habitat required by nesting flycatcher can

regenerate and persist over the long-term.

Lake Isabella Dam and Reservoir operations that periodically inundate the SFWA are managed by the Corps in accordance with the terms and conditions of the Biological Opinions which require actions for the conservation of flycatchers, including: Long-term studies of flycatcher habitat and demographics; implementation and monitoring of a cowbird trapping program; a nest moving protocol to prevent inundation of nests during high water events; measures to control water craft in coordination with the Forest Service; and the acquisition of 465 ha (1,150 ac) of land to compensate for incidental take resulting from the periodic inundation of the SFWA. To date, the Corps has acquired 415 ha (1,025 ac) of land to satisfy the conditions of the Biological Opinions. In the most recent amendment to the Biological Opinions, the Corps and the Service have committed to work together on acquiring the last 51 ha (125 ac) within five years of the date of the amendment (Service File No. 1-1-05-F-0067). Funding for the implementation of these measures is provided by the Corps in accordance with terms and conditions of the Biological Opinions.

The SFWA is managed by the Forest Service within Lake Isabella (after the water recedes) and along the Kern River immediately upstream. Through informal consultation with the Forest Service, measures for the conservation of flycatchers have been implemented, including: restricting the speed of water craft to 8 km per hour (5 mi per hour) within 30.5 m (100 ft) of the SFWA; prohibition of overnight camping, motorized vehicles, and campfires in the South Fork Wildlife Area. The SFWA is fenced, and the fencing is maintained to enforce the exclusion of unauthorized uses. Grazing is also excluded from the SFWA.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within portions of the SFWA within the Kern Management Unit because, as explained above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the SFWA would likely require a reduction in the capability of the habitat

to sustain existing populations. Because Isabella Dam operations provide the dynamics needed to sustain habitat over the long-term and the Forest manages the land for the benefit of wildlife and the flycatcher, it is highly unlikely that projects would be considered for this area that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing flycatcher populations. Similar to other lakes, one of the primary purposes of the conservation space of the lake bottom is to store water for delivery downstream. As a result of the importance of this space for temporary water storage, there is little to no reason to believe that within the lake bottom there would be any permanent development or alteration that would eliminate or significantly reduce the amount of open space where flycatcher habitat develops and persists. Concurrently, Forest Service management of cattle grazing activities and recreation through fencing and other restrictions has helped foster the development and maintenance of flycatcher habitat within the SFWA. As a result, dam operations and land management and long-term commitments through section 7 consultations have and will provide benefits to the flycatcher within the SFWA.

As described above, the SFWA lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, and as further discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated

southwestern willow flycatcher critical habitat.

We believe the operation of Isabella Dam and current on-the-ground conservation measures being conducted for the flycatcher on the SWFA that include field studies, management of recreational uses, grazing exclusion, acquisition of upstream areas, fluctuating dam operations, and efforts to reduce predation and protection of nestlings from inundation provides as much as would be achieved through section 7 consultations involving consideration of critical habitat, using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

As discussed in the "Educational Benefits of Critical Habitat" section above, we believe that there would be little additional informational benefit gained from including these portions of the SFWA within the designation because this area is well known for its value to southwestern willow flycatcher by managing agencies and the public. Additionally, since this area is already being federally managed for the benefit of the flycatcher its importance to flycatcher conservation is already well established.

#### (2) Benefits of Exclusion

The implementation of management actions for the southwestern willow flycatcher and its habitat within the SFWA may require further section 7 consultation between the Corps, the Forest Service, and the Service. As a result, there would be an additional use of time and money by each agency to develop sections of biological assessments and analyses in biological opinions to address a critical habitat designation. These costs would be an additional time and cost burden above that which would be required for section 7 consultations without critical habitat. It could cause delays to implementing beneficial management actions for the flycatcher. The use of time and effort on evaluation of projects on critical habitat could take away time, money, and effort by these agencies to implement beneficial flycatcher management on the SFWA or other areas where management is needed for the flycatcher such as the Sprague Ranch or other nearby Forest Service lands. Therefore, a benefit of excluding the SFWA from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal

consultations, the development of the critical habitat component of a biological opinion. The implementation of long-term management activities by Corps and Forest Service at SFWA has and will continue to help generate important status and trend information for flycatcher recovery within the Kern Management Unit.

The exclusion of Lake Isabella from critical habitat may facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Throughout the comment period and during public hearings, we heard from many local residents who were very concerned with any possible restrictions to Lake Isabella lake levels as a result of a critical habitat designation. While Isabella is operated by the Corps and the land is managed by the Forest Service, the recreation associated with the lake was a significant concern for the community. Continued cooperative relations with Corps, Forest Service, and non-Federal stakeholders associated with recreation at Lake Isabella and local governments can be expected to influence other future partners and lead to greater conservation than might be achieved through multiple site-by-site, project-by-project, section 7 consultations. The benefits of excluding lands within the SFWA from critical habitat designation include recognizing the value of conservation benefits associated with long-term management actions being implemented for the flycatcher and demonstrating to the Corps, Forest Service, Lake Isabella community, local governments, stakeholders, and landowners along the Kern River the benefits associated with implementing conservation activities.

In contrast, failure to exclude the SFWA could be a disincentive for other entities contemplating partnerships with the Service, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. As noted above, while long-term management of the SFWA management is conducted by the Corps and the Forest Service, Lake Isabella was of extreme importance and interest to local non-Federal stakeholders. The scoping meetings held at Lake Isabella, arguably the smallest community visited across six states, generated the largest attendance (hundreds of private citizens concerned over the possible designation of the area as critical habitat). Excluding this area from critical habitat would help foster a collaborative relationship with the Corps, Forest Service, stakeholders, landowners, and local governments

associated with Lake Isabella and the Kern River. We believe this collaboration makes a difference in our ability to form partnerships with others. Concerns over perceived additional regulation imposed by critical habitat when long-term conservation strategies are being implemented harms collaborative relationships and can lead to distrust. Our experience has demonstrated that successful completion of conservation efforts such as HCPs, conservation easements, or the unique long-term section 7 consultation on Lake Isabella dam operations can result in the development of other conservation efforts and HCPs with other landowners.

#### (3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations, we have determined that the benefits of excluding the SFWA from critical habitat for the southwestern willow flycatcher in the Kern Management Unit outweigh the benefits of inclusion.

The SFWA is currently operating under the terms and conditions of the Biological Opinions issued to the Corps and management agreed upon through informal consultation with the Forest Service. These long-term management commitments implement conservation measures and achieve important conservation goals through information obtained by field studies, management of recreational uses, grazing exclusion, acquisition and management of upstream acreage, and efforts to reduce predation and inundation of nests for the benefit of the southwestern willow flycatcher.

The Service believes the additional educational and regulatory benefits of including the SFWA as critical habitat is relatively small to non-existent. The local community and managing agencies are well aware of the importance of Lake Isabella and the SFWA for southwestern willow flycatchers due to the notoriety consultation for Isabella Dam operation elicited in the community, concern by managing agencies, and awareness raised during the NEPA scoping process for this designation. The Service anticipates that the conservation strategies for SFWA will continue to be implemented in the future, and that the funding for these activities will be provided in accordance with the terms and conditions associated with the Biological Opinions under section 7 of the Act. We anticipate there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the SFWA will be negatively affected to any significant degree by Federal activities that were

not consulted on in the existing Biological Opinions pursuant to section 7 consultation requirements, and (b) we believe that based on past and ongoing Forest Service management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat. We also believe that due to the purpose of the conservation space of Lake Isabella for water storage and delivery, there is no reason to expect that this area will be developed or altered in a way that would prevent the SFWA within Lake Isabella from being capable of supporting southwestern willow flycatcher habitat. While management of Isabella is accomplished through Federal agencies, the benefits of excluding lands within the SFWA from critical habitat designation include demonstrating to the concerned Lake Isabella community, local governments, stakeholders, and landowners along the Kern River the benefits associated with implementing conservation activities.

We believe that exclusion of these lands will not result in the extinction of the southwestern willow flycatcher as the SFWA is occupied by the southwestern willow flycatcher. Actions which might adversely affect the species are expected to have a Federal nexus, and regardless of a critical habitat designation, would undergo a section 7 consultation with the Service. The jeopardy standard of section 7 and routine implementation of habitat preservation through the section 7 process provides assurance that the species will not go extinct. In addition, the species is protected from incidental take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the SFWA was designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas, including the Kern River adjacent to the SFWA that will be accorded protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, the subspecies occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural habitat values. This provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

In conclusion, we find that the benefits of excluding the SFWA outweigh the benefits of inclusion, and this exclusion will not result in

extinction of the southwestern willow flycatcher. We believe the exclusion of critical habitat on the SFWA would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to the flycatcher of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with the Corps, Forest Service, and local community, and due to the attention this generated within the local community, set a positive example that could provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the southwestern willow flycatcher without designated critical habitat than there would be with designated critical habitat on the SFWA.

*Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act*

We have determined that areas essential to the conservation of the southwestern willow flycatcher include the following National Wildlife Refuges (NWR): Bill Williams NWR, Parker, AZ; Cibola NWR, Blythe, AZ; Imperial NWR, Yuma, AZ; Havasu NWR, Needles, CA; Alamosa/Monte Vista NWR, Alamosa, CO; Bosque del Apache and Sevilleta NWRs, Socorro, NM; and Pahrana NWR, Alamo, NV. All of these refuges will be developing or in some cases (Sevilleta and Alamosa NWRs) have developed and completed Comprehensive Conservation Plans (CCPs) that provide the framework for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These plans, and the management actions undertaken to implement them, will have to undergo (or have undergone) review and consultation under section 7 of the Act and evaluation for their consistency with the conservation needs of listed species. Those NWRs without approved CCPs currently have management plans and/or programs in place that provide conservation benefits for the southwestern willow flycatcher. Their annual work plans provide the specific tasks associated with accomplishing the broader Refuge objectives of wildlife habitat management. Some of these

management plans have also been reviewed by the public under NEPA and consulted upon under section 7 of the Act. For example, the Lower Colorado River National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial NWRs) currently operate under a Comprehensive Management Plan (USFWS 1994) that has been evaluated under NEPA and section 7 of the Act. We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within NWR lands because these lands are protected areas for wildlife, and are currently managed for the conservation of wildlife, including threatened and endangered species, specifically the southwestern willow flycatcher. Below we first provide a description of the special management being provided by the NWR lands within the proposed designation, followed by a 4(b)(2) analysis that weighs the benefits of excluding versus those of including these lands within the final designation.

*Bill Williams Management Unit, AZ*

*Bill Williams NWR*

The Bill Williams NWR consists of 2,471 ha (6,105 ac) (USFWS 1994), and was originally established on January 22, 1941, concurrently with the Havasu NWR by Executive Order 8647. Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: “\* \* \* restore and maintain the natural diversity \* \* \*”; “\* \* \* achieve threatened and endangered species recovery \* \* \*”; “\* \* \* revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity”; “\* \* \* enhance use of Colorado River water and protect existing water rights holdings \* \* \*”; “\* \* \* ensure only compatible and appropriate activities occur \* \* \* and \* \* \* regulate all activities \* \* \* that are potentially harmful to refuge resources”; and to “\* \* \* effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources \* \* \* leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.”

The Bill Williams NWR Annual Habitat Work Plan for 2004–2005 described the Executive Order establishing the area “\* \* \* as a refuge and breeding ground for migratory birds and other wildlife.” This refuge includes the largest flood regenerated riparian forest on the Lower Colorado

River of approximately 931 ha (2300 ac) of cottonwood, willow, mesquite, and salt cedar woodlands and terrace shrublands. From 1994 to 2003, 1 to 15 flycatcher territories were detected on the refuge, with the largest number of territories detected in 2002 (USGS 2004). Migrant willow flycatchers have also been detected (Koronkiewicz *et al.* 2004). Their habitat goals are to protect, maintain, and if possible, enhance habitats, particularly those for neotropical migrants, endangered species, and other species of concern. This is being done by monitoring the location of flycatchers and other sensitive species, and protecting habitat from: wildfire, impacts of recreation, and exotic weeds such as Fountain Grass and *Arundo* spp.

The effort by the refuge to maintain and improve the abundance and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the refuge's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*Hoover to Parker Management Unit, AZ/CA*

#### Havasu NWR

The Havasu NWR was established by Executive Order 8647 on January 22, 1941, "as a refuge and breeding ground for migratory birds and other wildlife." It consists of 15,551 ha (38,427 ac) (USFWS 1994). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: "restore and maintain the natural diversity"; "achieve threatened and endangered species recovery"; "revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity"; "enhance use of Colorado River water and protect existing water rights holdings"; "ensure only compatible and appropriate activities occur" and "regulate all activities that are potentially harmful to refuge resources"; and to "effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources" leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System." In addition, flycatcher management on this refuge will work in

conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Havasu NWR Annual Habitat Work Plan for 2004–2005 identifies specific areas where habitat for the southwestern willow flycatcher will be maintained, improved, protected, and managed. Overall, the refuge manages for a variety of habitat types that provide locations for waterfowl, wading birds, passerines, etc. Because southwestern willow flycatchers are a keystone woody riparian species, management and improvement of habitat for the flycatcher (and all riparian passerine species) is a specific goal of the refuge. Between 2 and 20 flycatcher territories have been detected on the refuge between 1995 and 2003 (USGS 2004), as well as migrating southwestern willow flycatchers (Koronkiewicz *et al.* 2004). A high of 20 territories were detected in 2002.

Riparian habitat restoration and maintenance projects are underway and will continue in order to provide a conservation benefit for the flycatcher. For example, approximately 40 ha (100 ac) in the Beal Unit and 20 ha (50 ac) in the Pintail Unit are being restored and managed for woody riparian vegetation that can be used by migrant and possibly nesting flycatchers. During the 2004 fiscal year, a total of 8,765 cottonwoods, 4,800 Goodding's willows, 4,065 Coyote willow, and 940 mesquites were planted in the Beal Unit. In the Pintail Unit, during the 2004 fiscal year, 1,650 cottonwoods and 1,175 willows were planted. In the 1,619 ha (4,000 ac) Topock Unit, habitat exists and is being managed for nesting flycatchers and wading birds, and the 202 ha (500 ac) Whiskey Slough Unit is also targeted for management for southwestern willow flycatchers.

In addition to the riparian restoration efforts occurring on the refuge, additional management occurs in order to improve habitat quality and persistence. Specific water management to mimic the natural hydrology is needed for woody vegetation and to maintain conditions and prey for nesting flycatchers. Management of feral pigs that can harm and destroy vegetation is needed to protect habitat. Additionally, management of exotic woody and weed species such as salt cedar and Johnson grass occurs to reduce risks of fire in riparian areas.

The effort by the refuge to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation

benefit to the flycatcher. Additional water management is an essential component to the success of plantings and existing habitat conditions favored by the flycatcher. Protecting habitat by reducing the risk of fire and destruction by feral pigs also provides a conservation benefit. As a result of the refuge's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*Parker to Southerly International Border Management Unit, AZ/CA*

#### Cibola NWR

The Cibola NWR consists of approximately 6,745 ha (16,667 ac) (USFWS 1994). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: "restore and maintain the natural diversity"; "achieve threatened and endangered species recovery"; "revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity"; "enhance use of Colorado River water and protect existing water rights holdings"; "ensure only compatible and appropriate activities occur" and "regulate all activities that are potentially harmful to refuge resources"; and to "effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources" leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System." In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Cibola NWR 2004–2005 Annual Habitat Work Plan identifies as its main objective, the restoration of wetland, riverine, riparian, moist soil and agricultural habitat in order to maintain the natural abundance and diversity of native species, habitats and communities which are found in the Lower Colorado River floodplain (with emphasis on trust resources, endangered and threatened species, and other species of concern). As a result, the migratory and nesting habitat of the

southwestern willow flycatcher, as well as habitat for other passerine species is specifically identified as the important habitat to maintain, preserve, and restore. A single southwestern willow flycatcher territory has been detected on the refuge (USGS 2004) as well as migrating willow flycatchers (Koronkiewicz *et al.* 2004).

The Cibola NWR has specifically identified as a goal, maintaining existing native riparian woodland and restoring an average of 20 ha (50 ac) annually through seeding and planting native mesquite, cottonwood, and willow trees, and associated understory plants. Three different Refuge Management Units that contain approximately 323 ha (800 ac), 6 ha (15 ac), and 40 ha (100 ac) of habitat, are designated for restoration to native mesquite, cottonwood, and willows.

Previous plantings and habitat maintenance has occurred, which has resulted in improved habitat conditions for the flycatcher. At one 7 ha (17.8 ac) field where about 7,100 one gallon cottonwood and willow trees were planted in 2003, the area has shown extensive use by birds, including detections of migrant willow flycatchers and yellow-billed cuckoos.

Protection of existing sites through fire management and replacement of poor quality salt cedar to less flammable and higher quality native plant species is occurring as part of the refuge's restoration efforts. Reducing the amount of unsuitable salt cedar and replacing it with native mesquite, cottonwoods, and willows, provides improved habitat value for flycatchers and other passerines and reduces the risk of wildfire.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of fire through management of flammable salt cedar, also provides a conservation benefit. As a result of Cibola's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

#### Imperial NWR

The Imperial NWR consists of 10,428 ha (25,768 ac). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola,

and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: “\* \* \* restore and maintain the natural diversity \* \* \*”; “\* \* \* achieve threatened and endangered species recovery \* \* \*”; “\* \* \* revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity”; “\* \* \* enhance use of Colorado River water and protect existing water rights holdings \* \* \*”; “\* \* \* ensure only compatible and appropriate activities occur \* \* \* and \* \* \* regulate all activities \* \* \* that are potentially harmful to refuge resources”; and to “\* \* \* effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources \* \* \* leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.” In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Imperial NWR Annual Habitat Work Plan for 2004–2005 identifies specific areas where riparian habitat will be maintained, improved, protected, and managed. Overall, the refuge manages for a variety of habitat types that provide locations for waterfowl, wading birds, passerines, etc. Their Work Plan specifically identifies 15 Management Units (totaling about 648 ha/1600 ac) where habitat for riparian obligate passerines is a target. Not every hectare/acre of these Units is dedicated specifically to woody riparian habitat. Restoration and management of flycatcher habitat include maintenance of areas with woody riparian vegetation, and restoration and protection through methods such as planting, salt cedar control, and prescribed burns. The Backwater Riversedge Management Unit has an additional 2,270 ha (5,609 ac) of salt cedar, willow, remnant cottonwoods, and scattered marshes for southwestern willow flycatchers. One to five flycatcher territories were detected for 3 years on the refuge between 1996 and 2003 (USGS 2004), as well as migrating southwestern willow flycatchers (Koronkiewicz *et al.* 2004).

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of wildfire through management of flammable salt cedar, also provides a

conservation benefit. As a result of Imperial's refuge-wide effort and long-term commitment to provide a conservation benefit to habitat for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

#### Middle Rio Grande Management Unit, NM

##### Bosque del Apache NWR

The Bosque del Apache NWR consists of 23,117 ha (57,121 ac), of which approximately 4,856 ha (12,000 ac) occur within the Rio Grande floodplain. Since 1986, the refuge has been actively restoring riparian forests and grasslands. In 1999, the refuge expanded its “place of use” increasing the potential for additional riparian habitat to be restored. Since 1993, migratory and nesting southwestern willow flycatchers have been annually detected at the refuge with 1 to 5 territories detected (USGS 2004).

The refuge currently manages eight sites for southwestern willow flycatcher habitat. Within the historic floodplain there is currently an estimated 32 ha (78 ac) of native-dominated flycatcher habitat, and within the active floodplain, 23 ha (58 ac) of native-dominated habitat is estimated to exist. More suitable habitat in non-native and native vegetation exists.

The refuge is planning to manage seven areas specifically for southwestern willow flycatcher breeding habitat in the active floodplain and four areas in the historic floodplain. Combined, these 11 areas total 271 ha (669 ac).

The refuge currently uses a variety of restoration and management techniques to create, maintain, and protect southwestern willow flycatcher habitat. Flammable salt cedar is being selectively removed and replaced with native vegetation and grasslands in order to improve the quality and abundance of flycatcher habitat. The reduction of exotic vegetation, increase in native vegetation, and creation of grassland fire breaks reduces the occurrence and impact of wildfire. In order to achieve restoration success with native woody riparian vegetation, water is being applied to restoration sites in order to mimic the timing of natural hydrograph (the refuge has a license for 12,417 acre feet of water per year). Also, within the active floodplain, in order to restore/improve channel floodplain connection, water distribution, channel movement, and sediment transport, banks are planned

for de-stabilization as are limited topographic changes to the floodplain are needed.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of fire through management of flammable salt cedar, also provides a conservation benefit. As a result of Bosque del Apache's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher habitat for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

#### Sevilleta NWR

The Sevilleta NWR's CCP describes 10 goals that promote the diversity, protection, management, enhancement, and maintenance of wildlife habitat. A few of those goals are specific to the management of southwestern willow flycatcher habitat. A specific goal is to "provide for the enhancement, preservation, and protection of threatened and endangered species as they occur naturally or were historically present on the Sevilleta NWR so that viable, self-sustaining populations can be restored to their natural habitats." Additional goals describe, restoring and maintaining " \* \* \* the natural diversity of plants and wildlife \* \* \*," and protecting existing, and securing " \* \* \* additional water rights and/or in-stream flow rights as necessary to protect the integrity of the riparian and aquatic habitats on the refuge." A total of 4 to 10 flycatcher territories have been detected on the refuge between 1999 and 2003 (USGS 2004).

The CCP more specifically describes the refuge's objectives to meet the goal of enhancing riparian habitat on the Rio Grande. At Sevilleta NWR, one objective is to " \* \* \* preserve refuge habitat diversity and threatened and endangered species habitats by preserving and enhancing habitats to their natural condition." Another is to "reverse declining trends in quality and quantity of riparian wetland habitats; restore, maintain, and enhance the species composition, aerial extent, and spatial distribution of riparian/wetland habitats." The CCP also describes that a key objective is to " \* \* \* preserve, enhance, and restore hydrological regimes in order to perpetuate a healthy river ecosystem."

The CCP describes the goal of providing, " \* \* \* 100 acres (40 ha) of cottonwood/willow habitat specifically

for southwestern willow flycatchers." In addition to the main goals and objectives specific to river function and riparian habitat, the CCP describes strategies in order to reach this flycatcher objective such as controlling non-native vegetation, implementing management practices that ensure survival of and eliminate impacts to naturally occurring threatened and endangered species, and restoring native plants.

The effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the Sevilleta NWR's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

#### San Luis Valley Management Unit, CO

##### Alamosa NWR

The Alamosa NWR's CCP describes 13 goals that promote the diversity, protection, management, enhancement, and maintenance of wildlife habitat. One of those goals is specific to the management of habitat used by the southwestern willow flycatcher. This goal is to "enhance the Rio Grande corridor and its tributaries on refuge lands to provide habitat for river, riparian dependent, and other wetland species." A total of 19 to 29 southwestern willow flycatcher territories have been detected on the refuge between 1997 and 2003 (USGS 2004). In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the San Luis Valley Management Unit (see section describing *Relationship of Critical Habitat to Partnerships*).

The CCP more specifically describes the refuge's objectives to meet the goal of enhancing riparian habitat on the Rio Grande. At Alamosa NWR, the objective is to " \* \* \* dense multi-layered native riparian vegetation such as willows and cottonwoods for breeding and migrating riparian obligate species, notably the southwestern willow flycatcher \* \* \*." Additionally, an objective is to protect the aquatic resources and provide for a disturbance free breeding environment for migratory species. The refuge intends to perpetuate the natural aspect of the physical and biological characteristics of the Rio Grande floodplain. Additionally, the refuge

intends to protect sufficient habitat for the southwestern willow flycatcher through easement and fee-title acquisition, habitat improvements on the refuge, and protections of habitat on private lands through Partners for Fish and Wildlife Programs.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of Alamosa's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from southwestern willow flycatcher critical habitat.

#### Pahranagat Management Unit, NV

##### Pahranagat NWR

The Pahranagat NWR was established for the conservation of wildlife, including migratory birds like the southwestern willow flycatcher. The Refuge's draft CCP specifies as one of its goals the enhancement of wildlife diversity and contribution to the recovery of endangered, threatened, and special status species through habitat improvements and restoration.

In order to accomplish this goal for the southwestern willow flycatcher, the refuge is currently engaged in a variety of management actions. They are maintaining 41 ha (100 acs) of cottonwood/willow riparian habitat specifically for breeding southwestern willow flycatchers and other migratory birds. Additionally, over the last three years the refuge has planted over 6,000 willows and cottonwood trees on 81 ha (200 ac) to provide more breeding habitat for the flycatcher. The refuge continues to help coordinate with other agencies in their surveys and research of southwestern willow flycatchers and to seek funding to develop more acreage into cottonwood/willow through restoration efforts.

As a result of the refuge's management, the population of breeding southwestern willow flycatchers has increased from 5 to 14 territories between 1997 and 2003 (USGS 2004). The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the refuge's goals for conserving wildlife, and their commitment to improving the abundance, distribution, quality, and

persistence of native riparian vegetation for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from southwestern willow flycatcher critical habitat.

#### (1) Benefits of Inclusion for NWR lands

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher on NWR lands because, as explained in detail above, these lands are already managed for the conservation of wildlife.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on NWR lands would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Consequently, the outcome of the section 7 consultations on NWR lands may not be materially different with designation of critical habitat compared to the listing of the species alone. In addition, given that these lands are managed for the conservation of wildlife, in particular endangered and threatened species, and specifically riparian habitat for migratory and nesting southwestern willow flycatchers, it is highly unlikely that the NWR lands would consider undertaking any projects that would result in a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring within NWR lands are specifically for the benefit of the flycatcher, by restoring, improving, and protecting its habitat.

As described above, all of NWR lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only

discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

The draft environmental assessment found that minor changes through section 7 consultation may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. For activities that NWR's are anticipated to engage in, those are expected to primarily be projects focused on habitat restoration and fire management. One formal consultation for habitat restoration has occurred on NWR lands (Parahnagat NWR, NV) that resulted in incidental take of one flycatcher territory. Both restoration and fire management activities were anticipated in the draft environmental assessment to possibly have short-term adverse impacts to PCEs, but long-term beneficial effects from protections and improvement of habitat quality, quantity, and persistence. However, as discussed above, consultations on these activities would be similar to existing conditions, where consultations already address potential affects to the southwestern willow flycatcher because these river segments are occupied by nesting and migrating southwestern willow flycatchers. The outcome of the section 7 consultations on these NWRs may not be materially different with designation of critical habitat compared to the listing of the species alone due to the threshold for reaching destruction or adverse modification on proposed critical habitat. Moreover, we note that while additional conservation recommendations may result for projects of this nature, they would be discretionary on the part of the Federal agency.

#### (2) Benefits of Exclusion for NWR lands

The benefits of excluding NWR lands include a reduction in administrative costs associated with engaging in section 7 consultations for critical habitat. Administrative costs include additional time spent in meetings and preparing letters, and in the case of biological assessments and informal and formal consultations, the development of those portions of these documents that specifically address the critical habitat designation. NWR staff can, more appropriately, use these funds

toward continuing to manage and improve NWR lands for their stated purpose, wildlife conservation (and southwestern willow flycatcher conservation). In the future, these refuges will likely engage in low effort informal intra-Service section 7 consultations annually, and less frequently formal consultations, to address impacts of activities on the southwestern willow flycatcher (primarily those associated with habitat restoration and fire management). Potential project modifications are likely to be minimal, given the beneficial nature of the NWR activities and projects.

#### (3) Benefits of Exclusion Outweigh Benefits of Inclusion

In summary, we believe that the benefits of excluding NWR's from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including the NWR's in critical habitat. We find that including the NWR's would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. However, including the NWRs in the designation would require some additional administrative effort and cost during the section 7 consultation process. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, it would require the NWR's to use additional resources that may be otherwise used towards beneficial projects for wildlife (and the southwestern willow flycatcher).

We also find that the exclusion of these NWRs will not lead to the extinction of the southwestern willow flycatcher, nor hinder its recovery because there is the emphasis at each NWR to protect and enhance habitat specifically for the southwestern willow flycatcher.

#### *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on tribal lands are

better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

We have determined that the following Tribes and Pueblos have lands essential to the conservation of the southwestern willow flycatcher:

Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Hualapai, Isleta, La Jolla, Pala, Rincon, San Carlos, San Ildefonso, San Juan, Santa Clara, Santa Ysabel, and Yavapai-Apache. In making our final decision with regard to tribal lands, we considered several factors including our relationship with the Tribe or Pueblo and whether a management plan has been developed for the conservation of the southwestern willow flycatcher on their lands.

Tribal governments protect and manage their resources in the manner that is most beneficial to them. Each of the affected Tribes exercises legislative, administrative, and judicial control over activities within the boundaries of their respective lands. Additionally, they have natural resource programs and staff, and some have generated Southwestern Willow Flycatcher Management Plans (SWFMP). In addition, as trustee for land held in trust by the United States for Indian Tribes, the BIA provides technical assistance to the Tribes on management planning and oversees a variety of programs on Tribal lands. Flycatcher conservation activities have been ongoing on many Tribal lands included in the proposed critical habitat designation. On other Tribal lands, their natural resource management, while not specific to the flycatcher, has been consistent with management of habitat for the flycatcher. The development and implementation of these efforts formalized in these Management Plans will continue with or without critical habitat designation.

#### Tribal Conservation/Management Plans/Partnerships

In this section, we first provide the specifics of the SWFMPs that were developed by the Tribes/Pueblos

(Chemehuevi, Colorado River, Fort Mojave, Quechan—Fort Yuma, Hualapai, Isleta, La Jolla, Rincon, San Carlos, and Yavapai-Apache). These plans were all admitted to the supporting record during the open comment period for the proposed rule. After this introduction, we analyze the benefits of including these lands within the critical habitat designation and the benefits of excluding these areas. We have also developed partnerships specifically for the management of southwestern willow flycatcher habitat on the San Ildefonso, Santa Clara, and San Juan Pueblos in northern New Mexico. We provide a description of those partnerships and a benefits analysis for each of these Pueblos at the end of the tribal section below.

#### Tribal Conservation/Management Plans

In this section, we first provide the specifics of the SWFMP that were developed by the Tribes/Pueblos. These plans were all admitted to the supporting record during the open comment period for the proposed rule. After this introduction, we analyze the benefits of including the Tribes' lands within the critical habitat designation and the benefits of excluding these areas.

#### *Middle Colorado Management Unit, AZ* Hualapai Tribe

The Hualapai Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River on the south side of the channel in the Middle Colorado Management Unit above Lake Mead. The Hualapai Tribe had no known southwestern willow flycatcher territories in 2003, but has eight sites where territories have previously been detected. The Hualapai Tribe has finalized a SWFMP and the plan has been adopted by the Hualapai Tribal Council.

The SWFMP's objectives are to: manage riparian vegetation to maximize continued presence of native plant species suitable for use by southwestern willow flycatchers; ensure that existing land uses (which presently include recreational activities) will not result in net loss or reduction in quality of southwestern willow flycatcher habitat; and continue their Department of Natural Resources partnership in the management of the lower Colorado River (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

This SWFMP specifically addresses and presents assurances for southwestern willow flycatcher conservation measures. There would be no net loss or permanent modification from management of suitable native riparian habitat to the bird. Any restoration activities that are directed at reducing nonnative tamarisk, controlling fire, construction of roads, or recreational management within occupied willow flycatcher habitat, will be coordinated with the Service to ensure that detrimental impacts are minimized. Helicopter flights will not approach closer than 91 m (300 feet) of occupied habitat to avoid any possible physical damage to birds or habitat from over-flights. Campsite management will continue to ensure that no detrimental impacts to overall willow flycatcher habitat quality. The Tribe will continue to ensure documentation of breeding and migratory use by willow flycatchers, pending availability funds. In this regard, the Hualapai Nation will continue to seek funding through Tribal sources, partners associated with the LCR MSCP, and outside grant sources. The Tribe will encourage recreational use awareness of the conservation needs of the willow flycatcher wherever possible. The Tribe will implement a cowbird-trapping program if parasitism becomes a problem in the future, dependent on available funds.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Hualapai Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### *Hoover to Parker Management Unit, AZ/CA*

#### Fort Mojave Tribe

The Fort Mojave Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River in the Hoover to Parker Management Unit above Lake Havasu. The Fort Mojave Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Fort Mojave lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management

throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Fort Mojave Tribe has completed a SWFMP. Within the budgetary constraints of the Fort Mojave Indian Tribe and the Service, the Tribe has committed to continue management to sustain the current value of saltcedar and willow and cottonwood stands that meet moist soil conditions necessary to maintain the species; to continue to utilize lands that do not have moist soil characteristics for territory and associated nesting purposes for agricultural and other cultural, economic and social needs; to carry out monitoring to determine species presence and vegetation status in cooperation with the Service; and to continue to provide wildfire response and law enforcement to protect habitats having moist soil conditions of value for feeding within a nesting area and similarly protect native cottonwood, willow, and mesquite habitats to benefit the southwestern willow flycatcher.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Fort Mojave Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### Chemehuevi Tribe

The Chemehuevi Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River on the west side of the channel in the Hoover to Parker Management Unit adjacent to the Colorado River and Lake Havasu. The Chemehuevi Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Chemehuevi lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Chemehuevi Tribe has finalized a SWFMP, that within funding limits, commits the Tribe to continue to control

wild fire, improve native plant presence through restoration projects, minimize impacts associated with recreational or other use along the river and lake shorelines, and collaborate with the Service to improve conditions for the flycatcher by discussing and implementing projects to reduce burro damage. The SWFMP identifies the management of riparian saltcedar and native willow, cottonwood, and mesquite to maximize native plant presence. Management will be done in cooperative work effort with the Service to identify restoration sites and provide early control response to wild fires that would result in no net loss or permanent modification that is detrimental to flycatcher or its habitat as specified by the Recovery Plan (USFWS 2002). Any permanent river or lakeshore land use changes, such as recreational or other developments, will take habitat needs of the flycatcher into account and will be done in mutual consultation with the Service so as to design plans that minimize detrimental impacts to habitat requirements. The SWFMP identifies continued cooperation between the Tribe and Service to ensure continued management of or improve to habitat conditions. Continued monitoring of habitat and flycatchers and long-term restoration of native plants (e.g. cottonwood, mesquite, and willow), within funding constraints, will result in no net habitat loss or permanent habitat modification to avoid detrimental impacts to the flycatcher as specified in the Recovery Plan.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Chemehuevi Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### *Parker to Southerly International Border Management Unit, AZ/CA*

#### Colorado Indian Tribes (CRIT)

We determined that the CRIT have areas that are essential to the conservation of the southwestern willow flycatcher along the Colorado River. The CRIT currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use CRIT lands along the Lower Colorado River for foraging and shelter during migration. The CRIT have

been active in riparian restoration within tribal boundaries, where territories may become established. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Colorado River Indian Tribes have submitted a final SWFMP, which describes the protections and assurances for the flycatcher. The SWFMP identifies schedules for breeding habitat surveys and monitoring flycatcher nesting activity. The SWFMP also identifies the assessment, identification, and protection of flycatcher migration habitat. The SWFMP identifies protecting breeding habitat with the Ahakhav Tribal Preserve and in any areas established for flycatchers with the LCR MSCP. Seasonal closures of occupied habitat during the breeding season may be necessary and established by the CRIT. Protection of flycatcher habitat from fire is established in the SWFMP, as well as protections from other possible stressors such as overgrazing, recreation, and development.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on CRIT lands described above, we are excluding this area from flycatcher critical habitat.

#### Quechan (Fort Yuma) Indian Tribe

We determined that the Quechan Tribe has areas that are essential to the conservation of the southwestern willow flycatcher along the Colorado River near the City of Yuma. The Quechan Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Quechan lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Quechan Tribe has completed a SWFMP. The objectives of the SWFMP

specifically address and present assurances for southwestern willow flycatcher habitat conservation measures. The Tribe will manage riparian saltcedar that is intermixed with cottonwood, willow, mesquite, and arrowweed to maximize potential value for use by flycatchers for nesting. Any permanent land use changes for recreation or other reasons will consider the biological needs of the flycatcher and support flycatcher conservation needs as long as consistent with Tribal cultural and economic needs. The Tribe will consult with the FWS to develop/design plans that minimize impacts to habitat requirements for the flycatcher. The Tribe will establish collaborative relationships with the FWS to benefit the flycatcher including monitoring for flycatcher presence and habitat condition, all within the constraints of available funds to the Tribe. These goals and objectives will result in no net habitat loss or permanent modification to habitat values as specified within the Recovery Plan (USFWS 2002).

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Quechan Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### *Upper Gila Management Unit, AZ*

##### San Carlos Apache Tribe

The San Carlos Apache Tribe has completed a SWFMP. The Tribe highly values its wildlife and natural resources which it is charged to preserve and protect under the Tribal Constitution. Consequently, the Tribe has long worked to manage the habitat of wildlife on its tribal lands, including the habitat of endangered and threatened species. We understand that it is the Tribe's position that a designation of critical habitat on its lands improperly infringes upon their tribal sovereignty and the right to self-government.

The San Carlos Apache Tribes' SWFMP provides assurances and a conservation benefit to the southwestern willow flycatcher. Implementation of the SWFMP will result in protecting all known flycatcher habitat on San Carlos Tribal Land and assure no net habitat loss or permanent modification will result. All habitat restoration activities (whether it is to rehabilitate or restore native plants) will be conducted under reasonable coordination with the Service. All reasonable measures will be taken to ensure that recreational activities do not result in a net habitat loss or permanent modification. All reasonable measures will be taken to

conduct livestock grazing activities under the guidelines established in the Recovery Plan (USFWS 2002). Within funding limitations and under confidentiality guidelines established by the Tribe, the Tribe will cooperate with the Service to monitor and survey habitat for breeding and migrating flycatchers, conduct research, and perform habitat restoration, cowbird trapping, or other beneficial flycatcher management activities.

As a result of the assurances, protections, and conservation benefit provided to the southwestern willow flycatcher and its habitat on San Carlos Apache Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### *Verde Management Unit, AZ*

##### Yavapai-Apache Nation

We determined that the Yavapai-Apache Nation has areas that are essential to the conservation of the southwestern willow flycatcher along the Verde River in AZ. The Yavapai-Apache Nation currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Yavapai-Apache lands along the Verde River for foraging and shelter during migration.

The Yavapai-Apache Nation has completed a SWFMP. The objectives of the SWFMP specifically address and present assurances for southwestern willow flycatcher habitat conservation measures. The Nation will, through zoning, Tribal ordinances and code requirements, and measures identified in the Recovery Plan, take all practicable steps to protect known southwestern willow flycatcher habitat located in the riparian areas located along the Verde River. The Nation will take all reasonable measures to assure that no net habitat loss or permanent modification of flycatcher habitat will result from recreational and road construction activities, or habitat restoration activities, and will take all reasonable steps to coordinate with the Service so that flycatcher habitat is protected. Within funding limitations and under confidentiality guidelines established by the Tribe, the Tribe will cooperate with the Service to monitor and survey habitat for breeding and migrating flycatchers, conduct research, and perform habitat restoration, cowbird

trapping, or other beneficial flycatcher management activities.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Yavapai-Apache Tribal lands described above, we are excluding this area from flycatcher critical habitat.

#### *Middle Rio Grande Management Unit, NM*

##### Pueblo of Isleta

The Pueblo of Isleta has amended its riverine management plan to include the southwestern willow flycatcher. The main objective of the flycatcher portion of this plan is to protect, conserve, and promote the management of the southwestern willow flycatcher and its associated habitat within the Pueblo's boundaries.

The Pueblo of Isleta's Management Plan focuses on identifying the distribution and abundance of breeding flycatchers, their reproductive success, and reducing stressors. Cattle grazing is not allowed in the riparian area. Fire management will be conducted to protect flycatcher habitat. Management of flycatcher habitat includes protecting occupied habitat, maintaining native vegetation, and preventing habitat fragmentation.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Pueblo lands described above, we are excluding this area from flycatcher critical habitat.

#### *San Diego Management Unit, CA*

##### La Jolla Band of Luiseño Indians

The San Luis Rey (approximately 5 km/8 mi) flows through the La Jolla Band of Indian Tribal Lands in northern San Diego County, CA. The Tribe has identified that river flow is controlled by Lake Henshaw Dam that can sometimes, due to drought, cause interruptions in flow and possibly limit the development of riparian habitat and success for species such as the southwestern willow flycatcher. This section of stream was proposed as critical habitat. The La Jolla Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories, upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use La Jolla lands along the San Luis Rey for foraging and shelter during migration.

The Tribe has described a collection of measures, protections, and efforts they are and will be undertaking to protect riparian habitat for the southwestern willow flycatcher. The Tribe maintains permanent staff to address environmental issues, of which a Master's level biologist is employed. The Tribe will work to maintain open space along the river, with a particular emphasis on the western 2 km/3.5 mi stretch of stream. The Tribe is working to establish this piece of river as a reserve for environmental and cultural purposes. Management of native vegetation and removal of exotic vegetation is occurring that could improve the quality and abundance of native species, and/or decrease the risk of wildfire in the riparian area. They are also actively reducing the impact of recreation in riparian areas by continuing to educate Tribal Members through outreach programs and newsletters. Tribal staff are also developing brochures to provide to campground visitors to encourage good stewardship and to educate them on how to reduce impacts to the land. Additionally they are working to discourage use of off-road vehicles in riparian areas through education, movement of roads, closures, and development of Tribal ordinances. The Tribe will explore future opportunities for research to determine how to best manage for flycatchers. For example, they indicated that it may be necessary to initiate a cowbird trapping program if appropriate.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on La Jolla Tribal Lands through maintenance of open space, management, and protections, we are excluding this area from flycatcher critical habitat.

#### Rincon Tribe

The San Luis Rey River (roughly 3 km/1.8 mi) flows through Rincon Tribal Lands in northern San Diego County, CA, just downstream from La Jolla Tribal Land. The entire section of stream was proposed as critical habitat. The Rincon Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories, upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Rincon lands along the San Luis Rey River for foraging and shelter during migration.

The Tribe has completed a plan that addresses potential threats to flycatcher habitat through implementation of a variety of protective measures. The Tribe will monitor and remove introduced exotic plants that could reduce the quality and abundance of native species, and/or increase the risk of wildfire in the riparian. They will exclude activities in the floodplain which could remove or reduce the quality of riparian habitat such as mining and livestock grazing. The Tribe will exclude unauthorized recreational uses and off-road vehicle use. Signs, boundaries, and/or other measures will be taken to educate the public and prevent unauthorized recreational use.

The Tribe will dedicate funding to this effort and report to the Service its annual progress. The Tribe will coordinate with the Service on whether the Plan requires updating. The Tribe hopes to incorporate these activities into a formalized HCP that is targeted for completion in 2006. In the event that a decision is made to not complete the HCP, this Plan will be revised and adopted for another 30 years.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Rincon Tribal Lands through implementation of their management plan, we are excluding this area from flycatcher critical habitat.

#### (1) Benefits of Inclusion for Tribal Lands

Few additional benefits would be derived from including these Tribal lands in a flycatcher critical habitat designation beyond what will be achieved through the implementation of their management plans. 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. However, we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on these Tribal lands because, as described above, these Tribes are already managing their lands consistent with the Recovery Plan. When we review projects pursuant to section 7 for the flycatcher we review them for their consistency with the Recovery Plan. Therefore, consultations would not be materially different without a designation of critical habitat since we would use a similar approach in this case for both the jeopardy and adverse modification analyses. Also, where there is consistency with the

Recovery Plan, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as noted above, when the threshold for adverse modification is not reached, as noted above, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency. These Tribes have already agreed under the terms of their flycatcher management plans to protect flycatcher habitat, to ensure no net loss, to coordinate with the Service, and to conduct activities consistent with the Recovery Plan. Accordingly, we find the consultation process for a designation of critical habitat is unlikely to result in additional protections for the flycatcher on Tribal lands.

Another possible benefit is that the designation of critical habitat can help to inform the Tribes/Pueblos regarding potential conservation value of an area, and may focus efforts by clearly delineating areas of high conservation value for the flycatcher. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. These Tribes/Pueblos are currently working with the Service to address habitat and conservation needs for the flycatcher. Additionally, we anticipate that these Tribes/Pueblos will continue to actively participate in working groups, and provide for the timely exchange of management information. The educational benefits important for the long-term survival and conservation of the flycatcher are being realized. Educational benefits will continue on these lands if they are excluded from the designation, because the management/conservation plans already recognize the importance of those habitat areas to the flycatcher. Additionally, we included these lands in the proposed and final rules as areas essential to the conservation of the southwestern willow flycatcher so information about their essential nature has been published through this rulemaking process.

Another possible benefit is the additional funding that may be generated for habitat restoration or improvement by having an area designated as critical habitat. In some instances, having an area designated as critical habitat may improve the ranking a project receives during evaluation for funding. Tribes/Pueblos often require additional sources of funding in order to conduct wildlife-related activities. Therefore, having an area designated as

critical habitat could improve the chances of Tribes receiving funding for flycatcher-related projects. However, the perceived restrictions of a critical habitat designation would likely have a more damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat. Additionally, areas occupied by nesting, migrating, dispersing, or foraging flycatchers, as is the case here, also provide benefits when projects are evaluated for receipt of funding.

For these reasons, then, we believe that designation of critical habitat would have few additional benefits beyond those that will result from continued consultation under the jeopardy standard.

#### (2) Benefits of Exclusion

The benefits of excluding these Tribal Lands from designated critical habitat are more significant. They include: (1) The advancement of our Federal Indian Trust obligations and our deference to tribes to develop and implement tribal conservation and natural resource management plans for their lands and resources, which includes the flycatcher; (2) the maintenance of effective working relationships to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation; (4) the provision of conservation benefits to riparian ecosystems and the flycatcher and its habitat that might not otherwise occur; and (5) the reduction or elimination of administrative and/or project modification costs as analyzed in the economic analysis.

During the development of the flycatcher critical habitat proposal (and coordination for other critical habitat proposals), and other efforts such as development of the Southwestern Willow Flycatcher Recovery Plan, we have met and/or communicated with various Tribes/Pueblos to discuss how they might be affected by the regulations associated with flycatcher management, flycatcher recovery, and the designation of critical habitat. As such, we established relationships with Tribes/Pueblos specific to flycatcher conservation. As part of our relationship, we provided technical assistance to each of these Tribes/Pueblos to develop measures to conserve the flycatcher and its habitat on their lands. These measures are contained within the management/conservation plans that we have in our supporting record for this decision (see discussion above). These proactive actions were conducted in accordance with Secretarial Order 3206, "American

Indian Tribal Rights, Federal—Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that these Tribes/Pueblos should be the governmental entities to manage and promote the conservation of the flycatcher on their lands. During our communication with these Tribes/Pueblos, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian ecosystems.

The designation of critical habitat on these Tribal or Pueblo lands would be expected to adversely impact our working relationship with these Tribes. In fact, during our discussions with these Tribes and from comments received, many informed us that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that each Tribe would prefer to work with us on a government-to-government basis. For these reasons, we believe that our working relationships with these Tribes would be better maintained if they are excluded from the designation of critical habitat for the flycatcher. We view this as a substantial benefit since we have developed a cooperative working relationship with the Tribes and Pueblos for the mutual benefit of the conservation of the southwestern willow flycatcher and other threatened and endangered species.

We indicated in the proposed rule (October 12, 2004; 69 FR 60706) that our final decision regarding the designation of critical habitat on Tribal Lands, would consider our relationship with Tribes and/or Pueblos and whether they developed a flycatcher specific management plan. We identified that the Colorado River Indian Tribes and Hualapai Tribe had draft plans and the Santa Ana Pueblo had developed a Safe Harbor Agreement with us for flycatchers. Santa Ana Pueblo lands were not included in the proposal. We also discussed our continued cooperation with Tribes and Pueblos during the comment period on the development of Management Plans. During the comment period, we received input from many Tribes and BIA offices expressing the view that designating critical habitat for the flycatcher on Tribal land would

adversely affect the Service's working relationship with all Tribes. Many noted the beneficial cooperative working relationships between the Service and Tribes have assisted in the conservation and recovery of listed species and other natural resources. They indicated that critical habitat designation on these Tribes or Pueblos would amount to additional Federal regulation of sovereign Nations' lands, and would be viewed as an unwarranted and unwanted intrusion into Tribal natural resource programs. We conclude that our working relationships with these Tribes on a government-to-government basis have been extremely beneficial in implementing natural resource programs of mutual interest, and that these productive relationships would be compromised by critical habitat designation of these Tribal lands.

In addition to management/conservation actions described for the conservation of the flycatcher, we anticipate future management/conservation plans to include conservation efforts for other listed species and their habitat. We believe that many Tribes and Pueblos are willing to work cooperatively with us to benefit other listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntarily management actions for other listed species will likely be contingent upon whether these Tribal lands are designated as critical habitat for the flycatcher. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed species.

#### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including these Tribes and Pueblos in the critical habitat designation are limited to a potential benefit gained through the requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat and potential educational benefits. However, as discussed in detail above, we believe these benefits are provided for through other mechanisms. The benefits of excluding these areas from being designated as critical habitat for the flycatcher are more significant, and include encouraging the continued implementation of the tribal management/conservation measures such as monitoring, survey, restoration, protection, and fire-risk reduction activities that are planned for the future or are currently being implemented. These programs will allow the Tribes to manage their natural resources to

benefit riparian ecosystems for the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the flycatcher and other listed species that would not otherwise be available due to the Service's ability to encourage and maintain cooperative working relationships with other Tribes and Pueblos. We find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas.

As noted above, the Service may exclude areas from the critical habitat designation 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 these Tribes and Pueblos from the critical habitat designation will not result in the extinction of the flycatcher. First, activities on these areas that may affect the flycatcher 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 these lands, activities that occur on these lands cannot jeopardize the continued existence of the flycatcher. Second, each of the Tribes have committed to protecting and managing according to their management/conservation plans and natural resource management objectives. In short, the Tribes have committed to greater conservation measures on these areas than would be available through the designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher, chiefly because the management/conservation plans are generally based on the management tenets of the Recovery Plan. Accordingly, we have determined that these Tribes and Pueblos should be excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the flycatcher outweigh the benefits of their inclusion and the exclusion of these lands from the designation will not result in the extinction of the species.

#### *Upper Rio Grande Management Unit San Ildefonso Pueblo*

We have worked with San Ildefonso Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined, pursuant to section 4(b)(2) of the Act, that we will exclude the lands of this Pueblo, in the Upper Rio Grande Management Unit, from the final designation of critical habitat. As described in our 4(b)(2) analysis below, we have reached this determination because of our effective working relationship with the Pueblo and the benefits of excluding their lands from the final critical habitat designation outweigh the benefits of designating their lands.

San Ildefonso Pueblo is in Santa Fe County, approximately 37 km (23 mi) north of the city of Santa Fe. It encompasses approximately 10,602 ha (26,198 ac) in the Rio Grande valley, including approximately 434 ha (1,073 ac) of the Rio Grande floodplain. On the Pueblo, water is diverted from the Rio Grande for an irrigation system that supports Tribal agricultural practices. Multiple-use practices of the river and riparian habitat resources are an essential component of Tribal activities and culture, and as a result, the Pueblo has taken steps to manage all the components of the riparian habitat (bosque) to ensure that it is intact for future generations. The need for bosque restoration on the Pueblo includes the fact that it is an area of wildland urban interface and current fuel levels in the riparian area pose a fire threat. Over the years, the bosque area has been overtaken by non-native plant species that have created a hazardous potential for wildland fire within the urban interface. The removal of non-native vegetation with the planting of native vegetation and floodplain rehabilitation are being conducted by the Pueblo. Flycatcher surveys are conducted by the Bureau of Indian Affairs (BIA) before the implementation of projects and they have not detected any flycatchers in the project areas (Norman Jojola, BIA Northern Pueblos Agency, pers. comm., August 24, 2005). The Pueblo's long-term management objectives include efforts to reestablish and maintain sustainable native plant communities in the Rio Grande floodplain and improve habitat, including wetland restoration, for culturally important plant and wildlife species, including the southwestern willow flycatcher.

Since 1995, we have been working with the Pueblo and the BIA on wildlife-related projects. We established and maintain a cooperative working relationship with the BIA and their consultants when they requested our involvement and review of environmental assessments for Pueblo projects that included evaluations of habitat for flycatchers. We reviewed the project proposals, environmental assessments, and resulting determinations, and all but one of the proposed projects were determined to have "no effect" or to have an insignificant and discountable effect. The one project that was a "may effect" is described below.

The project that had the determination of "may affect, not likely to adversely affect" the flycatcher (Service Cons. #2-22-99-I-187, 1999), involved the installation of exploratory wells in the bosque, and resulted in an informal consultation for the flycatcher and its habitat. Surveys in the project area did not detect any flycatchers and a 10 by 15 m (32 by 50 ft) patch of potential flycatcher habitat was not affected by the project. In 2001, we also provided technical advice to the BIA and the Pueblo for upcoming bosque restoration projects (Norman Jojola, BIA, August 24, 2005). It was determined that nesting habitat did not exist at the proposed project sites. Surveys conducted by BIA did not detect any flycatchers at the sites.

A 2003-2005 project that we consulted on involves approximately 749 acres along the east side of the Rio Grande within the bosque corridor of San Ildefonso Pueblo (Service 2003, 2004). The project will restore native riparian vegetation and the floodplain by removal of non-native plants and the enhancement of native vegetation and wetlands. The BIA and the Pueblo consulted with us to address concerns about the flycatcher and its habitat at this project site. Flycatcher surveys were conducted and no flycatchers were detected. It was determined that the flycatcher nesting habitat did not exist at the project site and the effect to migration habitat would be insignificant and discountable.

The bosque is important to the traditional life of the people of the Pueblo of San Ildefonso. The Pueblo is managing the vegetation and water components of the bosque to ensure its integrity for the future. They were awarded a Pub. Law 93-638 contract in 2003 to implement the development of a reservation-wide Integrated Resource Management Plan. This process provides the opportunity for the Pueblo to address its resources as a whole and

provide a holistic management approach which would include threatened and endangered species and their habitat. As a sovereign entity they seek to continue to protect and manage their resources according to their traditional and cultural practices, with consideration given to the prevention of wildfires given that it is an area of wildland urban interface (San Ildefonso, August 22, 2005).

The Pueblo request that their land be excluded from the designation of critical habitat in that they want the Service to recognize their sovereign status and their right to manage their own resources. They consider the designation of critical habitat on their land as a total disregard of the Service's trust responsibility to the Tribe and their sovereign status (BIA Northern Pueblos Agency, July 11, 2005). They recognize the importance of their land as a migration area for the flycatcher and they understand that due to their proximity to known territories that their lands were included in the proposal as essential habitat, which includes the potential for dispersal of flycatchers and future development of nesting habitat. However, their traditions and culture have a holistic approach to resource management and they want the Service to recognize this and exclude the Pueblo from the designation of critical habitat.

#### (1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act if a Federal action is involved. Such consultations ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. The section 7 conferencing and consultations involving projects on lands of the San Ildefonso Pueblo for the flycatcher have all been informal. Effects to the flycatcher from Pueblo projects have been insignificant and discountable with determinations of "no effect" or "may affect, not likely to adversely affect" the flycatcher and its habitat. These determinations resulted from the beneficial nature of the projects proposed to the flycatcher (e.g., restoration and fuels reduction projects). Given that lands of the San Ildefonso Pueblo are managed in a way that provide benefits to the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to provide for areas of migration and dispersal. To the contrary, activities occurring on these lands will provide

benefits to the flycatcher by restoring, improving, and protecting its habitat. Thus we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on the Pueblo lands because, as described above, and as evidenced by the consultation history, the Pueblo is already managing their lands for the benefit of the flycatcher and its habitat. Furthermore, based on the consultation history and the beneficial nature of the projects undertaken by the Pueblo, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as described in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section above, when the threshold for adverse modification is not reached, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to understand the habitat needs of the species. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation, such as providing information to the BIA or the Pueblo on areas that are important for the long-term survival and conservation of the species, have already been provided by proposing the area as critical habitat. 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 for the presence of the species.

#### (2) Benefits of Exclusion

The benefits of excluding San Ildefonso Pueblo from designated critical habitat are significant. The proposed critical habitat designation included approximately 434 ha (1,073 ac) of Rio Grande floodplain within the

Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation in surveying as we work towards recovery of the species; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

As discussed above, we met with San Ildefonso Pueblo to discuss how they might be affected by the designation of critical habitat. The meetings with the Pueblo were conducted in accordance with Secretarial Order 3206; 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that the Pueblos should be the governmental entities that manage and promote the conservation of the flycatcher on their lands and this was stated during meetings. We also recognized and endorsed their resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to continue their natural resource management activities that provide benefits to the flycatcher.

Our meetings with the Pueblo are a component of our effective working relationship with them. We established a working relationship in respect to the flycatcher with the earlier informal consultations discussed above. We are maintaining the relationship by means of informal meetings that offer information sharing and technical advice/assistance about project effects to flycatchers and recommended conservation measures.

We find that conservation benefits (e.g., flycatcher surveys and habitat restoration enhancement) are being provided to the flycatcher and its habitat through our cooperative working relationship with the San Ildefonso Pueblo. During our discussions with the Pueblo we were informed that critical

habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the flycatcher.

The consultation history, conservation, restoration, and management information submitted to us by the Pueblo documents that meaningful collaborative and cooperative work for the flycatcher and its habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing and future management, restoration, enhancement, and survey activities and we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively with the Service to restore and enhance their Rio Grande floodplain with habitat that will contribute to the recovery of the species. Surveys that are conducted for the presence or absence of flycatchers at projects sites will record migration use of the area and the participation by tribal biologist in the survey process adds to educational benefits and conservation of the species.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to minor educational benefits. The benefits of excluding these areas from critical habitat for the flycatcher are more significant, and

include encouraging the continued development and implementation of special management measures such as surveys, enhancement, and restoration activities that are planned for the future or are currently being implemented. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande Management Unit for the flycatcher, without the perception of Federal Government intrusion because of the designation of critical habitat on their land. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We believe that exclusion of San Ildefonso Pueblo land will not result in extinction of the species. Current records do not document any nesting habitat on the Pueblo but recognize it as a migration corridor and potential area for dispersal. The Pueblo has committed to protecting and managing according to their tribal and cultural management plans and are in the process of creating an IRMP that includes management for threatened and endangered species. In short, the Pueblo has committed to greater conservation measures on their land than would be available through the designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher. Accordingly, we have determined that the Pueblo lands of San Ildefonso 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.

### Santa Clara Pueblo

During the open comment period, we worked with Santa Clara Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined that the lands of this Pueblo, in the Upper Rio Grande Management Unit, will not be designated as critical habitat. As described in our section 4(b)(2) analysis below, we have reached this determination because the benefits of

excluding their lands from the final critical habitat designation outweigh the benefits of designating their lands.

Santa Clara Pueblo lies within the proposed designated critical habitat for the flycatcher in the Upper Rio Grande Management Unit. The Pueblo is located on the west bank of the Rio Grande approximately 48 km (30 mi) north of the City of Santa Fe in northern New Mexico. The Pueblo encompasses more than 21,449 ha (53,000 ac) of diverse vegetative communities, including approximately 714 ha (1,764 ac) of Rio Grande woodland/shrubs (bosque). Approximately 10 km (6 mi) of the Rio Grande corridor is a heavily "checkerboarded" area with private non-Indian in-holdings now belonging to the City of Espanola, the result of non-Indian encroachment that was sanctioned by the Federal government in the 1920s and 1930s.

The Rio Grande is an integral part of the Pueblo's history, culture, and continued preservation as a homeland. They view all of their natural resources, including the Rio Grande bosque, as important to the survival of the Santa Clara people. Many of the various vegetative communities within the Pueblo and the innumerable wildlife species they support have significant traditional and spiritual value to the tribal people. Because of this and because the Pueblo maintains the sovereign right to manage all the resources within their boundaries, the Tribal Council of Santa Clara Pueblo made a commitment in 2000, that was extended in 2001, to develop an Integrated Resource Management Plan (IRMP) that addresses multi-use, enhancement, and management of their natural resources. Progress is being made in completing the IRMP but it is not yet complete. The Pueblo has submitted a copy of the Tribal Council Resolution as documentation of their commitment to ensure that as part of the IRMP process they "consider traditional and long-standing uses of tribal lands and utilize appropriate land management protocols while ensuring that culturally and biologically sensitive areas, plants, animals, and other resources will be provided the highest levels of protection." (Santa Clara Pueblo Tribal Council Resolution No. 2001-23; July 18, 2001). The IRMP, in its current draft form, was not submitted during the open comment period because it is undergoing review from the Santa Clara Pueblo community (Santa Clara Pueblo, July 12, 2005). They believe it would be inappropriate not to follow the community's internal review system, which experienced delays due to staff changes. Nonetheless, the Pueblo

has already sought and received over \$600,000 in funds to complete the IRMP and has contributed approximately 4,500 staff hours within the Pueblo toward development of the IRMP.

Approximately 714 ha (1,764 ac) of Rio Grande bosque on Santa Clara Pueblo has become very susceptible to wildfire; changes in hydrology have encouraged the growth of vegetation that results in heavy fuel loads. The Pueblo had to contend with catastrophic wildfires just within the past decade. The "Tuesday Fire," in the urban interface, burned approximately 61 ha (150 ac) of bosque in 1997; in 2004, the "Black Mesa" fire burned additional bosque acres. Other fires that occurred in the area were: the "Oso Complex" in June 1998, the "Cerro Grande" in May 2000, and bosque fires in the adjoining San Juan Pueblo. This susceptibility to wildfire has prompted Santa Clara Pueblo to undertake management activities along the bosque to protect the health and safety of the Tribal people. In conjunction with the comprehensive IRMP process, the Pueblo has undertaken projects to reduce the fire risk in the area.

The main Pueblo village, the City of Espanola, and nearby non-Indian communities are located close to the river and therefore the bosque acres on Santa Clara Pueblo, which are proposed designated critical habitat for the flycatcher, are considered by the Bureau of Indian Affairs (BIA) and the Pueblo to be Wildland-Urban Interface (WUI) for purposes of implementation of the Federal government's National Fire Plan. A key priority of the National Fire Plan is to reduce hazardous fuel loads in WUI areas in order to reduce the imminent danger to human life and property. However, the Pueblo recognizes the need for fuels reduction and habitat restoration to occur in small increments so as not to harm wildlife in the transition and has committed to this process (Santa Clara Pueblo, July 12, 2005).

The Pueblo has implemented fuel reduction and restoration in their bosque since 2001 and they have projects in various planning stages for the future. In 2001, fuel reduction and restoration took place on 64 ha (159 ac). After that, the Pueblo submitted a request to the BIA for additional funds to work on treatment and restoration of and additional 121 ha (298 ac). In addition, the Pueblo entered into an agreement with New Mexico Association of Conservation Districts and the East Rio Arriba and Water Conservation District for a two-year hazardous fuels treatment project which is in progress on 54 ha (133 ac). Finally,

the Pueblo received approval from the U.S. Forest Service for an inter-tribal Collaborative Forest Restoration Proposal to treat and restore another 23 ha (58 ac). As is evidenced here, Santa Clara Pueblo, for the past five years, has systematically planned and received funding to do WUI bosque management and habitat restoration along their bosque.

The Pueblo and its consultants and the BIA have worked in close communication with the Service to address any impacts to the flycatcher and its habitat in connection with these projects (Service 2003). There have been informal meetings with Service staff and Pueblo staff that have resulted in a good working relationship. Another demonstration of this cooperative working relationship and the Pueblo's efforts for conservation of the flycatcher is that, in 2005, three Tribal members participated in training, held at the Service's Albuquerque Field Office, for conducting protocol surveys for the flycatcher. The Pueblo has also identified funding to conduct flycatcher surveys within their entire bosque for Spring of 2006.

The Pueblo has pointed out that their commitments to manage the bosque are in keeping with the goals and techniques and guidelines for fire management and habitat restoration outlined in the Recovery Plan for the flycatcher (Santa Clara Pueblo, July 12, 2005). Santa Clara's commitment to protect the health, well-being, safety, and economy of their people is not isolated from the commitment to protect and restore the ecosystem with its wildlife species and habitat. They view the world holistically and their management and commitments will result in long-term benefits to the ecosystem upon which a diverse array of plants and wildlife depend, including the endangered southwestern willow flycatcher.

#### (1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultations ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. The section 7 conferencing and consultations involving Santa Clara Pueblo for the flycatcher have been informal. Effects to the flycatcher from Pueblo projects have been insignificant and discountable with determinations of "no effect" to the flycatcher and its habitat (Santa Clara Pueblo, August 26,

2005). These determinations resulted from the lack of presence of the flycatcher.

Given that lands of the Santa Clara Pueblo are managed in a way that provide benefits to the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to provide for areas of migration and dispersal. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat. Thus we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on the Pueblo lands because, as described above, and as evidence by the consultation history, the Pueblo is already managing their lands for the benefit of the flycatcher and its habitat. Furthermore, based on the consultation history and the beneficial nature of the projects undertaken by the Pueblo, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as described in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section above, when the threshold for adverse modification is not reached, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to understand the habitat needs of the species and some of their biologists have participated in flycatcher survey training classes. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation, such as providing information to the BIA or the Pueblo on areas that are important for the long-term survival and conservation of the species, have already been provided by

proposing the area as critical habitat. 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 for the presence of the species.

## (2) Benefits of Exclusion

The benefits of excluding Santa Clara Pueblo from designated critical habitat are significant. The proposed critical habitat designation included approximately 714 ha (1,764 ac) of Rio Grande woodland/shrubs (bosque) within the Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat, including future surveys; (3) the allowance for management and restoration in a WUI area that focuses on fire prevention, and human health and safety, and yet addresses conservation for the flycatcher; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

As discussed above, we met with Santa Clara Pueblo to discuss how they might be affected by the designation of critical habitat. The meeting with the Pueblo was conducted in accordance with Secretarial Order 3206; 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that the Pueblos should be the governmental entities that manage and promote the conservation of the flycatcher on their lands. During our meetings with the Pueblo, we recognized and endorsed these resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to develop, continue, or expand natural resource management such that the designation of critical habitat for the flycatcher would provide few if any benefits.

We have an effective working relationship with Santa Clara Pueblo, which was established and has evolved from informal consultations. As part of this cooperative working relationship, we provided technical advice/assistance to the Pueblo, in respect to project activity, to evaluate habitat for primary constituent elements and to develop measures to conserve the flycatcher and its habitat on their lands. Another demonstrable example of the trust and relationship that the Service has with the Pueblo is the participation by some of their staff. In 2005, in Service sponsored training for flycatcher surveys.

As part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including habitat restoration and enhancement have been possible. During our discussions with the Pueblo, and reiterated in their written comments, (Santa Clara Pueblo, July 12, 2005), we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the flycatcher. We view this as a substantial benefit.

As mentioned above, the Pueblo is an important land manager in respect to its land being a Wildland-Urban Interface. Its bosque needs to be managed and restored with the focus of fire prevention and human health and safety. The restoration and management information submitted by the Pueblo documents their commitment to having meaningful collaborative and cooperative work for the flycatcher and its habitat continue within their lands as they address the need to manage for human protection (Santa Clara Pueblo, July 12, 2005). These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities and we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands (Santa Clara Pueblo, July 12, 2005). The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this

area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation, because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively with the Service to restore and enhance their Rio Grande floodplain with habitat that will contribute to the recovery of the species. Surveys that are planned for 2006 for the presence or absence of flycatchers in their bosque will add to recovery information and the participation by tribal biologist in the survey process adds to educational benefits and conservation of the species.

## (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to minor educational benefits. The benefits of excluding these areas from being designated as critical habitat for the flycatcher are more significant, and include encouraging the continued development and implementation of special management measures such as surveys, enhancement, and restoration activities that are planned for the future or are currently being implemented. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande management Unit and the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We believe that exclusion of the Pueblo land will not result in extinction of the species. The Pueblo has committed to protecting and managing according to their tribal and cultural management plans and natural resource management objectives. In short, the Pueblo has committed to greater conservation measures on their land than would be available through the

designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher.

Accordingly, we have determined that the Pueblo lands of Santa Clara 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.

As discussed in the "Relationship of Critical Habitat to Tribal Lands" section of the Proposed Rule, in accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we have found that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on our experience, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend. In making our final decision with regard to tribal lands, we considered several factors including our relationship with the Tribe or Pueblo and whether conservation measures are in place for the southwestern willow flycatcher on their lands.

#### San Juan Pueblo (Ohkay Owingue)

During the open comment period, we worked with San Juan Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined that the lands of this Pueblo, in the Upper Rio Grande Management Unit, will not be designated as critical habitat. As described below, we have reached this determination because the benefits of excluding their lands from the final

critical habitat designation outweigh the benefits of designating their lands.

San Juan Pueblo, is located just north of Espanola in Rio Arriba County, New Mexico, and adjoins the lands of Santa Clara Pueblo. The Pueblo includes the southern or downstream end of the Velarde reach of the Rio Grande, and comprises the largest contiguous area of generally intact bosque, as well as the largest riparian area under the control of a single landowner, within the Velarde reach. A total of about 17 km (10.3 mi) are located within the Pueblo, (USGS 1:24,000 map, 7.5 minute series, San Juan, NM), and over 445 ha (1100 ac) of riparian woodland, or bosque, are still extant within the Pueblo boundaries.

In June of 1993, the flycatcher was documented on the west side of the Rio Grande north of the NM 74 Bridge as a biological assessment was being prepared for the proposed San Juan Bridge project. The project proposed to replace an existing bridge and two-lane road section with a newly located bridge and two-lane road with shoulders. Subsequent evaluations indicated that a viable population of nesting flycatchers was using the area.

The presence of the nesting flycatcher prompted the Pueblo to restore the bosque habitat and associated wetlands for the flycatcher. Habitat within the Pueblo is much degraded relative to historic conditions for two main reasons: (1) River channelization that has caused floodplain desiccation, cessation of overbank flooding, and disruption of geomorphological processes; and (2) intensive invasion by non-native trees, primarily Russian olives. The increasing frequency and severity of fires in the Rio Grande bosque, accompanied by changes in vegetation and the water regime, underscores the urgency of restoration needs.

The San Juan Pueblo immediately began restoration/conservation projects to benefit the flycatcher following the bridge project in 1994. Two acres of native riparian vegetation were planted on the reclaimed old roadway; 0.1 ha (0.22 ac) of riparian vegetation were planted adjacent to the new bridge; 1 acre of riparian woodland was restored adjacent to the project; and, wetland restoration, which included open water and saturated soils, was developed at three sites encompassing 0.19 ha (0.46 ac), 0.14 ha (0.34 ac), and 0.06 ha (0.14 ac). Since 1999 the Pueblo has initiated or completed a variety of restoration/conservation projects, including further wetland creation and expansion, flycatcher habitat enhancement with vegetation and open water, and removal of non-native vegetation with

replacement of native vegetation. These projects are funded through various programs of the Environmental Protection Agency, Wildland Urban Interface/Collaborative Forest Restoration Program, Endangered Species Act Collaborative Program, and the State of New Mexico; they affect 301 ha (744 ac) of riparian habitat on the Pueblo with direct and indirect benefits to the flycatcher. The project implementations include conservation, monitoring, and management for the flycatcher into the future. These efforts contribute to the long term goals of recovery for the flycatcher. In addition to the habitat work, the Pueblo supports flycatcher surveys and nest monitoring on the Pueblo lands.

The long-term goal of riparian management on San Juan Pueblo is to make significant additions of wetland areas for breeding flycatchers, as well as implement innovative restoration techniques, decrease fire hazards by restoring native vegetation, share information with other restoration practitioners, utilize restoration projects in the education of the tribal community and surrounding community, and provide a working and training environment for the people of the Pueblo. In 2004, the Pueblo sponsored a multi-agency/organization riparian restoration conference on their lands. Their restoration efforts and flycatcher conservation were highlighted at the conference. As such, the Service and its partners gained valuable information about restoring flycatcher habitat and management techniques that can be applied to other riparian areas.

Based on their traditional beliefs and ties to the bosque area, the Pueblo continues to protect, conserve, and restore the riparian habitat and the species that utilize the habitat. As is demonstrated through their projects, the Pueblo has invested a significant amount of ongoing time and effort to address the needs and recovery of the flycatcher. In addition, based on the long term goals of restoring additional wetland and native habitat, the Pueblo has shown that it is managing its resources to meet its traditional and cultural needs, while addressing the needs of the flycatcher. Currently, the San Juan Pueblo Environmental Affairs department employs nine Tribal members who work on holistic habitat restoration and management, which includes threatened and endangered species and their habitat.

#### (1) Benefits of Inclusion

There are few benefits of including San Juan Pueblo in the critical habitat designation above those that will be

achieved through the implementation of the Pueblo's voluntary conservation measures, restoration projects, and management. The principal benefit of any designated critical habitat is that activities affecting such habitat requires consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. However, if adequate protection can be provided in another manner, such as those provided by the Pueblo, the benefits of including any area in critical habitat are insignificant.

Since 1993, the section 7 consultations involving San Juan Pueblo for the flycatcher have been informal. Effects to the flycatcher from these projects have been insignificant and discountable because conservation measures have focused on restoration and management for the flycatcher and its habitat. As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on lands of the San Juan Pueblo would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed for the benefit of the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat

designation, such as providing information to the BIA or Pueblos on areas that are important for the long-term survival and conservation of the species, have already been provided by proposing these areas as critical habitat. 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 for the presence of the species.

## (2) Benefits of Exclusion

The benefits of excluding the Pueblo from designated critical habitat are significant. The proposed critical habitat designation included 10.3 mi (16.5 km) of river and over 445 ha (1100 ac) of riparian woodland, or bosque, within the Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation in surveys and nest monitoring as we work towards recovery of the species; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation, because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively toward the conservation of the flycatcher, which will include continuing, initiating, and completing flycatcher surveys/research and habitat restoration. As mentioned above, the Pueblo has already actively contributed to the education of multiple individuals about the conservations efforts and needs of the flycatcher through their riparian restoration conference.

As discussed above, we met with San Juan Pueblo to discuss how they might be affected by the designation of critical

habitat. We have an effective working relationship with the Pueblo, which was established and has evolved from the earlier informal consultations. As part of our cooperative working relationship, we provided technical advice/assistance to the Pueblo to develop measures to conserve the flycatcher and its habitat on their lands. San Juan Pueblo's past, present, and on-going voluntary conservation measures in connection with their Environmental Affairs Department, Federal/State habitat restoration grants, and species conservation grants were summarized and submitted to the Service (San Juan Pueblo, July 18/August 18, 2005). These actions were conducted in accordance with Secretarial Order 3206; 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 relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that these Pueblos should be the governmental entities to manage and promote the conservation of the flycatcher on their lands. During our meetings with each of these Pueblos, we recognized and endorsed these resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to develop, continue, or expand natural resource management such that the designation of critical habitat for the flycatcher would provide few if any benefits.

We find that other conservation benefits are provided to the Upper Rio Grande Management Unit and the flycatcher and its habitat by excluding the Pueblo from the designation. For example, as part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including flycatcher surveys, nest and habitat monitoring, and habitat restoration and enhancement have been possible. During our discussions with the Pueblo, and reiterated in their written comments, (San Juan Pueblo, July 18/August 18, 2005), we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation

of critical habitat for the flycatcher. We view this as a substantial benefit.

Proactive voluntary conservation efforts will promote the recovery of the flycatcher. As mentioned above, the Pueblo is an important land manager in the Upper Rio Grande management Unit. The consultation history, surveys, and conservation, restoration and management information submitted by the Pueblo documents that meaningful collaborative and cooperative work for the flycatcher and its habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the flycatcher are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande management Unit and the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We have determined that exclusion of the Pueblo land will not result in extinction of the species. The Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the Pueblo lands of San Juan 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 and we are excluding the Pueblo lands of San Juan from this critical habitat designation.

### **Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act**

#### *Verde Management Unit, AZ*

#### *Salt River Project Partnership at Horseshoe Lake*

As discussed in the “Summary of Changes from the Proposed Rule” section above, we have determined that proposed critical habitat in the conservation space of Horseshoe Lake on the Verde River in Maricopa County, AZ will not be designated as critical habitat in this final rule due to our partnership and the ongoing HCP negotiations with Salt River Project (SRP). Salt River Project operates Horseshoe Dam and the Tonto National Forest manages the ground. We have reached this determination because we believe the benefits of excluding this segment from the final critical habitat designation outweigh the benefits of designating the lake as critical habitat.

Similar to Roosevelt Dam, flycatcher habitat in Horseshoe Lake is created as a result of the storage and release of water behind and from Horseshoe Dam, which exposes fine sediments across a broad/flat floodplain. These conditions maintained with Verde River inflow generates, through a vegetative successional process and timeframe, abundant riparian habitat for the flycatcher. Periodic flooding or inundation of the habitat can result in temporary losses or unavailability of habitat and incidental take of flycatchers due to operations. Over time though, water is needed to flow over the conservation space to recharge groundwater, prevent dessication, and

re-establish vegetation. Therefore, in the long-term through this cyclical and successional process, dam operations are expected to help support the existence of flycatcher habitat within Horseshoe Lake. Flycatcher habitat and territories at Horseshoe Lake have improved over the last three years, growing from 6 territories in 2003, to 11 in 2004, and now approximately 27 territories in 2005 (R. Ockenfels, AGFD, e-mail).

Salt River Project and the Service have an ongoing partnership of working toward conserving federally-listed species that has existed for nearly two decades. As examples of our partnership that extends to a variety of threatened and endangered species, SRP has voluntarily worked with the Service toward bald eagle recovery since the 1980s. They have participated in the inter-agency Southwestern Bald Eagle Management Committee, and provided annual helicopter flights to assess annual eagle productivity, conduct winter counts, detect new breeding areas, and access remote sites to band eaglets. In some instances they have also volunteered helicopter time to rescue bald eagles in life-threatening situations or take a rehabilitated eagle back to its nest area quickly. SRP has further donated funds to hire Arizona Bald Eagle Nestwatchers in order to protect bald eagles at nest sites. SRP has also produced a variety of bald eagle educational materials (brochures, posters, etc.) and atlases to track nest and territory locations. Additionally, SRP has supported California condor recovery by providing helicopter transportation of birds and biologists to remote locations. SRP has also worked with the Service’s law enforcement and other local power companies toward improving reporting of bird electrocutions, identifying locations of mortality, and retrofitting transmission poles to protect birds.

Salt River Project has also been active in developing HCPs for southwestern willow flycatchers. Together SRP and the Service developed a comprehensive plan that allows for the protection and persistence of southwestern willow flycatchers at Roosevelt Lake, and acquisition of properties to mitigate effects of water storage (see Roosevelt HCP portion of this Exclusion section). Bald eagles and yellow-billed cuckoos were also included in this HCP.

At Horseshoe Lake, SRP has committed resources to manage the lake not only for water storage, but also to retain habitat for southwestern willow flycatchers. Unlike some other reservoirs, because of the ability to store water downstream in Bartlett Lake, SRP

has more flexibility with how water is stored and released. Since the discovery of southwestern willow flycatchers at Horseshoe Lake, SRP has engaged in flycatcher and habitat surveys and has worked with the Service to determine ways in which the reservoir can be managed to balance the needs of the flycatcher and its purpose for water storage. This has been an ongoing two-year effort that will be formalized in a HCP, resulting in improved management of the dam to ensure long-term southwestern willow flycatcher habitat persistence, combined with off-site habitat acquisition. We published our notice of intent to conduct NEPA, prepare an Environmental Impact Statement, and hold scoping meetings related to the Horseshoe/Bartlett HCP in June 2003 (68 FR 36829). Since scoping, the Service and SRP continue to develop and refine plans that solidify development, maintenance, and protection of flycatcher habitat at Horseshoe Lake and conservation measures for other species involved in the Plan. The Horseshoe/Bartlett HCP, once completed, will result in conservation for bald eagles, yellow-billed cuckoos, and federally-listed and non-listed native fish. Collectively, our partnership in all of these areas has resulted in benefits that have contributed to immediate and long-term benefits to the conservation and recovery of protected species.

#### (1) Benefits of Inclusion

SRP has determined that any incidental take as a result of dam operations is appropriately authorized under section 10(a)(1)(B) of the Act (*i.e.*, Habitat Conservation Plan). Therefore, the eventual finalization of a HCP and issuance of this permit will commit an applicant (*i.e.*, SRP) to conduct southwestern willow flycatcher conservation activities, and minimize and/or mitigate to the maximum extent practicable for any incidental take. In order to issue this permit, the Service would have to conclude that the HCP would not jeopardize the southwestern willow flycatcher. Because southwestern willow flycatchers already exist at Horseshoe Lake, the scope of our analysis would include flycatcher habitat.

There is a Federal nexus for Tonto National Forest activities at Horseshoe Lake, because once the lake recedes, the Forest Service manages the dry lake bottom. Therefore, if the Forest carried out, funded, or permitted any activities that affected critical habitat at Horseshoe Lake, it would require consultation under section 7 of the Act. Forest Service management of activities

that can reduce quality of flycatcher habitat such as cattle grazing and recreation at Horseshoe Lake helped foster habitat development since the lake receded due to drought in the mid-1990s, and since southwestern willow flycatcher territories were discovered at Horseshoe in 2002, no Forest Service projects have been proposed that have adversely affected southwestern willow flycatchers or their habitat. Because of this lake's importance for water storage and because water periodically floods the entire area, there is no reason to anticipate that the lake bottom will be anything but open space. Due to the periodic water flow, it limits the extent this lake bottom can be managed for any other activities. Because southwestern willow flycatchers currently occupy Horseshoe Lake, section 7 consultation and analysis of effects to habitat already occurs, leaving few additional benefits to the designation of critical habitat.

Designation of critical habitat also provides educational benefits, including informing project proponents (in this case SRP and the Forest Service) of areas that are important to the conservation of listed species and providing important information on those habitats and their primary constituent elements. Because SRP and the Forest Service are the water and land managers, they have conducted and contracted surveys, nest monitoring, and vegetation monitoring for the southwestern willow flycatcher at Horseshoe Lake. Therefore, the potential designation of critical habitat at Horseshoe Lake would not provide this educational benefit because both SRP and the Forest Service already know the birds are present and are studying its habitat and breeding locations. SRP and the Forest are also already aware that Horseshoe Lake has a high concentration of flycatchers, and are important to conservation goals on the Verde River Management Unit. In addition, this area was included in our proposed designation and is discussed in this final designation as an area essential to the conservation of the flycatcher.

#### (2) Benefits of Exclusion

The benefits of excluding lands within Horseshoe Lake area from critical habitat designation include recognizing the value of conservation benefits associated with a partnership and a developing HCP; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to groups such as SRP. Additionally, our existing

partnership and the integration of Federal land management will generate a consistent management approach at Horseshoe Lake.

The partnership and cohesive management at Horseshoe Lake will maintain habitat for southwestern willow flycatchers for the long-term. This partnership will culminate in development, finalization, and implementation of an HCP that will provide long-term conservation benefits. In addition to maintaining habitat for the long-term at Horseshoe Lake, this partnership and subsequent HCP will include the development of status and distribution information needed to guide conservation efforts and assist in species conservation outside the HCP planning area, and the creation of innovative solutions to conserve species that can be applied wherever similar needs exist, irrespective of land ownership. The partnership with SRP also facilitates other cooperative activities with other similarly situated industry, communities, and landowners. Continued cooperative relations with SRP and their stakeholders (*i.e.*, City of Phoenix) are expected to influence other future partners and lead to greater conservation than would be achieved through multiple section 7 consultations.

Non-Federal landowners or dam operators such as SRP are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Already, the Horseshoe/Bartlett HCP development process has exceeded two years. Excluding this area from critical habitat would help promote and honor that trust by providing certainty for permittees that once appropriate conservation measures have been agreed to that additional consultation will not be necessary.

In discussions with the Service, SRP and their stakeholders have indicated they view critical habitat designation at Horseshoe Lake as unwarranted, and undermines the regulatory certainty that

would be provided by their expected incidental take permit and the No Surprises assurances. There is a concern by SRP and stakeholders that designation of critical habitat at Horseshoe Lake has the potential to threaten the storage and delivery of water to the greater Phoenix metropolitan area (described in the Economic Analysis). Should this ever come to pass, the results could be significant, however we do not believe that scenario is reasonably foreseeable. Having applicant's understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs. By excluding areas where our partnerships have been established following years of collaborative efforts that has resulted, and will continue to result in habitat protection for the flycatcher, preserves these partnerships and promote more effective conservation actions in the future.

A benefit of excluding Horseshoe Lake from critical habitat designation includes relieving additional regulatory burden and costs associated with the preparation of portions of section 7 documents related to critical habitat. While the cost of adding these additional sections to assessments and consultations to the Service and the Forest Service is relatively minor, there could be delays which can generate real costs to some project proponents. Since critical habitat is only proposed for occupied areas already subject to section 7 consultation and a jeopardy analysis, it is anticipated this reduction would be minimal.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher at Horseshoe Lake are small in comparison to the benefits of exclusion. In making this finding, we have weighed the benefits of including Horseshoe Lake as critical habitat, and compared them to the benefits of these lands without critical habitat, but with management based on our existing partnership (with a future HCP) and management by the Forest Service. Excluding Horseshoe Lake would reduce some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding Horseshoe Lake would continue to help foster development of future partnerships and HCPs and strengthen our relationship with permittees and stakeholders. Because there is no Federal nexus for

Horseshoe Dam operations, critical habitat, in and of itself, provides little benefit to Horseshoe Lake flycatcher habitat from Horseshoe Dam operations. Our 4(b)(8) determination in this final rule indicated that we did not believe dam operations, like Roosevelt Dam, would result in adverse modification. Horseshoe Dam operations, similar to Roosevelt Dam, will continue to foster the maintenance, development, and necessary recycling of habitat for the flycatcher in the long-term due to the dynamic nature of water storage and delivery. To date, Forest Service management has fostered the development, presence, and protection of flycatcher habitat. Because the lake bottom is intended for water storage, we believe there is virtually no risk of development or extensive land-use by the Forest Service that would be expected to result in adverse modification. Excluding Horseshoe Lake eliminates the concern of permittees and stakeholders of the possible risk to water storage and delivery to the greater Phoenix metropolitan area. This subsequently eliminates any uncertain risk of significant economic costs due to loss of water storage capabilities.

We have, therefore, concluded that the current partnership and management established with SRP for flycatcher habitat, existing Forest Service management fostering flycatcher habitat, and conservation commitment to flycatcher habitat, outweigh those benefits that would result from the area being included in the designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of Horseshoe Lake will not lead to the extinction of the species, nor hinder its recovery. The periodic fluctuation in Horseshoe Dam operation, the maintenance of the dry lake bottom as open-space, and continued appropriate Forest Service management will ensure the long-term persistence and protection of flycatcher habitat at Horseshoe Lake.

#### *San Luis Valley Management Unit, CO*

##### San Luis Valley Partnership and Regional Habitat Conservation Plan

As discussed in the "Summary of Changes from the Proposed Rule" section above, we have determined that all proposed critical habitat in the San Luis Management Unit, CO (Rio Grande and Conejos River), will not be designated as critical habitat in this final rule due to our past and future conservation partnerships within the San Luis Valley, as discussed below. We

have reached this determination because we believe the benefits of excluding this unit from the final critical habitat designation outweigh the benefits of designating the unit as critical habitat.

A partnership has been formed to develop a HCP in the San Luis Valley of Colorado. The State of Colorado received a \$380,000 HCP Section 6 Planning Grant on behalf of the Rio Grande Water Conservation District in 2004 to develop the HCP for five counties, two cities, the State of Colorado, and 14 other smaller communities. In September 2005 the State received another \$120,000 Section 6 grant to draft NEPA documents and finalize the HCP. A preliminary draft of the San Luis Valley Regional HCP has been submitted to the Service for review. The HCP as proposed would cover nearly 809,300 ha (2 million ac) and 241 km (150 mi) of habitat for the southwestern willow flycatcher, bald eagle, and yellow-billed cuckoo. The acreage covered by the HCP encompasses the entire Colorado portion of the San Luis Valley Management Unit, as described in the Southwestern Willow Flycatcher Final Recovery Plan, and extends well beyond the two stream segments in the Rio Grande and Conejos Rivers that we proposed as critical habitat.

The San Luis Valley has a strong tradition of locally supporting issues that provide for long-term conservation of natural resources. For instance, entities within the Valley fought a strong effort on two occasions by governmental entities from larger cities (Colorado Springs and Aurora, CO) to the north to withdraw water from the Valley's underground aquifer and have it pumped to the larger cities. A subsequent result of this effort was the expansion of the Service's National Wildlife refuge lands in the Valley (now referred to as the Baca Refuge under the administration of the Alamosa-Monte Vista Refuge) and expansion of the adjacent Great Sand Dunes National Park and Preserve, actions supported by the local community. These efforts have facilitated strong, meaningful, and enduring conservation partnerships with the Service.

The Valley has other strong conservation efforts that are locally driven: such as the Rio Grande Headwaters Restoration Project, Alamosa River Restoration Project, Colorado Wetlands Initiative—San Luis Valley Focus Area Group, Rio Grande Natural Area, and Saguache Creek Corridor Project. All these efforts, described in further detail below to demonstrate the history of conservation

efforts in the San Luis Valley, are within the HCP planning area and will provide conservation benefits to the southwestern willow flycatcher, bald eagle, and yellow-billed cuckoo, as well as other wildlife within riparian and wetland communities.

The Rio Grande Headwaters Restoration Project objective is to implement a master restoration plan for approximately 64 km (40 mi) of the upper Rio Grande. This project presents a plan to enhance the adequacy of the Rio Grande to fulfill historical function such as maintenance of riparian habitat and channel capacity, as well as meeting Rio Grande Compact commitments. The Alamosa River Restoration Project has \$5 million in funds to restore and enhance the Alamosa River. This project's efforts include stream bank stabilization, boulder placement, vegetation plantings, and fencing of the riparian area to restore riparian function, The Colorado Wetlands Initiative—San Luis Valley Focus Area Group is a coalition of conservation organizations, private landowners, and State and Federal agencies that have contributed to several conservation projects that help protect southwestern willow flycatcher habitat. The Rio Grande Water Conservancy District is providing strong political support for establishment of the Rio Grande Natural Area, currently before Congress. The 33 mile stretch of the Rio Grande from the Alamosa National Wildlife Refuge to the New Mexico border will continue to be managed by the Bureau of Land Management and private landowners as a Natural Area. If enacted, the Natural Area would establish an advisory council that would develop a plan and provide a framework for the conservation of riparian habitat. The Saguache Creek Corridor Project has been awarded a \$3.7 million grant by the Colorado Cattleman's Agricultural Land Trust to assist landowners in the perpetual protection of conservation easements. These easements would permanently protect the agricultural, wildlife, and scenic values of this riparian corridor that contains significant patches of willow.

#### (1) Benefits of Inclusion

The draft environmental assessment found that minor changes through section 7 consultations, due to a critical habitat designation, may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. Thus, if the areas proposed in the San Luis Valley were designated as critical habitat, there may be some benefit through consultation

under the adverse modification standard for federally sponsored actions. But, we believe this benefit is minimal since these locations are currently occupied by breeding flycatchers, dispersing young-of-the-year flycatchers, migrating, foraging, and non-breeding flycatchers; thus, effects to flycatcher habitat are already considered in consultations under section 7 of the Act. In addition, the past history of conservation efforts, as well as efforts and funding to date in the development of the preliminary HCP, demonstrate the commitments of the San Luis Valley to provide for the conservation of the flycatcher and the growth and persistence of its habitat. For these reasons and because formal consultations in these proposed areas of critical habitat, as explained elsewhere in this rule, will likely result in only discretionary conservation recommendations due to existing appropriate management, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the southwestern willow flycatcher.

With regard to the preliminary HCP, in order for the Service to issue this permit regardless of whether critical habitat is designated, we would have to conclude that the HCP would not jeopardize the southwestern willow flycatcher. However, because southwestern willow flycatchers already exist in these proposed critical habitat areas in the San Luis Valley, as noted above, the scope of our analysis pursuant to section 7 would also include effects to flycatcher habitat; therefore, we believe the additional designation of critical habitat would provide little benefit when we conduct our inter-Service consultation on the anticipated issuance of this HCP.

We have also determined through our review of the preliminary San Luis Valley Regional HCP that it provides for the development and accumulation of important biological information that would otherwise be unavailable and that will benefit the flycatcher and many other species. Specifically, we find that it will educate many people regarding the role of geology and topography in meeting the needs of wildlife in these stream habitats, and understanding the ecological processes that develop, maintain, or degrade these habitats. This HCP also provides conservation benefits that address and benefit multiple species and environmental concerns across broad landscapes, regardless of occupancy by southwestern willow flycatcher and

other covered species. The HCP is anticipated to provide conservation beyond what could be achieved through a parcel-by-parcel avoidance of take, or through multiple section 7 consultations due to a diversity of actions undertaken through the HCP, including proactive restoration and remediation of existing problem areas. The HCP will serve as a foundation for landscape conservation planning on adjacent lands and allow longer-range planning, all of which would benefit the southwestern willow flycatcher, bald eagle, yellow-billed cuckoo and other riparian associated wildlife. For the reasons discussed above and because formal consultation on the issuance of the HCP would likely result in only discretionary conservation recommendations due to beneficial nature of the HCP, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising in this case. Therefore, as noted above, we believe the designation of critical habitat would provide little benefit as a result of our section 7 analysis on the anticipated issuance of this HCP.

There may also be non-regulatory and educational benefits to conservation of the flycatcher, including informing the public of areas important for conservation of the species, and focusing attention on and awareness of those areas. In *Sierra Club v. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. However, we believe that there would be little educational and informational benefit gained from including proposed critical habitat in the Rio Grande and Conejos Rivers of the San Luis Valley within the designation, because they were included in the proposed rule as essential habitat, are discussed in this final rule, and have been the focus of conservation related activities for a number of years. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat.

#### (2) Benefits of Exclusion

The benefits of excluding lands within the proposed critical habitat area of the Rio Grande and Conejos Rivers, that are encompassed by the San Luis Valley HCP, from critical habitat

designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their adoption and support of the HCP. Additionally, the existing partnerships and the integration of Federal land management with non-Federal land management will enhance a consistent management approach on a landscape level.

If issued, the San Luis Valley HCP will help promote flycatcher recovery through the development and implementation of the HCP, as noted above, and by providing for other important conservation benefits, including the development of important biological information needed to guide conservation efforts and assist in species conservation within and outside the HCP planning area. In general, HCPs also aid in the creation of innovative solutions to conserve species that can be applied wherever similar needs exist, irrespective of land ownership.

If issued, the San Luis Valley HCP can also facilitate other cooperative activities with other similarly situated landowners. Continued cooperative relations with San Luis Valley citizens are expected to influence other future partners and lead to greater conservation than would be achieved through multiple section 7 consultations. We anticipate participating in a scientific advisory team that oversees the HCP, and allows for the sharing of information and development of relationships with a number of other entities, including Tribes.

Failure to exclude these two stream segments in the San Luis Valley could be a disincentive for other entities contemplating partnerships, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to or are underway, as is the case here with the development of the San Luis Valley HCP.

Nonfederal landowners are motivated to work with the Service collaboratively to develop HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits on nonfederal lands than could be achieved through strictly regulatory approaches, such as critical habitat designation. The

conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding these stream segments from critical habitat would help promote and honor that trust and thereby our partnership by providing greater certainty for the HCP applicant.

In discussions with the Service, HCP permittees and applicants have indicated they view critical habitat designation as an unwarranted and unwelcome intrusion on their property, and an erosion of the regulatory certainty that would be provided by their incidental take permit and the No Surprises Assurances. Having applicant's understand the Service's commitment will encourage continued partnerships that could result in additional conservation plans or additional lands enrolled in HCP's and, in this case, demonstrate the Service's commitment to continue to work in cooperation with these entities for the mutual benefit of the flycatcher.

Our collaborative relationships with an HCP applicant clearly make a difference in our partnership with the numerous landowners of the San Luis Valley and influence our ability to form partnerships with others. Concerns over added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners. We believe this HCP will result in implementation of conservation actions that we would be unable to accomplish otherwise and by excluding this area we preserve our partnership and promote more effective conservation actions in the future.

Additional benefits from excluding these two stream segments from critical habitat designation includes relieving landowners, communities, and counties from any additional regulatory burden and costs associated with the preparation of section 7 documents related to critical habitat. While the costs of these additional documents to the Service is relatively minor, there could be delays which generate very real costs to private landowners in the form of opportunity costs as well as direct costs. In addition, stigma costs are associated with the regulatory designation of critical habitat. There would be reduced costs and staffing requirements as consultations would be

more extensive with a critical habitat designation thereby reducing costs associated with producing Biological Assessments and Biological Opinions. Since critical habitat is only proposed for occupied areas, already subject to a jeopardy analysis, it is anticipated this reduction would be minimal. If issued, the HCP will provide substantial protection to the ecosystem as a whole, which we believe will contribute to the conservation of the flycatcher and other covered species. This preliminary HCP covers a large area that is outside of our proposed stream segments, including areas not currently occupied by the flycatcher. Including these areas as part of the HCP can contribute to southwestern willow flycatcher recovery by including riparian habitats suitable for future occupancy by southwestern willow flycatcher.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding these stream segments based upon our past and current partnership, including the current efforts towards development and issuance of the preliminary San Luis Valley HCP, from the designation of southwestern willow flycatcher critical habitat outweighs the benefits of their inclusion. We find that including these two stream segments, would result in very minimal, if any additional, benefits to the southwestern willow flycatcher, as explained above. However, including them would require additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, it would require the citizens of the San Luis Valley and the Service to use additional resources that may otherwise be used towards beneficial projects for wildlife throughout the San Luis Valley.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because the management emphasis of the San Luis Valley in general and specifically through the preliminary HCP and the various partners within the San Luis Valley is to protect and enhance riparian habitat, which the southwestern willow flycatcher depends on. This emphasis on conserving riparian habitat will ensure the long-term conservation of the southwestern willow flycatcher and other riparian species and contribute to flycatcher recovery by conserving

riparian habitat that is not currently occupied.

#### *Owens Management Unit, CA*

Los Angeles Department of Water and Power Conservation Strategy

As discussed in the "Summary of Changes from the Proposed Rule" section above, we have determined that the Owens Management Unit, CA (OMU) in the Basin and Mojave Recovery Unit will not be designated as critical habitat in this final rule. We have reached this determination because we believe the benefits of excluding the Owens River from the final critical habitat designation outweigh the benefits of designating the Owens River as critical habitat.

The OMU, which was proposed as critical habitat, includes a 111 km (69 mi) long reach of the Owens River and a 1.4 km (0.9 mi) long reach of Rock Creek in Inyo and Mono Counties, CA. The Owens River segment is bounded on the upstream end by a point that is 0.8 km (0.5 mi) east of the Long Valley Dam, and on the downstream end by a point that is 6.4 km (4 mi) north of Tinemaha Reservoir. The Rock Creek segment consists of the downstream-most portion of the creek in Birchim Canyon before it intersects the Owens River. All of the land within the OMU is owned and managed by the Los Angeles Department of Water and Power.

On July 12, 2005, the Service and the Los Angeles Department of Water and Power signed a memorandum of understanding (MOU) which included a southwestern willow flycatcher conservation strategy designed to proactively manage flycatchers in the OMU. The conservation strategy addresses three elements, livestock grazing, recreational activities, and wild land fires that have the potential to adversely affect the southwestern willow flycatcher in the OMU. The conservation strategy provides specific measures that: (1) are designed to create suitable breeding habitat for the southwestern willow flycatcher, and (2) avoid and minimize potential adverse effects such as the degradation or loss of habitat that may be associated with grazing activities, recreational activities, and wild land fires. The document also states the Los Angeles Department of Water and Power will implement the aforementioned measures with the goal of promoting the establishment of 50 southwestern willow flycatcher territories in the OMU; this number of territories was identified in the Southwestern Willow Flycatcher Recovery Plan (USFWS 2002), and

reflects the number of territories the Service believes is necessary to recover this species in that area. The finalized MOU and conservation strategy signed by the Los Angeles Department of Water and Power were received by the Service during the public comment period which ended July 18, 2005.

The MOU provides a commitment by the Los Angeles Department of Water and Power to implement the conservation strategy for a minimum of 10 years, and also contains a clause stating that the MOU will become null and void if all or any part of the OMU is designated as critical habitat for the southwestern willow flycatcher. At the end of the 10-year period, the Service and LADWP will conduct a joint evaluation to determine if there is a need to renew the conservation strategy for an additional 10-year period. If it is deemed necessary, the renewal of the conservation strategy will provide assurances that the measures to conserve the habitat of the southwestern willow flycatcher will continue. In the event that the conservation strategy is renewed, the Service and LADWP will collectively determine if new measures need to be implemented to promote the establishment and persistence of additional habitat for the southwestern willow flycatcher.

#### (1) Benefits of Inclusion

As of the date of this final rule, the Service has not conducted any formal or informal consultations that involve the southwestern willow flycatcher in the Owens Valley area since this species was listed as endangered in 1995. We also note that staff from the Los Angeles Department of Water and Power have stated that, with regard to the OMU, they have not received or required any Federal permit, license, authorization, or funding to complete projects in this area, and they do not anticipate there will be a project that will create a Federal nexus within the foreseeable future. The lack of previous section 7 consultations during the past 10 years, and the expectation that there will be no future project within the OMU with a Federal nexus leads us to believe that critical habitat designation will create relatively few benefits for the southwestern willow flycatcher in this area.

Designation of critical habitat also provides educational benefits, including informing private landowners of areas that are important to the conservation of listed species and providing important information on those habitats and their primary constituent elements. Because the Los Angeles Department of Water and Power is the sole owner of the land

within the OMU, and they have either conducted, or contracted surveys for the southwestern willow flycatcher, the agency is aware the species occurs on their property. Therefore, the potential designation of critical habitat in the OMU would not provide this educational benefit because the Los Angeles Department of Water and Power already knows the species is present on their property. Los Angeles Department of Water and Power staff is also already aware that their property has a relatively high concentration of southwestern willow flycatchers in relation to other areas outside of the Owens Valley area, and this species has specific habitat requirements that require proactive management. Additionally, these lands are identified in our proposed and final rule as areas essential to the conservation of the southwestern willow flycatcher.

#### (2) Benefits of Exclusion

The development of a MOU between the Service and another entity is an activity that both parties must voluntarily agree to; as such, both entities negotiate the terms and conditions of the document. In the case of the MOU involving the OMU, the Los Angeles Department of Water and Power agreed to implement the conservation strategy to benefit the southwestern willow flycatcher, provided that critical habitat in the Owens Valley is not designated.

The Service has reviewed the measures in the conservation strategy, and we believe the implementation of these measures will create a tangible and quantifiable benefit within the 19,830 ha (49,000 ac) area that constitutes the OMU. For example, the grazing prescriptions will enhance the survival of riparian shrubs and trees during their first years of growth and minimize adverse effects to young age classes of riparian willow and cottonwood trees, thereby allowing the riparian community to develop dense thickets of trees and shrubs that are likely to be used by the southwestern willow flycatcher. The regulation of recreational activities conducted by the public within the OMU will act to protect and/or restore riparian areas by minimizing erosion, reducing the number of trails that exist or could develop, and improving bank stability. Unintentional fires in riparian areas will be given high priority for fire suppression. If fires affect significant portions of the Owens River, Los Angeles Department of Water and Power staff will pursue management actions that facilitate a more rapid recovery of the affected riparian habitats. For

example, flows in the Owens River, authorized grazing activities, and recreational use may be adjusted to facilitate the recovery of burned riparian habitats.

The conservation strategy also provides a commitment by the Los Angeles Department of Water and Power and the Service to review the conservation strategy and management activities to determine what mutually agreeable protective measures could be further implemented/added to the existing conservation strategy. If such additional protective measures are needed, the Los Angeles Department of Water and Power will identify these measures in annual reports that will be sent to the Service, and implement the new measures as soon as possible. As stated above, the commitment to conduct the aforementioned activities is based on Los Angeles Department of Water and Power's desire to work with the Service and reduce the need to designate critical habitat in Owens Valley.

We also note the development of the MOU and conservation strategy for the southwestern willow flycatcher in the OMU has been a collaborative effort that has promoted the development of a positive relationship between the Service and the Los Angeles Department of Water and Power. The Service believes the collaborative relationship between the two agencies will be especially useful in the future because Los Angeles Department of Water and Power staff have indicated they will likely work with the Service on additional partnership efforts to conserve fish and wildlife resources within the next year or two. Such documents are more easily completed when the Service and an applicant have a collaborative relationship, and would benefit a variety of listed species in the Owens Valley area.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We find that the benefits of designating critical habitat within the OMU are relatively small in comparison to the benefits of exclusion. In making this finding, we have weighed the benefits of including these lands as critical habitat without the MOU and conservation strategy against the exclusion of these lands from critical habitat and the implementation of the MOU and conservation strategy. We have concluded that the benefits of the MOU and conservation strategy far outweigh those that would result from the designation. We have therefore excluded these lands from the final

critical habitat designation pursuant to section 4(b)(2) of the Act.

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions that might adversely affect the southwestern willow flycatcher, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The southwestern willow flycatcher is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. Consistent with the recommendations in the Recovery Plan (USFWS 2002), LADWP will implement measures and activities with the goal of promoting the establishment of 50 southwestern willow flycatcher territories in the Owens Management Unit. There is accordingly no reason to believe that this exclusion would result in extinction of the species.

#### *Middle Rio Grande Management Unit, NM*

Rio Grande Valley State Park (City of Albuquerque)

Within the Middle Rio Grande Management Unit lies the Rio Grande Valley State Park (Park), an area proposed as critical habitat for the flycatcher. The Park consists of the entire wooded riparian forest and associated floodway of the Rio Grande within Bernalillo County, NM, with minor exceptions (e.g., Pueblo lands, private lands, land within the Village of Corrales, and bridge rights-of-way). The Park is approximately 1,756 ha (4,340 ac), of which 1,060 ha (2,620 ac) are riparian forest (bosque) and 696 ha (1,720 ac) are floodway of the Rio Grande. Its outer boundaries are service roads that run along the land-side of several main riverside drains. The City of Albuquerque (City) has managed the Park since 1983 under legal authority granted by the State of New Mexico.

The City is designated by State law to manage the Park "in such a manner as to protect and enhance the scenic and natural values of the Rio Grande," NMSA § 16-4-14 (D). It has done so since 1983 pursuant to a series of conservation-based management plans through the City's Open Space Division. In 1987 the City wrote a Management

Plan emphasizing bosque management to conserve, preserve, protect, enhance and diversify the riparian ecosystem. Even though the Management Plan was developed before the listing of the flycatcher, the plan includes actions needed to provide conservation measures to the flycatcher. A 1993 Bosque Action Plan, written by the City of Albuquerque Parks and General Services Department and adopted by the City Council, includes preservation and conservation of vegetation and wildlife communities including the flycatcher and the habitat upon which it depends. Over the past decade the City's plans and management initiatives have focused increasingly on habitat restoration and management for endangered species, including the flycatcher. In 1999 a number of parties came together to develop a constructive solution that would resolve conflicts and benefit the flycatcher and Rio Grande silvery minnow. The City is one of these parties which signed a Memorandum of Understanding in April 2002 as the Middle Rio Grande ESA Collaborative Program (Program). The Program was created by Senator Domenici of New Mexico in 2000 and has since been funded through the Energy and Water Development Appropriations Subcommittee. The Program's goal is to contribute to the survival and recovery of the flycatcher and Rio Grande silvery minnow in the Middle Rio Grande basin. Most recently, the City's 2005 Environmental Enhancement Plan (EEP) includes numerous new revegetation and off-channel water improvements intended specifically to enhance flycatcher habitat. It focuses on establishing and maintaining a mosaic of habitat types and vegetation/plant communities within the Park. The City's commitment to managing established plant communities will ensure long-term sustainability of habitats preferred by and beneficial to the flycatcher. The EEP and current management of the Park represent a culmination of previous plans and ongoing research and management efforts.

The Park is contained within a highly urbanized environment and the EEP also focuses on the serious threat to public health and safety posed by bosque wildfire. Consistent with its mandate to manage the Park to protect and enhance the scenic and natural environment, the City manages the Park to prevent catastrophic wildfire. The threat to the public was made clear by the devastating bosque fires of 2003 in the Park. Major fires consumed over 162 ha (400 ac) of bosque, or approximately

1/6 of the riparian forest in Bernalillo County. These fires destroyed or threatened homes and lives and also resulted in serious damage to wildlife habitat.

The U.S. Army Corps of Engineers (Corps) was initially requested to assist with restoration of these burn areas and other work needed to improve access and prevent future fires. In January of 2004, the Corps was authorized to assist local efforts of this type. Pursuant to the authority of Public Law 108-137, Operations and Maintenance, Section 116, which states: "the Secretary of the Army, acting through the Chief of Engineers, is authorized to undertake appropriate planning, design, and construction measures for wildfire prevention and restoration in the Middle Rio Grande bosque in and around the City of Albuquerque. Work shall be directed toward those portions of the bosque which have been damaged by wildfire or are in imminent danger of damage from wildfire due to heavy fuel loads and impediments to emergency vehicle access."

High fuel loads that have accumulated over the past 50 years and growth of non-native species have added to the danger of fire in the bosque. Over the last five to ten years, this threat has grown due to drought conditions throughout the west causing the build-up of dead material to become extremely dry. Because of the proximity of structures to the bosque, the threat to human health and property is of imminent concern. In August 2004, we consulted on the Bosque Wildfire Project, Bernalillo and Sandoval Counties, New Mexico (Bosque Wildfire Project) with the Army Corps of Engineers (U.S. Army Corps of Engineers 2004; USFWS 2004a). The Bosque Wildfire Project was designed to reduce the fuel loading in the bosque, as well as improving access for fire fighter safety, in case a fire were to break out. The project began in September 2004 and should be complete by March 2006. We found that the overall project and revegetation activities would begin to restore the bosque and improve habitat over the long-term for the flycatcher. Therefore, potential project modifications are likely to be minimal, given the beneficial nature of the current activities and projects. We note that protecting human life and property is the highest priority in the wildland urban interface. In addition, threats of wide-scale habitat loss due to fire are real and immediate on many private and public lands. As such, we will continue to encourage efforts such as this project to reduce the

risk of wildfire, while conducting habitat restoration activities.

The City's response to these fires was to utilize State and Federal resources to accelerate broad-scale fuels reduction within the Park. The City's fire suppression program, developed in concert with State and Federal agencies, is part of the 2005 EEP and is largely based on thinning of the thick accumulations of dead and down vegetation; and replacement of non-native species with cottonwoods, willow, and other native species. Over 526 ha (1,300 ac) were treated in a six-month period; 890 ha (2,200 ac) (nearly 85%) of the riparian forest had been treated or previously burned by the beginning of May 2005. The only untreated areas remaining are those scheduled for habitat restoration projects in the fall of 2005, or selected research sites, which will have fuels reduction at a later date. The outcome of these public safety actions has been to greatly alter the former hazardous conditions within the Park in order to favor re-establishment of native vegetation communities.

The loss of bosque due to fire and the vegetation management to reduce the threat of future fire destruction has created the opportunity to recreate a healthy native bosque. The circumstances have allowed the Park to analyze the bosque ecosystem and plan for a mosaic of plant community types that will benefit the wildlife, including the flycatcher. Plant communities are proposed that would significantly improve the existing habitats in the Park to those more beneficial to the flycatcher. Acreages of restored under-canopy species, thickets of native shrubs, and plantings at edges of standing or slow-moving water are identified. Suitable vegetation structure is but one side of an equation for potential flycatcher habitat; proximity to water is also a vital consideration. Planned features include created or enhanced wetland or outfall channels, moist soil depressions, and overbank flooding areas. Several Park zones are considered "special management areas" due to their high habitat values or unique existing characteristics and will be managed for the flycatcher. All of these feature types are proposed as part of the EEP and will work towards sustained conservation for the flycatcher.

#### (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Park because, as explained

above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on Park lands would likely require a reduction in the capability of the habitat to sustain existing populations. Currently, the only territories known are immediately downstream of the Park, so the only populations expected to use this area are migrant or dispersing southwestern willow flycatchers. As noted above, a consultation with the Corps for restoration and fire prevention activities within the Park was finalized in 2004 at which time we concurred that the project "may affect, but is not likely to adversely affect" the flycatcher. The Service recognized the beneficial effects to flycatcher habitat from the Corps' proposed activities to reduce the risk of catastrophic wildfire and to reestablish native vegetation. Because southwestern willow flycatchers use the Park as habitat for migration and dispersal, the scope of our analysis in this consultation already included consideration of the effects to flycatcher habitat and determined that the project provides benefits to the flycatcher through reducing the risk of wildfire that can destroy its habitat and through the restoration of native riparian vegetation.

Given the consultation history and the fact that these lands are managed in a way that provide a conservation benefit for the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

We believe the conservation measures for the flycatcher that are occurring or will be used in the future in the Park (*i.e.*, riparian restoration and fire prevention measures) provide as much, and possibly more benefit than would be achieved through section 7 consultations involving consideration of critical habitat using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This is because management that is occurring or future activities will be the same activities which would be implemented in order to maintain or restore flycatcher habitat.

We believe that there would be little additional informational benefit gained

from including the Park within the designation because the final rule identifies all areas that are essential to the conservation of the flycatcher, regardless of whether all of these areas are included in the regulatory designation. Consequently, we believe that the informational benefits are already provided for areas that are being excluded from the designation of critical habitat.

## (2) Benefits of Exclusion

The proposed critical habitat designation would be an administrative and economic burden to the ongoing ecological stewardship of the Park by the City, and the multi-agency cooperative projects now planned. The costs of section 7 consultations for the Corps and non-Federal project proponents would increase due to the administrative costs associated with allocating staff time to the consultation process, costs associated with delay of thinning and revegetation activities until consultations are completed, and direct monetary expenditures associated with potential project delays. As such, the benefits of excluding the Park from the designation include a reduction in administrative costs associated with engaging in consultations pursuant to section 7 of the Act.

Designation could thwart ongoing conservation efforts by the City and by others, adding additional regulatory burdens. The Corps also has an ongoing revitalization project that will create a 32 km (20 mi) aquatic park/wetland along the Middle Rio Grande (Tingley Beach) (USFWS 2004). There has been some concern that critical habitat designation for the flycatcher may hinder the efforts of these programs. Effects to actions planned by these programs to date has been similar to those experienced by other saltcedar removal and vegetation management projects, primarily including avoiding removal of vegetation during flycatcher breeding season (USFWS 2005a). Costs and any potential delays for reinitiation of consultation will be minimized by excluding this area from designated critical habitat.

The City's collective management plans for the Park represent a complete and comprehensive program, which will provide a conservation benefit to the flycatcher. The City's management of the Park is consistent with the recovery plan for the flycatcher; the collective plans implement or propose to implement many of the conservation measures set forth in the flycatcher recovery plan. The City's various management plans provide assurances that the management will be

implemented. Indeed, as noted, the City is mandated by State law to manage the Park. Finally, the collective plans provide assurances that management of the Park will be effective in providing benefits to the southwestern willow flycatcher through continued monitoring and reporting, among other things, and the City's management of the Park is of a perpetual nature.

## (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Park from critical habitat for the flycatcher outweigh the benefits of its inclusion in critical habitat. Including this area may result in some benefit through additional consultations with those whose activities may affect critical habitat. However, overall this benefit is minimal because the Park is currently being managed in a manner that provides a conservation benefit to the flycatcher. On the other hand, exclusion will greatly benefit the expeditious completion of scheduled bosque restoration activities for the fall of 2005 and will encourage the ongoing management for the sustainability of flycatcher habitat. It will recognize the benefits to conservation of the flycatcher in the management plans and the multi-agency collaborative efforts that are based on the premise that it is better to work in the spirit of cooperation to develop solutions to shared problems regarding resource management and meeting the needs of our endangered species. It will also recognize the need to manage the bosque, a wildland-urban interface, for health and human safety.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because Park projects follow the guidelines set by the Recovery Plan for the flycatcher thereby providing a benefit to the flycatcher and its habitat. In addition, proposed projects will still require consultation pursuant to section 7 as a result of the species presence under the jeopardy standard and, as discussed above, the mandate of the Park is to manage this area for the protection and enhancement of the scenic and natural environment and prevent catastrophic wildfire.

### *Kern Management Unit, CA*

#### Hafenfeld Ranch Conservation Easement

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. One approximately 37 ha (93 ac) parcel (Hafenfeld Parcel) located on lands

owned by the Hafefeld Ranch in the proposed Kern Management Unit warrants exclusion from the final designation of critical habitat under section 4(b)(2) of the Act because we have determined that the benefits of excluding the Hafefeld Parcel from the critical habitat designation will outweigh the benefits of including it in the final designation based on the special management considerations and protections afforded for southwestern willow flycatcher habitat through a conservation easement and Conservation Plan developed by the Natural Resources Conservation Service (NRCS). The following represents our rationale for excluding the Hafefeld Parcel from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The dominant vegetation in the Kern Management Unit is mature willows (*Salix gooddingii*, *S. lasiandra*, and *S. laevigata*) and Fremont cottonwood (*Populus fremontii*). Other plant communities of the Kern Management Unit include open water, wet meadow, and riparian uplands. Approximately 9.3 ha (23 ac) of mature riparian forest habitat is found on the Hafefeld Parcel, mainly located along the braided channels of the Kern River that meander through the parcel. Portions of the Hafefeld Parcel are seasonally flooded, forming fragmented wetland communities throughout the area. The remainder of the parcel consists of wet meadow and riparian upland habitats, consistent with the character of habitats located throughout the larger Kern Management Unit. The Hafefeld Parcel completes a continuous corridor of willow-cottonwood riparian habitat along the south fork of the Kern River that connects the east and west segments of the Audubon Society's Kern River Preserve, which is known to be occupied by the southwestern willow flycatcher. The southwestern willow flycatcher has been documented on the Kern Management Unit, which includes the Hafefeld Parcel. The Hafefeld Parcel is currently protected under an Easement and Conservation Plan developed by the NRCS.

We proposed as critical habitat, but have now excluded from the final designation, as described below, portions of the Hafefeld property within the Kern Management Unit.

## (1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within portions of the Hafefeld property because, as explained above,

these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the Hafenfeld property would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed for the benefit of the flycatcher it is highly unlikely that projects would be considered for this area that would result in depreciable diminishment or a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands have provided benefits to the flycatcher by restoring, improving, and protecting its habitat.

As described above, the Hafenfeld property proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher.

Accordingly, and as further discussed above in the "General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process" section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

We believe the conservation measures for the flycatcher on the Hafenfeld property that include the activities described in this section that include willow planting and management of surface flows to achieve the optimal flooding regime for the enhancement of important riparian and wetland habitat provide as much benefit than would be achieved through section 7 consultations involving consideration of critical habitat. This is because they are

already implementing actions that restore and maintain flycatcher habitat.

As discussed in the "Educational Benefits of Critical Habitat" section above, we believe that there would be little additional informational benefit gained from including the Hafenfeld property within the designation because this area was included in the proposed rule as having essential flycatcher habitat. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, in light of the existing Easement and Conservation Plan executed between the Hafenfeld Ranch and the NRCS, we believe that an education benefit has largely been achieved.

#### (2) Benefits of Exclusion

The southwestern willow flycatcher occurs on public and private lands throughout the Kern Management Unit. Proactive voluntary conservation efforts by private or non-Federal entities are necessary to prevent the extinction and promote the recovery of the southwestern willow flycatcher in the Kern Management Unit.

The Hafenfeld Parcel is managed in such a way as to promote the conservation of the southwestern willow flycatcher through provisions of the Conservation Plan developed by the NRCS. Management activities include: (1) Limiting public access to the site, (2) winter-only grazing practices (outside of the flycatcher nesting season), (3) protection of the site from development or encroachment, (4) maintenance of the site as permanent open space that has been left predominantly in its natural vegetative state, and (5) the spreading of flood waters which promotes the moisture regime and wetland and riparian vegetation determined to be essential for the conservation of the southwestern willow flycatcher. Other prohibitions of the easement which would benefit the conservation of the southwestern willow flycatcher include: (1) Haying, mowing or seed harvesting; (2) altering the grassland, woodland, wildlife habitat, or other natural features; (3) dumping refuse, wastes, sewage, or other debris; (4) harvesting wood products; (5) draining, dredging, channeling, filling, leveling, pumping, diking, or impounding water features or altering the existing surface water drainage or flows naturally occurring within the easement area; and, (6) building or placing structures on the easement. Funding for the implementation of the Conservation Plan is apportioned between the United States and the Hafenfeld Ranch by

provisions of the Conservation Easement.

We have determined that the southwestern willow flycatcher within properties covered by management plans or conservation strategies that protect or enhance the conservation of the species will benefit substantially from voluntary landowner management actions due to an enhancement and creation of riparian and wetland habitat and a reduction in risk of loss of riparian habitat. The conservation benefits of critical habitat are primarily regulatory or prohibitive in nature. Where consistent with the discretion provided by the Act, the Service believes it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996; Bean 2002). Thus, we believe it is essential for the recovery of the southwestern willow flycatcher to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

#### (3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations, we have determined that the benefits of excluding the Hafenfeld Parcel from critical habitat in the Kern Management Unit outweigh the benefits of including it as critical habitat for the southwestern willow flycatcher.

The Hafenfeld Parcel is currently operating under a Conservation Plan to implement conservation measures and achieve important conservation goals through the conservation measures described above, as well as willow planting and management of surface flows to achieve the optimal flooding regime for the enhancement of important riparian and wetland habitat for the southwestern willow flycatcher.

The Service believes the additional regulatory and educational benefits of including these lands as critical habitat are relatively small. The Service anticipates that the conservation strategies will continue to be implemented in the future, and that the funding for these activities will be apportioned in accordance with the provisions of the Conservation Plan. The designation of critical habitat can serve to educate the general public as well as conservation organizations regarding the potential conservation

value of an area, but this goal is already being accomplished through the identification of this area in the Conservation Plan described above. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Hafenfeld Parcel will be negatively affected to any significant degree by Federal activities requiring section 7 consultation, and (b) we believe that based on ongoing management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat.

Excluding these privately owned lands with conservation strategies from critical habitat may, by way of example, provide positive social, legal, and economic incentives to other non-Federal landowners who own lands that could contribute to listed species recovery if voluntary conservation measures on these lands are implemented.

In conclusion, we find that the exclusion of critical habitat on the Hafenfeld Parcel would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to these subspecies of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with these landowners, and it will set a positive example and provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the southwestern willow flycatcher without designated critical habitat than there would be with designated critical habitat on these properties.

We believe that exclusion of these lands will not result in the extinction of the southwestern willow flycatcher as these areas are considered occupied habitat. Actions which might adversely affect the species are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7 of the Act and routine implementation of habitat preservation through the section 7 process provide assurance that the species will not go extinct. In addition, the subspecies is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that

would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, the flycatcher occurs on lands protected and managed either explicitly for the subspecies, or indirectly through more general objectives to protect natural values, this provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

#### *Upper Gila Management Unit*

##### U-Bar Ranch

Pacific Western Land Company (PWLC), a Phelps Dodge subsidiary, owns the U-Bar Ranch (Ranch) near Cliff, in Grant County New Mexico, in the Upper Gila Management Area. As discussed in the proposed rule, flycatchers have been detected nesting along stream segments in the Upper Gila Management Unit since 1993. In 1999, a high of 262 territories at 8 sites were detected; the Ranch had 209 of these territories. In 2003, 191 territories at 8 sites were detected on the Gila River stream segments proposed as critical habitat and the Ranch had 123 of these territories. Many of the territories on the Ranch were found outside of the flood-prone area, off-channel in habitat along irrigation ditches. This privately owned Ranch is an important site for the conservation and recovery of the flycatcher in Upper Gila Management Area.

Through the efforts of PWLC and its long-time lessee, Mr. David Ogilvie, Phelps Dodge has demonstrated a commitment to management practices on the Ranch that have conserved and benefited the flycatcher population in that area over the past decade. In addition, Phelps Dodge has privately funded scientific research at and in the vicinity of the Ranch in order to develop data that has contributed to the understanding of habitat selection, distribution, prey base, and threats to the flycatcher. Considering the past and ongoing efforts of management and research to benefit the flycatcher, done in coordination and cooperation with the Service, we find the benefits of excluding areas of the U-Bar Ranch outweigh the benefits of including it in critical habitat.

The U-Bar Ranch utilizes a management plan on its pastures within

the Gila Valley that are north of the Highway 180 West Bridge and south of the boundary of the Gila National Forest. Eight pastures that incorporate approximately 1,372 ha (3,390 ac) are managed with a plan that is adapted annually for operation of livestock and farming enterprises. The management consists of a multifaceted and highly flexible rest-rotation system utilizing both native forage and irrigated fields. The Ranch's numerous pastures allow a relatively dynamic rotation system that is modified based upon current conditions. Grazing use of river bottom pastures is monitored by daily visual inspections. Use of these pastures is limited to ensure that forage utilization levels are moderate and over-use does not occur. In addition, the riparian areas are monitored regularly, and riparian vegetation is allowed to propagate along the river as well as in irrigation ditches.

Some specific management practices, varying in different pastures, which relate to the flycatcher and its habitat are: (1) Grazing is limited to November through April to avoid negative impacts during migration and nesting season; (2) animal units are adjusted to protect and maintain the riparian vegetation needed by the flycatcher; (3) the irrigation ditches are maintained, along with the vegetation, to benefit the flycatcher; (4) restoration efforts follow flood events that destroy habitat; and (5) herbicide and pesticides are only used in rare circumstances and are not used near occupied territories during breeding season. These flexible and adaptive management practices have resulted in the expansion, protection, and successful continuance of a large flycatcher population.

In 1995, active restoration followed the flooding destruction of the Bennett Farm fields in the 162 ha (400 ac) River Pasture. The Bennett Restoration Project is a series of artificially created, flooded marshy areas located between irrigated and dry-land pastures and the river. The Bennett Restoration Project is a mosaic of vegetation in successional stages with dense patches and lines of young willows and cottonwoods occurring in manmade oxbows. The oxbows occur outside of the active flood channel behind a levee. Water is continuously present and the project has become a marshy habitat in which flycatcher nesting was noted in 1997 (Dave Ogilvie, pers. comm., 2005). The site now supports one of the higher numbers of territories on the U-Bar Ranch and in the Upper Gila Management Area. The 2004 survey review resulted in recording 35 territories for the Bennett site (N. Baczek, USFWS, pers. com.).

The second-most successful nesting site on the U-Bar Ranch is in the Lower River Pasture. A significant feature of this riparian area is the amount of water it receives from adjacent irrigated fields. The Ranch has rehydrated ditches and no longer follows past land-use practices, which involved active clearing of woody vegetation from ditch banks. The Ranch has developed tree growth and a network of wooded strips in connection with the ditch-banks to attract breeding flycatchers.

Besides land management practices, Phelps Dodge and the U-Bar Ranch have supported flycatcher surveys and research in the Gila valley since 1994. Surveyors are trained and permitted in coordination with the Service and survey results are submitted to the Service in annual reports. Flycatcher research on the Ranch has included: nest monitoring (sites, substrate, and success), diet, microhabitat use, climatic influences on breeding, cowbird parasitism, and distribution and characteristics of territories. Permits for studies are coordinated with the Service and reports are submitted to us for review and comments. The research provides information to apply to grazing and land management (David Ogilvie, May 30, 2005). A current study involves eliminating grazing in the Lower River Pasture, but continuing it in the Out Pasture and Bennett during flycatcher breeding season to evaluate the effect of grazing on nest success and population trends.

(1) Benefits of Inclusion

There are few benefits in including the U-Bar Ranch in the critical habitat designation above those that will be achieved through the implementation of their voluntary management and restoration projects. As discussed above, the principal benefit of any designated critical habitat is that activities affecting habitat require consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. Since the U-Bar Ranch is privately owned, unless there is a Federal nexus in connection with their

activities, the designation of critical habitat will not result in a consultation.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the U-Bar Ranch is already working with the Service to address the conservation and recovery of the species. Further, the Ranch was included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation have already been provided by proposing the area as critical habitat. 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 for the presence of the species.

(2) Benefits of Exclusion

We believe that significant benefits would be realized by excluding the U-Bar Ranch that include: (1) The continuance and strengthening of our effective cooperative relationship with the Ranch to promote the conservation of the flycatcher and its habitat; (2) the allowance for continued meaningful collaboration and cooperation in surveys, nest monitoring, and research as we work towards recovery of the species; and (3) the provision of conservation benefits to the Gila River ecosystem and the flycatcher and its habitat that might not otherwise occur.

As mentioned above, the U-Bar Ranch is an important land manager in the Upper Gila Management Unit. The surveys, conservation, restoration and management information submitted by the Ranch document that meaningful collaborative and cooperative work for

the flycatcher and its habitat will continue on their land. The Ranch has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur if we were to designate critical habitat on the Ranch. We believe that the results of these activities promote long-term protection and conserve the flycatcher and its habitat on the Ranch land. The benefits of excluding this area from critical habitat will encourage the continued conservation, land management, and coordination with the Service. If this area is designated as critical habitat, we may jeopardize future conservation, research, and information sharing for the recovery of the flycatcher.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the U-Bar Ranch in critical habitat are small, and are limited to insignificant educational benefits since these lands are privately owned and the trigger for section 7 consultation is lacking. The benefits of excluding this area from designation as critical habitat for the flycatcher are significant, and include encouraging the continuation of adaptive management measures such as monitoring, surveys, research, enhancement, and restoration activities that the Ranch currently implements and plans for the future. The exclusion of this area will likely also provide additional benefits to the species by encouraging and maintaining a cooperative working relationship with the Ranch. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We have determined that exclusion of areas of the Ranch will not result in extinction of the species. The Ranch is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that areas of the U-Bar Ranch 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.

TABLE 4.—TOTAL SIZE OF FINAL CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER, INCLUDING AREAS EXCLUDED AND EXEMPTED FROM THE FINAL DESIGNATION

Total area identified in proposal as containing essential features .....	143486 (354562)
Areas exempted under section 4(a)(3) of the Act: Camp Pendleton and Fallbrook Naval Weapons Station .....	1793 (4430)
Exclusion of areas under section 4(b)(2) of the Act: HCP plan areas including Western Riverside County, CA, Multiple Species Habitat Conservation Plan; San Diego County, CA, Multiple Species Conservation Plan; City of Carlsbad, CA, Habitat Management Program; Lower Colorado River, CA/AZ Multiple Species Conservation Plan; Roosevelt, AZ Habitat Conservation Plan .....	27494 (67940)

TABLE 4.—TOTAL SIZE OF FINAL CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER, INCLUDING AREAS EXCLUDED AND EXEMPTED FROM THE FINAL DESIGNATION—Continued

Exclusion of Tribes and Pueblos under section 4(b)(2) of the Act that have completed Southwestern Willow Flycatcher Management Plans and/or have developed flycatcher habitat specific partnerships with the Service: Hualapai, Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Yavapai-Apache, and San Carlos Tribes in AZ, La Jolla, and Rincon Tribes in CA; Isleta, San Ildefonso, Santa Clara, and San Juan Pueblos in NM .....	10480 (25897)
Exclusion of National Wildlife Refuges under section 4(b)(2) of the Act with completed CCPs or developed management programs/strategies for the southwestern willow flycatcher habitat: Pahrnagat, NV; Havasu, Cibola, Imperial, and Bill Williams in AZ, Alamosa, CO; Bosque del Apache and Sevilleta, NM .....	18788 (46427)
Exclusion of State and Federal Wildlife Areas under section 4(b)(2) of the Act with plans/programs for the management and protection of southwestern willow flycatcher habitat: Overton and Key Pittman Wildlife Area, NV; Alamo Wildlife Area, AZ; Kern River Wildlife Area and Sprague Ranch, CA .....	5199 (12847)
Exclusions of partnerships, management plans/programs or easements under section 4(b)(2) of the Act that provide protections specific to southwestern willow flycatcher habitat: Los Angeles Department of Water and Power-Owens River Southwestern Willow Flycatcher Conservation Strategy; San Luis Valley, CO, Partnership; Hafenfeld Ranch—Kern River, CA; Salt River Project Partnership—Horseshoe Lake, AZ; U-Bar Ranch—Gila River, NM; Rio Grande Valley State Park (City of Albuquerque), NM .....	30836 (76198)
Total Final Critical Habitat .....	48896 (120824)

Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. 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)(2) of the Act requires Federal agencies, including us, to insure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define “jeopardize the continued existence of” as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR 402.02). “Destruction or adverse modification of designated critical habitat” for this species would include habitat alterations that appreciably diminish the value of critical habitat by significantly affecting any of those physical or biological features that were the basis for determining the habitat to be critical. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed actions. The conservation measures in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. 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 Service’s Regional 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. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions under certain circumstances, including 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 reinstatement of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect southwestern willow flycatcher or its critical habitat will require consultation under section 7. Activities on private, State, or county lands, or lands under local jurisdictions requiring a permit from a Federal agency, such as Federal Highway Administration or Federal Emergency Management Act funding, or a permit from the Corps under section 404 of the Clean Water Act, will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

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 include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of southwestern willow flycatcher 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 that may affect the southwestern willow flycatcher and which may require consultation under section 7 of the Act to determine if they adversely modify critical habitat include, but are not limited to: Removing, thinning, or destroying riparian vegetation without a riparian restoration plan to cause habitat to become of equal or better quality in abundance and extent. Activities that remove, thin, or destroy riparian vegetation, by mechanical, chemical (herbicides or burning), or biological (grazing, biocontrol agents) means reduce constituent elements for southwestern willow flycatcher sheltering, feeding, breeding, and migrating. Each of the specific areas designated in this rule as critical habitat for the southwestern willow flycatcher have been determined to contain sufficient PCEs to provide for one or more of the life history functions for the flycatcher. In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation pursuant to section 7 of the Act conducted subsequent to this designation.

(1) Activities that appreciably diminish value or quality or habitat or primary constituent elements through direct or indirect effects (*e.g.*, degradation of watershed and soil characteristics, diminishing surface and subsurface flow, altering flow regimes, introduction of exotic plants, animals, or insects, or fragmentation of habitat);

(2) Alteration of current surface water diversion or impoundment, groundwater pumping, dam operation, or any other activity which changes the frequency, magnitude, duration, timing or abundance of surface flow (Poff *et al.* 1997), and/or quantity/quality of subsurface water flow in a manner which permanently reduces available riparian habitats by reducing food availability, or the general suitability, quality, structure, abundance, longevity, vigor, micro-habitat components, and distribution of riparian habitat for nesting or migrating. This would not

apply to the normal rise and fall of storage pools behind dams, as discussed below.

(3) Permanent destruction/alteration of the species habitat by discharge of fill material, draining, ditching, tiling, pond construction, levee construction and stream channelization (*i.e.*, due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, dikes, levees, etc.).

(4) Management of livestock in a manner that reduces the volume and composition of riparian vegetation, physically disturbs nests, alters floodplain dynamics such that regeneration of riparian habitat is impaired or precluded, facilitates excessive brood parasitism by brown-headed cowbirds, alters watershed and soil characteristics, alters stream morphology, and facilitates abundance and extent of exotic species.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the flycatcher. Federal activities outside of critical habitat are still subject to review under section 7 if they may affect the flycatcher. The prohibitions of section 9 also continue to apply both inside and outside of designated critical habitat.

In general, activities that do not remove or appreciably degrade the primary constituent elements of habitat for southwestern willow flycatchers are not likely to destroy or adversely modify critical habitat. For example, certain dam operations, like Roosevelt Dam in central AZ, allow water to significantly increase and decrease in the conservation space depending on availability and demand. This fluctuation results in the exposure of fine/moist soils in the flat/broad floodplain of the exposed ground and has led to the development of hundreds of acres of flycatcher habitat. The same operating regime that creates the habitat will also inundate and cause loss of habitat. At this particular location, habitat is expected to persist on the perimeter and over time will increase and decrease (USFWS 2003). It is this very process of the ebb and flow of the conservation pool that ensures persistence of habitat over time, although that habitat will vary spatially and temporally, as does flycatcher habitat in natural settings. As a result, the dry conservation space would not be adversely modified when inundated. Riparian restoration can also cause a temporary loss of habitat through the actual removal of existing riparian vegetation. However, if this action is combined with positive site-specific evaluation (through an analysis of on

the ground features such as groundwater elevation, etc.) and an implementation/restoration plan (USFWS 2002) that together are expected to cause habitat to become of the same quality or better for the flycatcher, it would be expected that those types of restoration activities would not destroy or adversely modify critical habitat. Each proposed action will be examined pursuant to section 7 of the Act in relation to its site-specific impacts.

All lands designated as critical habitat are within the geographic area occupied by the subspecies and are essential for the conservation of southwestern willow flycatcher. Within the 15 Management Units we are designating as critical habitat, only stream segments from the Santa Ana Management Unit (Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Creek), San Diego Management Unit (Santa Margarita River, Temecula Creek, Agua Hedionda Creek, Santa Ysabel River, and Temescal Creek), Mohave Management Unit (Deep Creek, Holcomb Creek, and Mohave River), Virgin Management Unit (Virgin River in NV and UT), and Lower Colorado Management Unit (East Fork of the Little Colorado River and the Little Colorado River) were not known to be specific areas within the geographic area occupied by the species at the time of listing. Due to the wide geographic area this bird inhabits due to it being a neotropical migrant, in all likelihood, these areas were inhabited by southwestern willow flycatchers for nesting, dispersing, or migrating, but had not been detected or re-confirmed (some areas were historically occupied) until after the species became listed in 1995. Much of the increase in the distribution and abundance of southwestern willow flycatcher territories since listing has largely been a result of increase survey effort (Durst *et al.* 2005). We have provided our rationale for why these specific areas have features essential for the southwestern willow flycatcher. We consider all of the units designated as critical habitat, as well as those that have been excluded, to be essential to the conservation of the southwestern willow flycatcher and to contain features essential to the conservation of the subspecies. All Management Units are within the geographical range by the species, all are occupied by the species (based on observations made within the last 10 years), and are likely to be used by breeding, non-breeding, territorial, dispersing, or migrating southwestern willow flycatchers. Federal agencies already consult with us on actions that may affect southwestern willow

flycatcher to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

If you have questions regarding whether specific activities will

constitute destruction or adverse modification of critical habitat, contact the Field Supervisor of the appropriate Service Office (see list below). In NM and AZ requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and

permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, Post Office Box 1306, Albuquerque, NM 87103-1306 (telephone 505/248-6920; facsimile 505/248-6922).

Area/State	Address	Phone No.
Southern CA .....	6010 Hidden Valley Road, Carlsbad, CA 92011 .....	760/431-9440
Central Coastal CA .....	2493 Portola Road, Suite B, Ventura, CA 93003 .....	805/644-1766
Central California .....	2800 Cottage Way, Sacramento, CA 95821 .....	916/414-6600
Nevada .....	4701 North Torrey Pines Way, Las Vegas, NV 89130 .....	702/515-5230
Utah .....	2369 West Orton Circle, West Valley City, UT 84119 .....	801/975-3330
Arizona .....	2321 W. Royal Palm Road Ste. 103, Phoenix, AZ 85021 .....	602/242-0210
New Mexico .....	2105 Osuna Rd. NE, Albuquerque, NM 87113 .....	505/761-4718

**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. We conducted an economic analysis to estimate potential economic effects of the proposed southwestern willow flycatcher critical habitat designation (USFWS 2005a). The draft analysis was made available for public review on April 28, 2005 (70 FR 21988). We accepted comments on the draft analysis until May 31, 2005, and once again between July 7 and July 18, 2005 (70 FR 39227).

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the conservation of the southwestern willow flycatcher, including the designation of critical habitat. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly

burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline. The total conservation costs from reported efficiency effects associated with the designation of critical habitat in this rule are approximately \$9 million from 2004 to 2025. This total includes losses in land value (by far the primary cost source), as well as project modification, administrative, CEQA, delay, and uncertainty costs.

A copy of the final economic analysis and description of the exclusion process with supporting documents are included in our administrative record and may be obtained by contacting the Arizona Ecological Services Fish and Wildlife Service office (see ADDRESSES section) or retrieved at <http://www.fws.gov/arizonaes/>.

**Required Determinations**

*Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, based on our economic analysis, it is not anticipated that this designation of critical habitat for the southwestern willow flycatcher will result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in

the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule or accompanying economic analysis.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, then the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweighs the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

*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 SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available

for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based upon our draft economic analysis we certified in our July 7, 2005 (70 FR 39227), **Federal Register** notice that this designation would not result in a significant effect as defined under SBREFA.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if this designation of critical habitat for the southwestern willow flycatcher would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, water management and supply, livestock grazing, land development, recreation). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered 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 the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted or authorized by

Federal agencies; non-Federal activities are not affected by the designation. Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our economic analysis we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in four categories: dam operations and water supply activities, and by extension, crop agriculture, ranching activities, residential development, and businesses affected by changes to recreational use. The following summary of the information contained in Appendix A of the final economic analysis provides the basis for our determination.

#### Dam Operations and Water Supply Activities

Under scenario two analyzed in the draft economic analysis, water operators are assumed to be required to change their management regimes to avoid adverse effects to southwestern willow flycatcher habitat, resulting in a loss of water for beneficial use (*i.e.* reservoir pools will be limited to current levels in order to avoid inundation of southwestern willow flycatcher habitat). Facilities assessed under this scenario include Lake Hodges, Cuyamaca Reservoir, Vail Dam, Pleasant Valley Reservoir (*i.e.* Owens River), Isabella Dam, Hoover Dam, Parker Dam, Alamo Dam, Roosevelt Dam, and Horseshoe Dam. No small businesses would be directly affected under this scenario because dams are not operated by small businesses. Additionally, as described elsewhere in this rule, these reservoirs have been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore no impacts to these water operators will result from a critical habitat designation.

Some water users may be more directly affected by changes in water supply that could occur as a result of southwestern willow flycatcher conservation activities, specifically, agricultural users dependent on the drought reserves provided by these systems. Appendix A of the draft economic analysis provides a profile of the agricultural users that are at greatest risk from direct losses in water supply under this scenario. The four water systems that provide water to agricultural users include Lake Isabella (including the North Kern Water Storage

District, the Buena Vista Storage District, and the City of Bakersfield Water Resources Department); Roosevelt and Horseshoe (the Salt River Project operates six reservoirs and dams on the Salt and Verde Rivers); Coolidge Dam (San Carlos Irrigation Project); and Lower Colorado River (water from the Colorado River is diverted to six States and is used for every purpose, including agricultural uses). As described elsewhere in this rule, these reservoirs have been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore no direct impacts to these water users, as described above and in Appendix A of the economic analysis, will result from a critical habitat designation.

Water users in the Safford Valley on the Gila River, Arizona, expressed concerns that groundwater and/or surface water withdrawals could need to be curtailed to accommodate flycatcher concerns. Water withdrawals have not been impacted under past operations, even during the period when critical habitat for the flycatcher was previously designated. As stated in the "Section 7" section above, ongoing Federal actions at the time of designation will be included in the baseline in any consultation pursuant to section 7 of the Act conducted subsequent to this designation. Therefore, we do not anticipate a significant economic impact to water users on the Gila River.

#### Ranching Activities

The economic analysis assumes that, in the future, grazing efforts on areas included in the proposed designation will be reduced, or, in the high-end estimate, be eliminated due to flycatcher concerns. Based on this analysis, the high impact scenario for allotments in the proposed critical habitat is a reduction of 89,400 AUMs (animal unit months) over 20 years. Of the total AUMs lost, 1,200 are federally permitted and 88,000 are private. Converting AUM reductions to cattle reductions reveals that the 37 affected counties may lose a total of 3,385 head of beef cattle, or 0.6 percent of the total number of beef cattle in the affected region. Even for counties for which percentage losses appear relatively large, absolute losses per average size ranch are one to three cows over a twenty year period.

#### Residential Development

Impacts to development activities within the proposed designation include land value loss, other project modifications, California Environmental Quality Act costs, and project delay costs in the Mojave and Santa Ana

Management Units in California. The economic analysis determines that less than 1 percent of land developers will be affected, and 0.02 percent of annual revenues of small land developers in this area may be lost.

#### Recreation Activities

Impacts to recreation activities include limitations on vehicle use, fires, and cigarette smoking in two areas near Roosevelt Lake on the Tonto National Forest, and fewer trips to the area for hunting and fishing for a total annual impact of approximately 0.25 percent of annual small business revenues in Gila County. As described elsewhere in this rule, Roosevelt Lake has been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore, no direct impacts to recreation activities at Roosevelt Lake will result from a critical habitat designation.

Based on this data we have determined that the designation of critical habitat will not affect a substantial number of small businesses involved in or affected by water management and supply activities, livestock grazing, land development, and recreation. Further, we have determined that the designation will not result in a significant effect to the annual sales of those small businesses impacted by this designation. As such, we are certifying that the final designation of critical habitat will not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our economic analysis for this designation for a more detailed discussion of potential economic impacts to small business entities.

#### Executive Order 13211

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is considered a significant regulatory action under E.O. 12866 due to it potentially raising novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Appendix B of the economic analysis provides a detailed discussion and analysis of this determination. Specifically, two criteria were determined to be relevant to this analysis: (1) Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity, and (2) increases in the cost of energy production in excess of 1 percent. The

draft analysis finds that no net reduction in electricity production is anticipated, and thus we do not anticipate that the suggested OMB threshold of 1 billion kilowatt hours will be exceeded. In addition, total financial impacts related to southwestern willow flycatcher conservation activities (\$2.7 million annually) represent 0.02 percent of the estimated annual baseline cost of regional energy production, and this is well below the 1 percent threshold suggested by OMB. Therefore, this action is not a significant action, and no Statement of Energy Effects is required.

#### Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) The economic analysis discusses potential impacts of critical habitat designation for the southwestern willow flycatcher on water management activities, administrative costs, livestock grazing, mining, residential and commercial development activities, Tribes, transportation activities, recreation activities, and fire management activities. The analysis estimates that annual costs of the rule could range from \$32.7 to \$38.00 million annually using the most likely costs scenario. Impacts are largely anticipated to affect water operators and Federal and State agencies, with some effects on livestock grazing operations, land development activities, and recreation activities. Impacts on small governments are not anticipated, or they are anticipated to be passed through to consumers. For example, costs to water operations would be expected to be passed on to consumers in the form of price changes. Consequently, for the reasons discussed above, we do not believe that the designation of critical habitat for the southwestern willow flycatcher will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

#### Federalism

In accordance with Executive Order 13132, this rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this proposed critical habitat designation with appropriate

State resource agencies in all affected states.

The designation of critical habitat in areas currently occupied by southwestern willow flycatcher imposes few restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations 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 are designating critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the proposed areas to assist the public in understanding the habitat needs of the southwestern willow flycatcher.

*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 the southwestern willow flycatcher in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the southwestern willow flycatcher does not pose significant takings implications.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of

information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).] However, when the range of the species includes States within the Tenth Circuit, such as that of the southwestern willow flycatcher, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation. We have conducted a NEPA evaluation and notified the public of the draft document's availability on April 28, 2005 (70 FR 21988). The final document can be retrieved off the Internet at <http://www/fws.gov/arizonaes/>.

*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 have coordinated with federally-recognized Tribes on a Government-to-Government basis. We have excluded specific Tribal lands from critical habitat pursuant to section 4(b)(2) of the Act.

*Relationship to Mexico*

We are not aware of any existing national regulatory mechanism in Mexico that would protect the southwestern willow flycatcher or its habitat. Although new legislation for wildlife is pending in Mexico, and Mexico has laws that could provide protection for rare species, there are enforcement challenges. Even if specific protections were available and enforceable in Mexico, the portion of the southwestern willow flycatcher's range in Mexico alone, in isolation, would not be adequate to ensure the long-term conservation of the species.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor,

Arizona Ecological Services Fish and Wildlife Office (see **ADDRESSES** section), or retrieve this information from the Internet at <http://www.fws.gov/arizonaes/>.

**Author**

The primary author of this notice is the U.S. Fish and Wildlife Service (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 § 17.95(b), revise the critical habitat for "Southwestern Willow Flycatcher (*Empidonax traillii extimus*)" to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*  
(b) *Birds.*  
\* \* \* \* \*

**Southwestern Willow Flycatcher (*Empidonax traillii extimus*)**

(1) Critical habitat units are depicted for Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, and Yavapai counties in Arizona, Kern, Santa Barbara, San Bernardino, and San Diego counties in southern California, Clark County in southern Nevada, Grant, Hidalgo, Mora, Rio Arriba, Socorro, Taos, and Valencia counties in New Mexico, and Washington County in southwestern Utah on the maps and as described below.

(2) The primary constituent elements of critical habitat for southwestern willow flycatcher are:

(i) Riparian habitat in a dynamic successional riverine environment (for nesting, foraging, migration, dispersal, and shelter) that comprises:

(A) Trees and shrubs that include Gooddings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geysers willow (*Salix geysera*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix*

*lasianдра*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), Russian olive (*Eleagnus angustifolia*), buttonbush (*Cephalanthus occidentalis*), cottonwood (*Populus fremontii*), stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia*, *Alnus oblongifolia*, *Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia*, *Baccharis glutinosa*), oak (*Quercus agrifolia*, *Quercus chrysolepis*), rose (*Rosa californica*, *Rosa arizonica*, *Rosa multiflora*), sycamore (*Platanus wrightii*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitis arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*);

(B) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 to 30 meters (m) (6 to 98 feet (ft)). Lower-stature thickets (2 to 4 m or 6 to 13 ft tall) are found at higher elevation riparian forests, and tall-stature thickets are found at middle- and lower-elevation riparian forests;

(C) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(D) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.*, a tree or shrub canopy with densities ranging from 50 percent to 100 percent); or

(E) Dense patches of riparian forests that are interspersed with small

openings of open water or marsh, or shorter/sparser vegetation that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

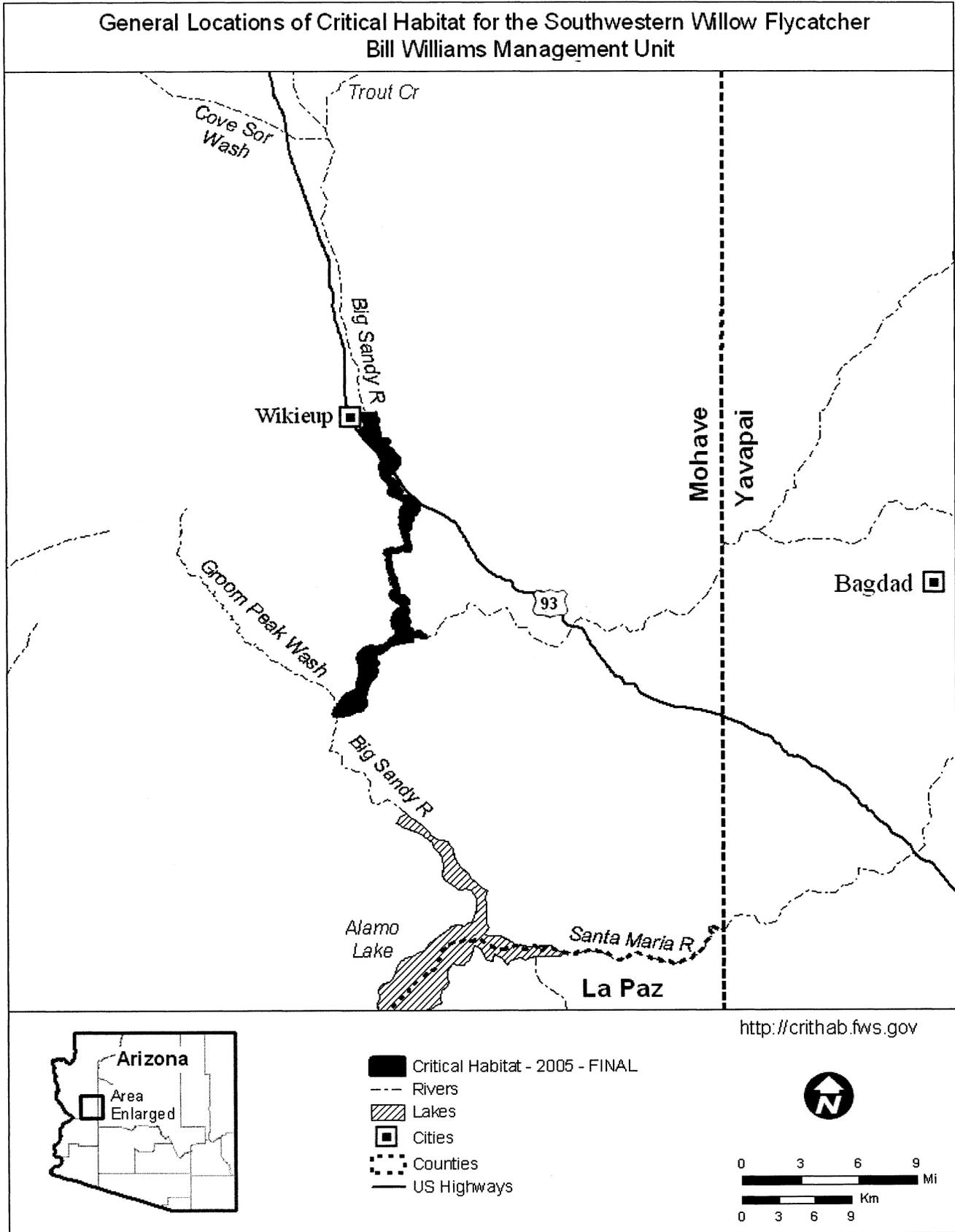
(ii) A variety of insect prey populations found within or adjacent to riparian floodplains or moist environments, including: flying ants, wasps, and bees (Hymenoptera); dragonflies (Odonata); flies (Diptera); true bugs (Hemiptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

(3) Maps and legal descriptions for southwestern willow flycatcher critical habitat follow:

- (4) Bill Williams Management Unit.
  - (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Bill Williams .....	Big Sandy River .....	34.705270	- 113.598290	34.479650	- 113.618700

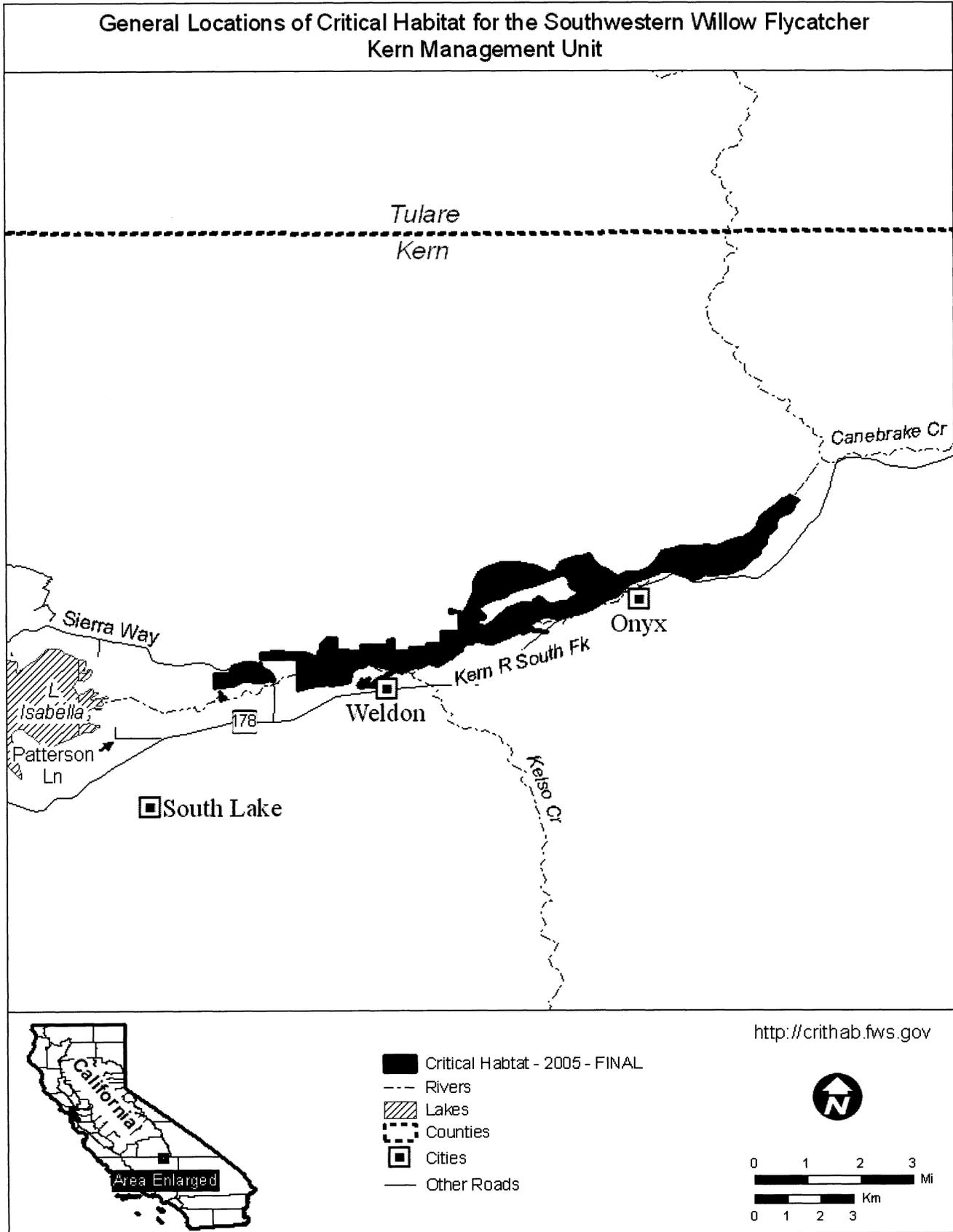
(ii) Bill Williams Management Unit  
Map follows:



(5) Kern Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Kern .....	South Fork Kern River .....	35.717690	- 118.180890	35.668890	- 118.339040

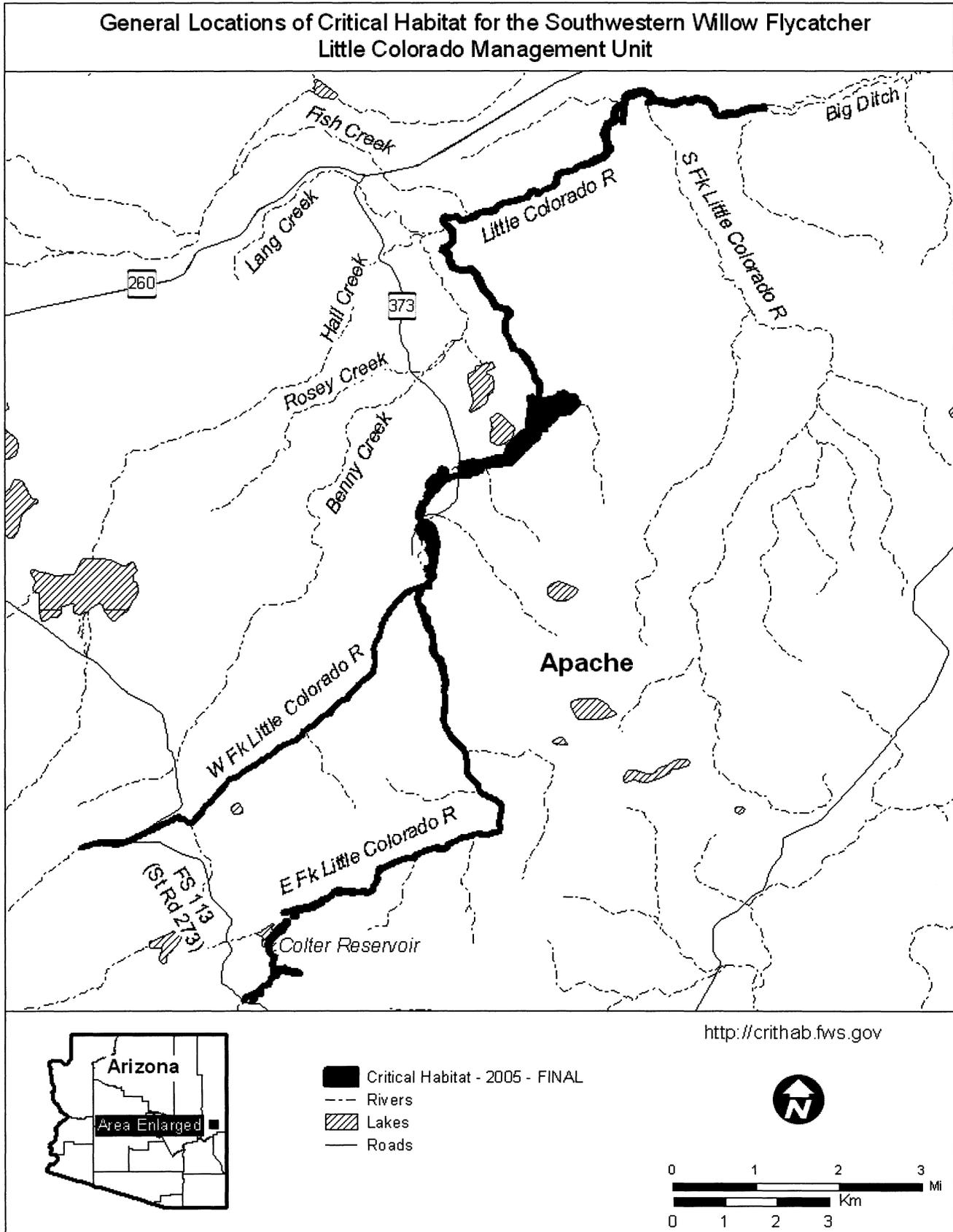
(ii) Kern Management Unit Map  
follows:



(6) Little Colorado Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Little Colorado .....	Little Colorado River .....	34.086800	- 109.397000	34.003660	- 109.456870
	Little Colorado River East Fork .....	34.003660	- 109.456870	33.931370	- 109.487290
	Little Colorado River West Fork .....	34.003660	- 109.456870	33.958300	- 109.516210

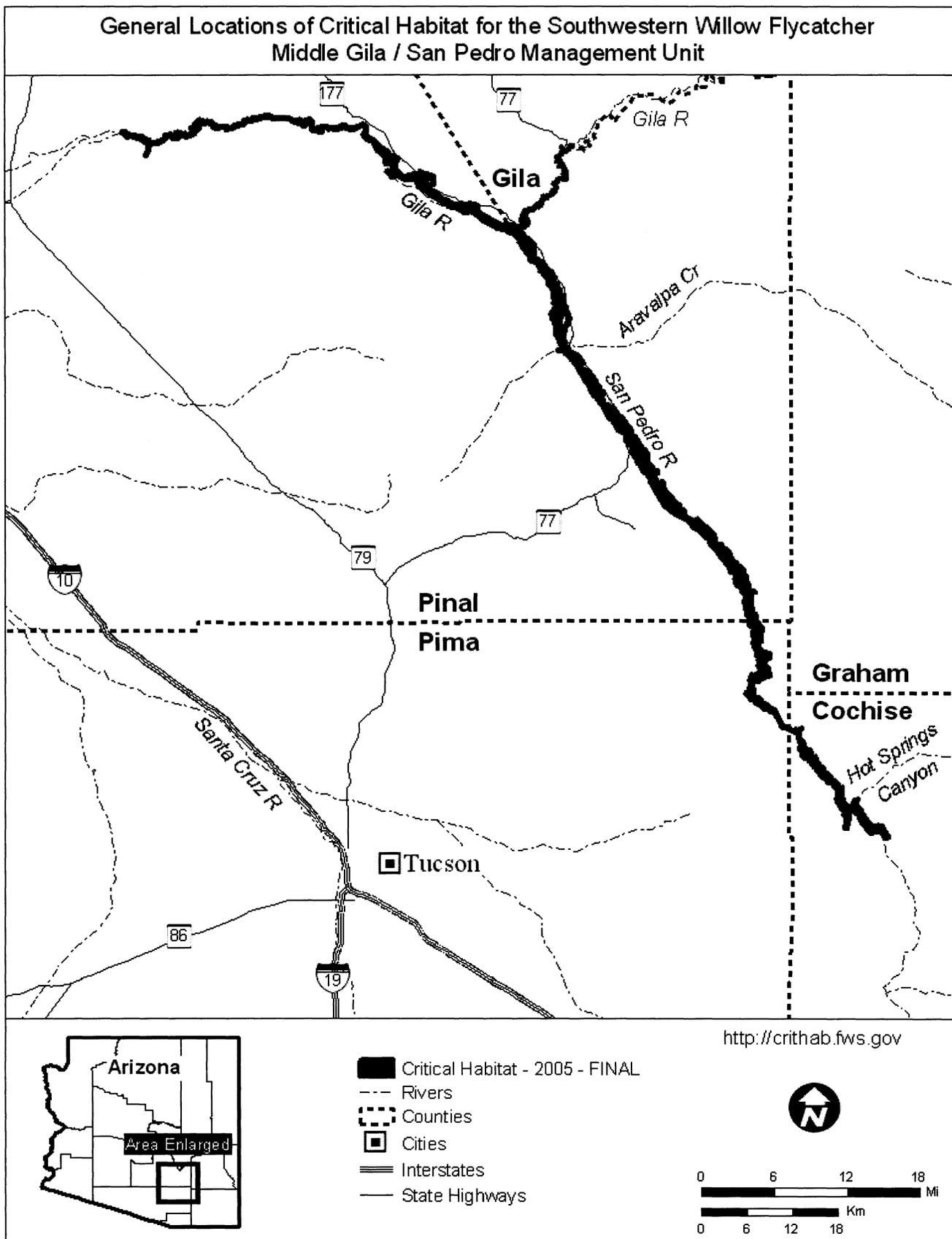
(ii) Little Colorado Management Unit  
Map follows:



(7) Middle Gila/San Pedro  
 Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Middle Gila/San Pedro .....	Gila River .....	33.082830	- 110.709340	32.981320	- 110.778790
	San Pedro River .....	33.099950	- 111.246310	32.252490	- 110.335190

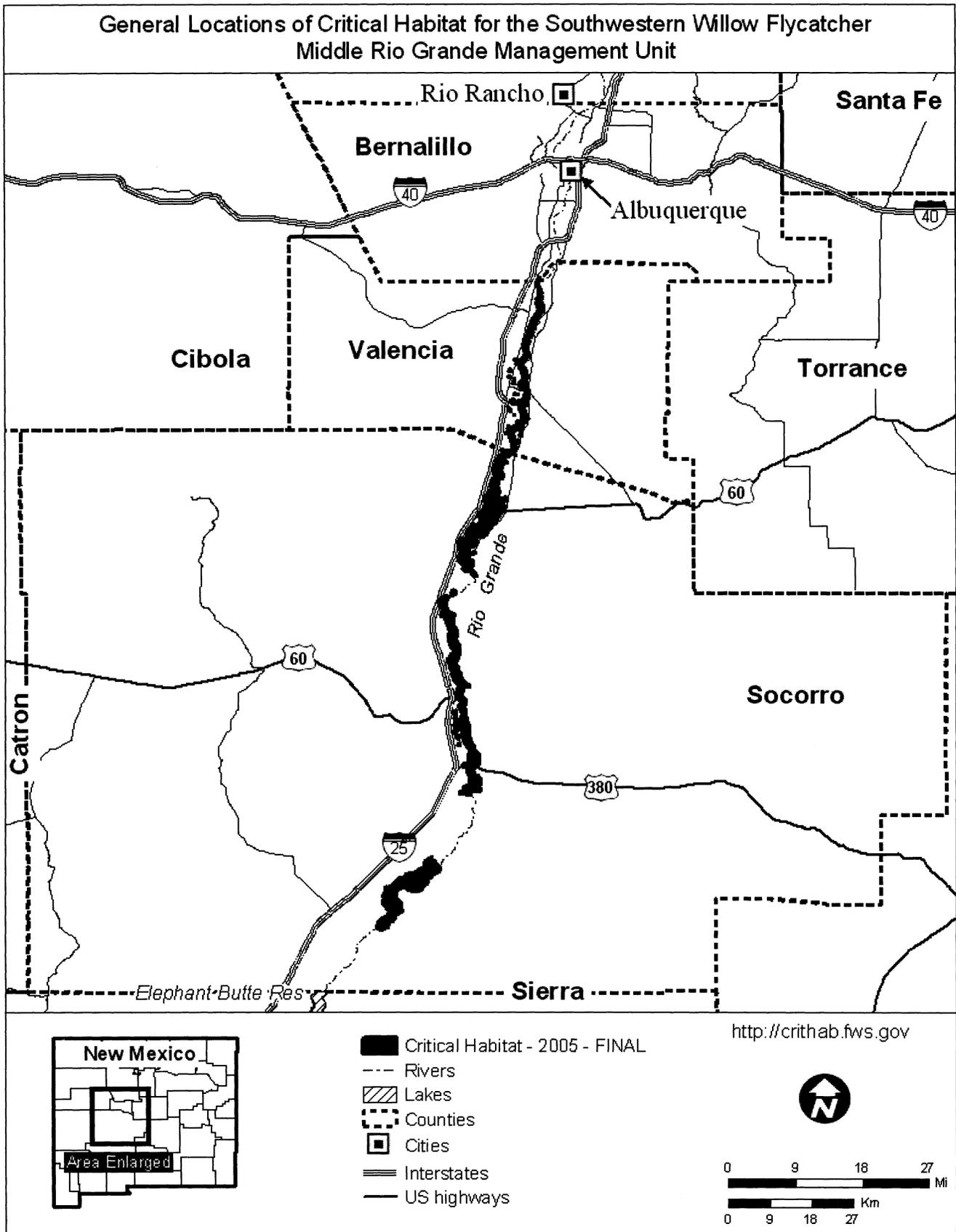
(ii) Middle Gila/San Pedro Management Unit Map follows:



(8) Middle Rio Grande Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Middle Rio Grande .....	Rio Grande—South segment—1 .....	34.870940	- 106.720440	34.294030	- 106.843240
	Rio Grande—South segment—2 .....	34.241980	- 106.898780	33.869720	- 106.845540
	Rio Grande—South segment—3 .....	33.730610	- 106.918770	33.605530	- 107.032890

(ii) Middle Rio Grande Management Unit Map follows:

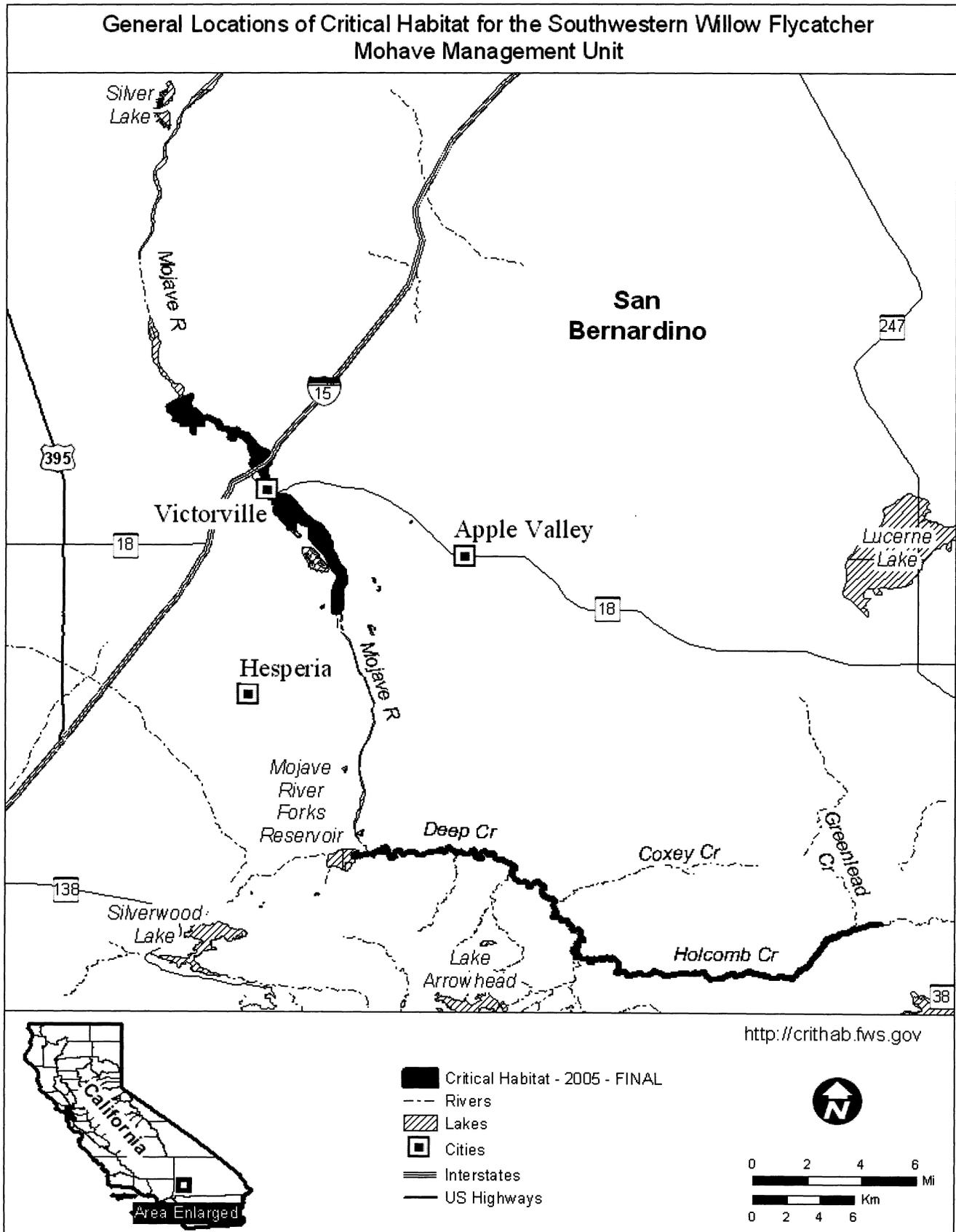


(9) Mojave Management Unit.

(i)

Management unit	River	Start lat	Start lon	End lat	End lon
Mojave .....	Deep Creek (incl. Mojave Fks Res) .....	34.287310	- 117.126850	34.340410	- 117.245700
	Holcomb Creek .....	34.304920	- 116.964650	34.287310	- 117.126850
	Mojave River .....	34.470190	- 117.254670	34.583870	- 117.337400

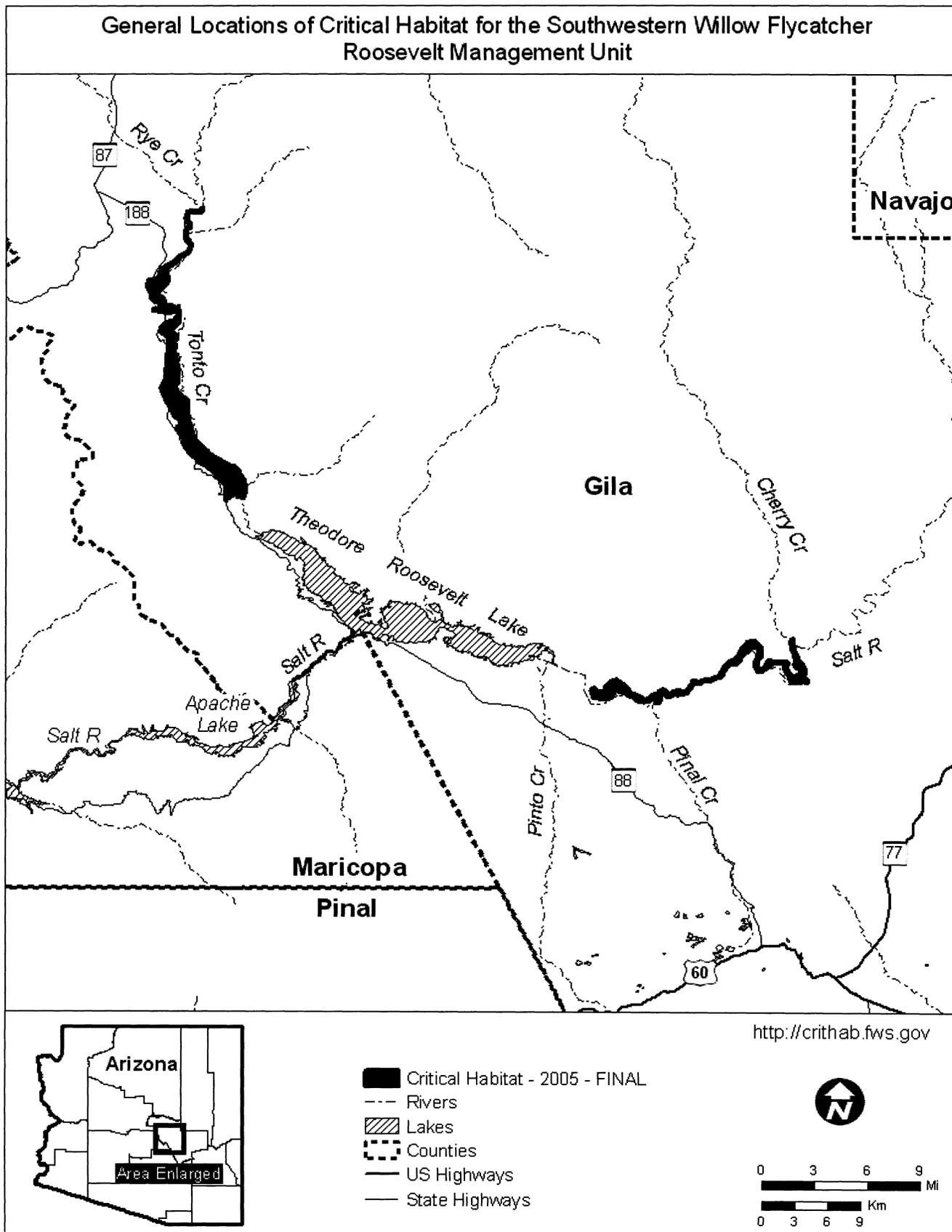
(ii) Mojave Management Unit Map follows:



(10) Roosevelt Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Roosevelt .....	Salt River .....	33.670900	- 110.800840	33.626350	- 110.964550
	Tonto Creek .....	34.023900	- 111.282800	33.785650	- 111.256270

(ii) Roosevelt Management Unit Map follows:



(11) Salton Management Unit.

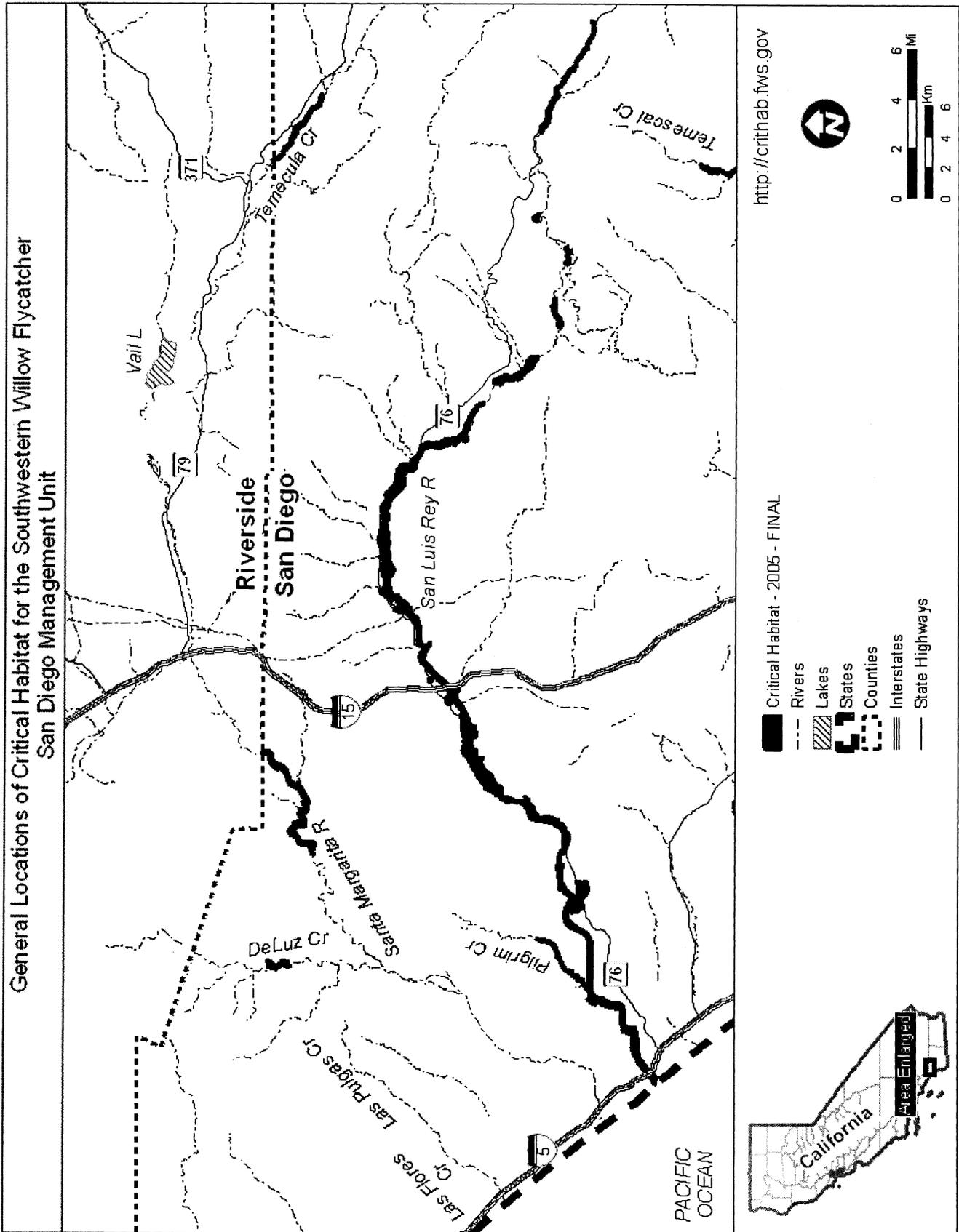
(i)

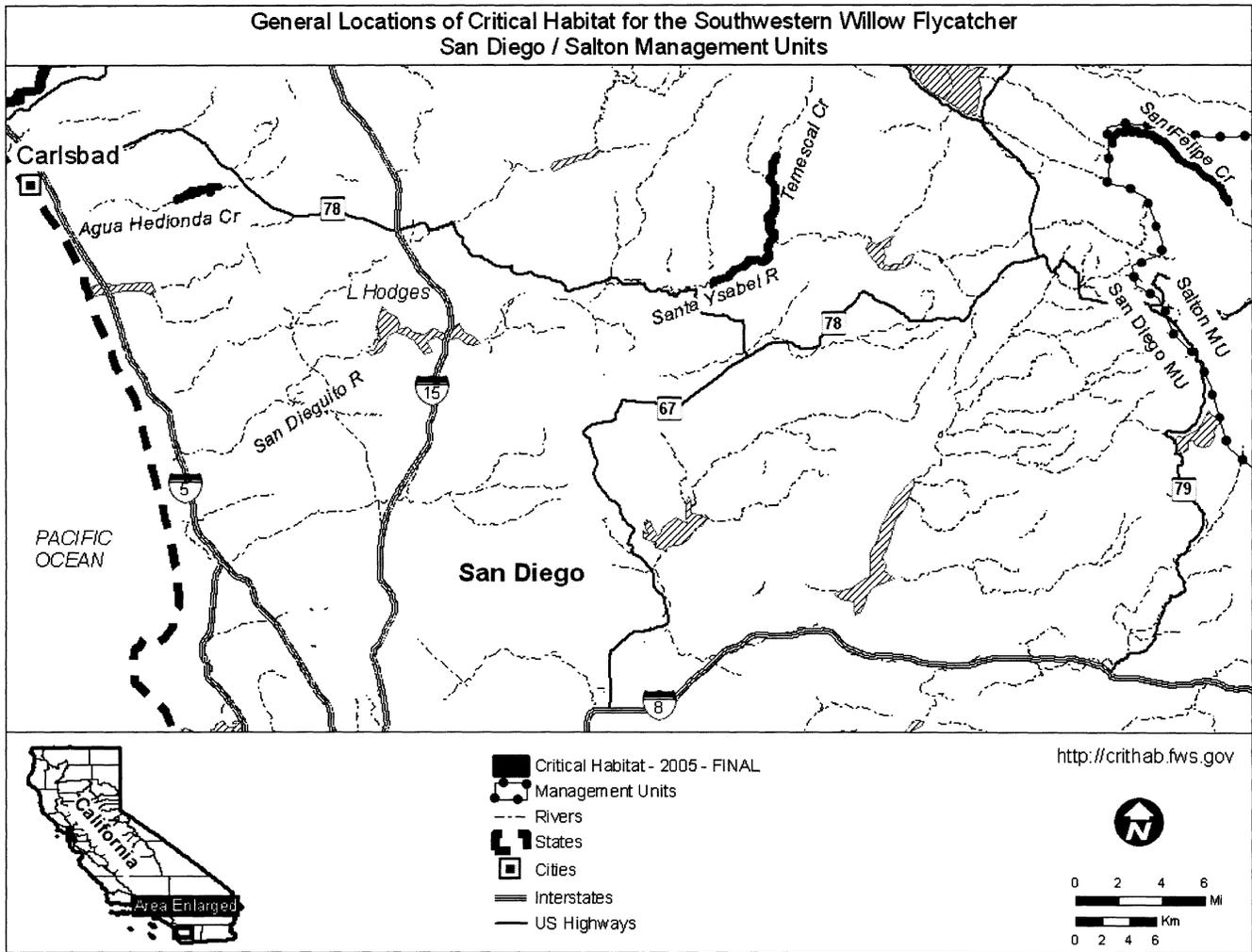
Management unit	River	Start lat	Start lon	End lat	End lon
Salton .....	San Felipe Creek .....	33.145510	- 116.544860	33.184870	- 116.623790

(ii) San Diego Management Unit.

Management unit	River	Start lat	Start lon	End lat	End lon
San Diego .....	Agua Hedionda Creek .....	33.156960	- 117.224330	33.148330	- 117.253480
	Deluz Creek .....	33.428730	- 117.319360	33.416570	- 117.321050
	Pilgrim Creek .....	33.271930	- 117.305790	33.241240	- 117.335920
	San Dieguito River .....	33.120070	- 116.853380	33.090540	- 116.892610
	San Luis Rey River—West segment .....	33.304240	- 116.989540	33.202520	- 117.389560
	San Luis Rey River—East segment—1 .....	33.273480	- 116.962270	33.295780	- 116.978050
	San Luis Rey River—East segment—2 .....	33.262670	- 116.927970	33.260640	- 116.944880
	San Luis Rey River—East segment—3 .....	33.256180	- 116.898390	33.256110	- 116.907120
	San Luis Rey River—East segment—4 .....	33.272450	- 116.881990	33.271960	- 116.878110
	San Luis Rey River—East segment—5 .....	33.240720	- 116.764750	33.270630	- 116.828580
	San Margarita River .....	33.432130	- 117.197380	33.402580	- 117.255860
	Temecula Creek .....	33.397690	- 116.809070	33.426680	- 116.847560
	Temescal Creek .....	33.177900	- 116.848790	33.120070	- 116.853380

(iii) Salton and San Diego Management Unit Maps follow:

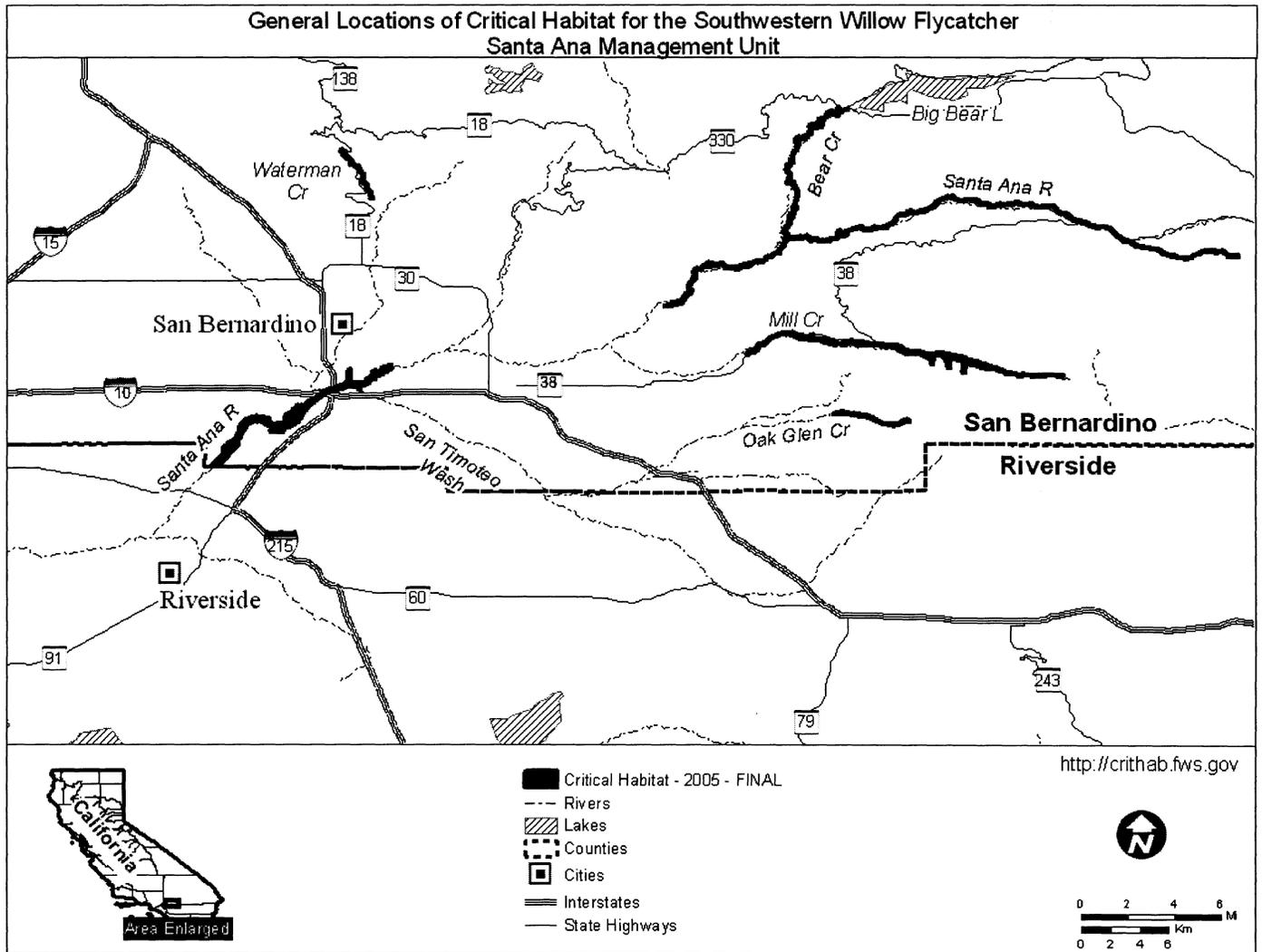




(12) Santa Ana Management Unit.  
(i)

Management unit	River	Start lat	Start lon	End lat	End lon
Santa Ana .....	Bear Creek .....	34.242210	-116.977290	34.160970	-117.015100
	Mill Creek .....	34.076650	-116.844390	34.089290	-117.039560
	Oak Glen Creek .....	34.048340	-116.939470	34.052820	-116.986090
	Santa Ana River—East segment .....	34.151300	-116.735070	34.119560	-117.090380
	Santa Ana River—West segment .....	34.081720	-117.259830	34.019510	-117.368930
	Waterman Canyon .....	34.186350	-117.272120	34.216970	-117.290940

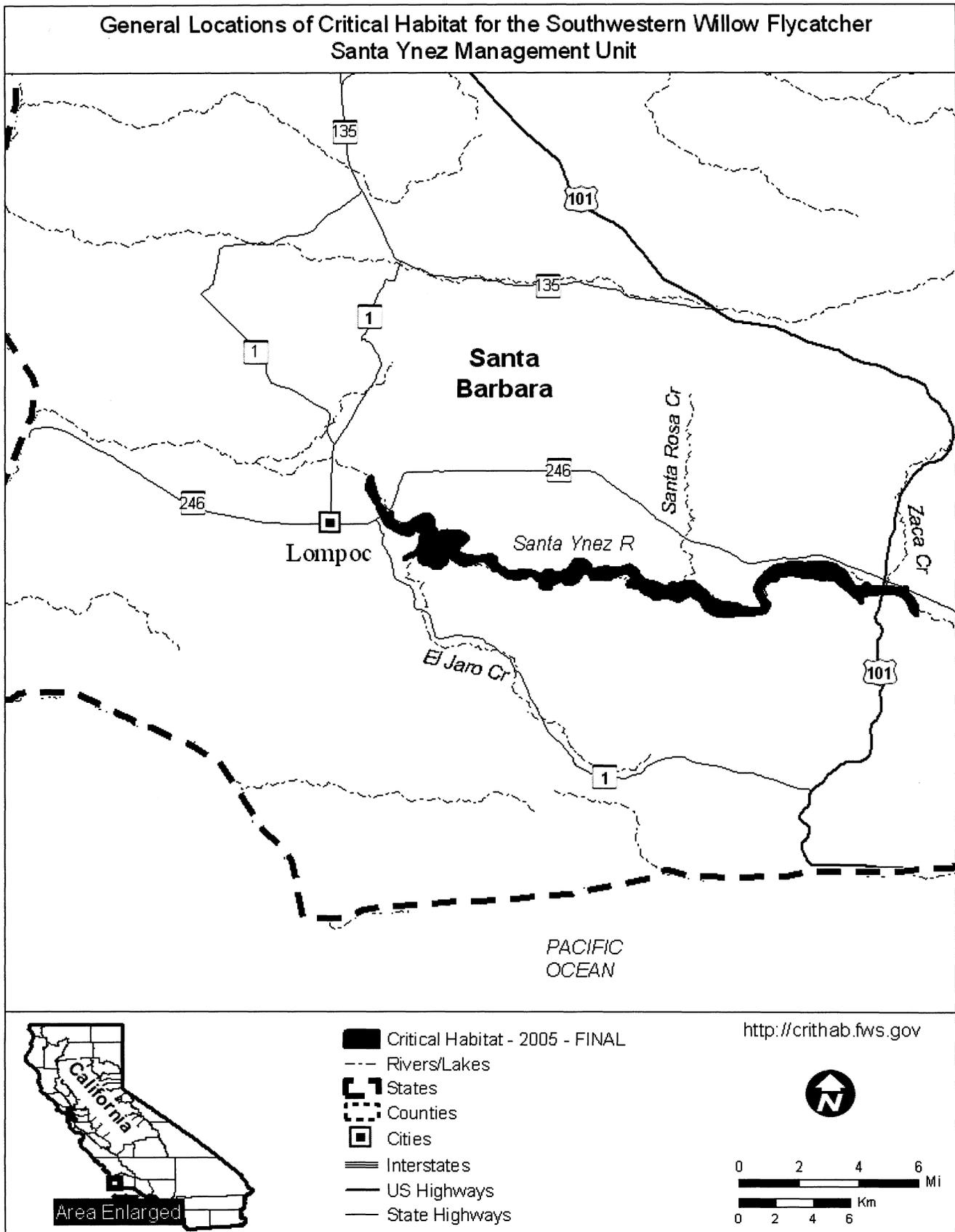
(ii) Santa Ana Management Unit Map follows:



(13) Santa Ynez Management Unit.  
(i)

Management unit	River	Start lat	Start lon	End lat	End lon
Santa Ynez .....	Santa Ynez River .....	34.597290	-120.174410	34.659670	-120.439490

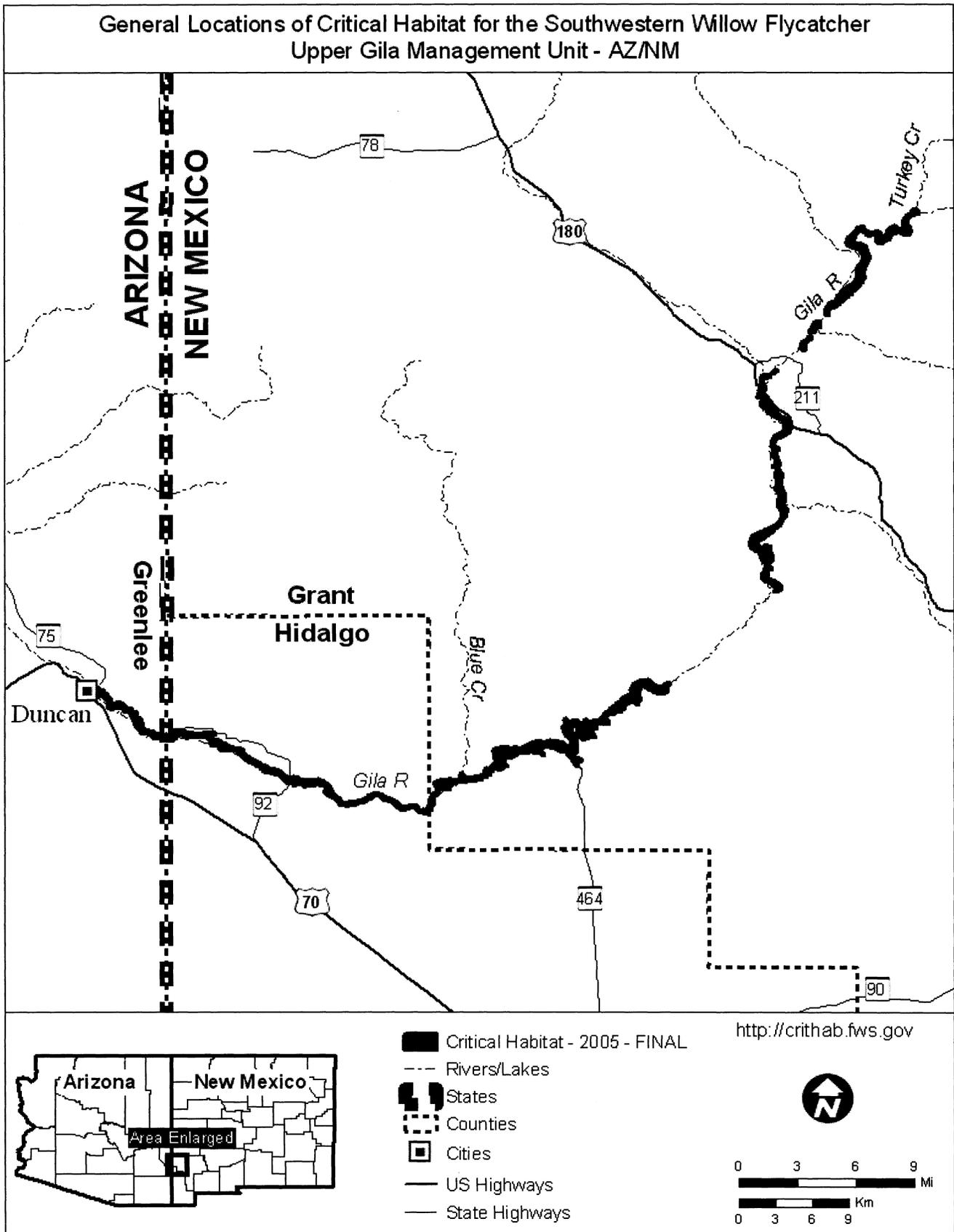
(ii) Santa Ynez Management Unit Map follows:



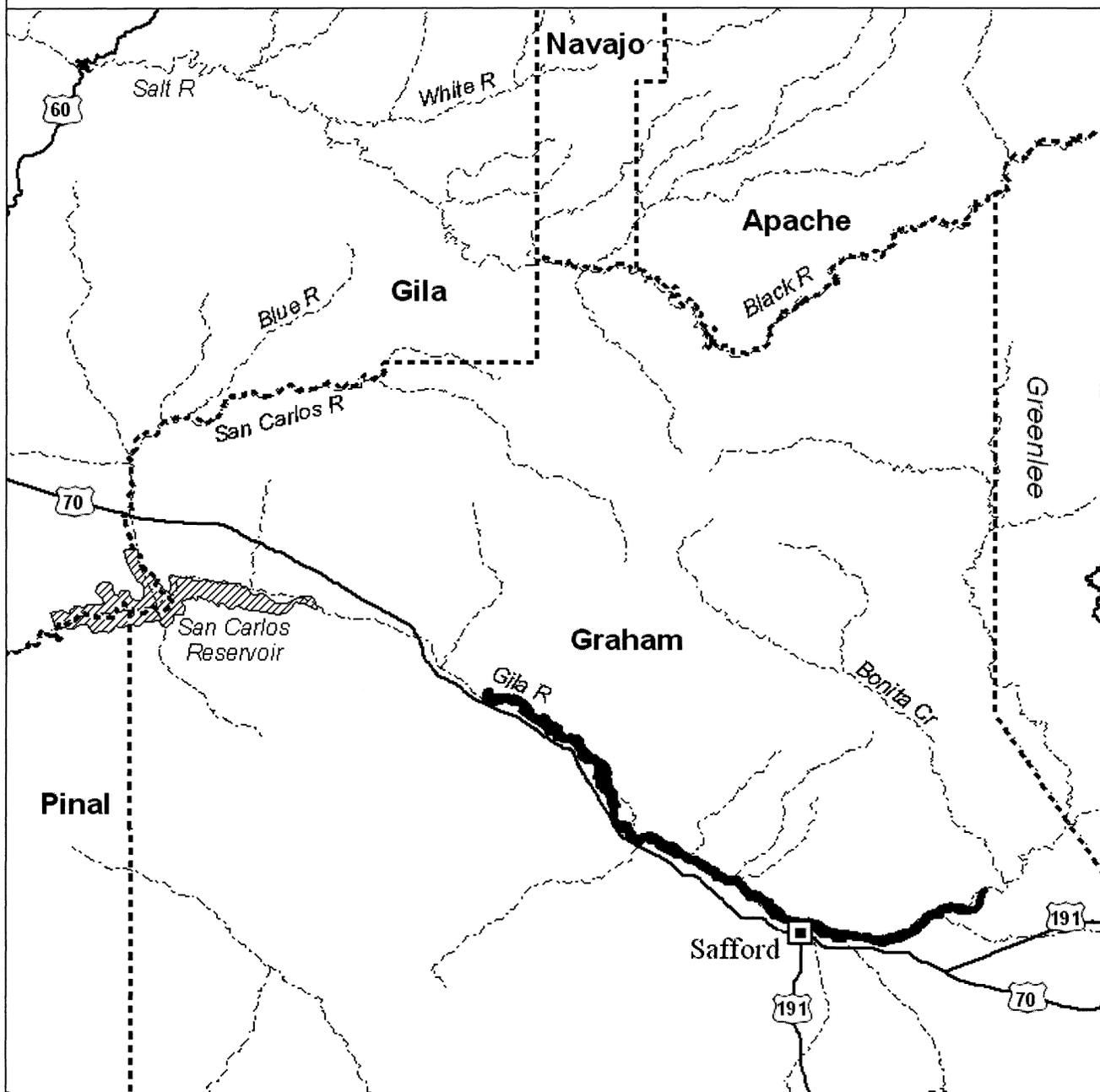
(14) Upper Gila Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Upper Gila .....	Gila River—East segment—1 .....	33.076740	- 108.491160	33.004370	- 108.560150
	Gila River—East segment—2 .....	32.995070	- 108.566320	32.987960	- 108.570190
	Gila River—East segment—3 .....	32.984180	- 108.571800	32.982890	- 108.573220
	Gila River—East segment—4 .....	32.980550	- 108.575780	32.977840	- 108.577660
	Gila River—East segment—5 .....	32.958940	- 108.597440	32.958010	- 108.599150
	Gila River—East segment—6 .....	32.955270	- 108.604210	32.795670	- 108.597480
	Gila River—Middle East segment .....	32.727070	- 108.675580	32.723890	- 109.101250
	Gila River—Middle West segment .....	32.882390	- 109.506890	33.094110	- 110.056150

(ii) Upper Gila Management Unit  
 Maps follow:

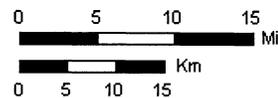


### General Locations of Critical Habitat for the Southwestern Willow Flycatcher Upper Gila Management Unit - AZ



-  Critical Habitat - 2005 - FINAL
-  Rivers
-  Lakes
-  Counties
-  Cities
-  US Highways
-  State Highways

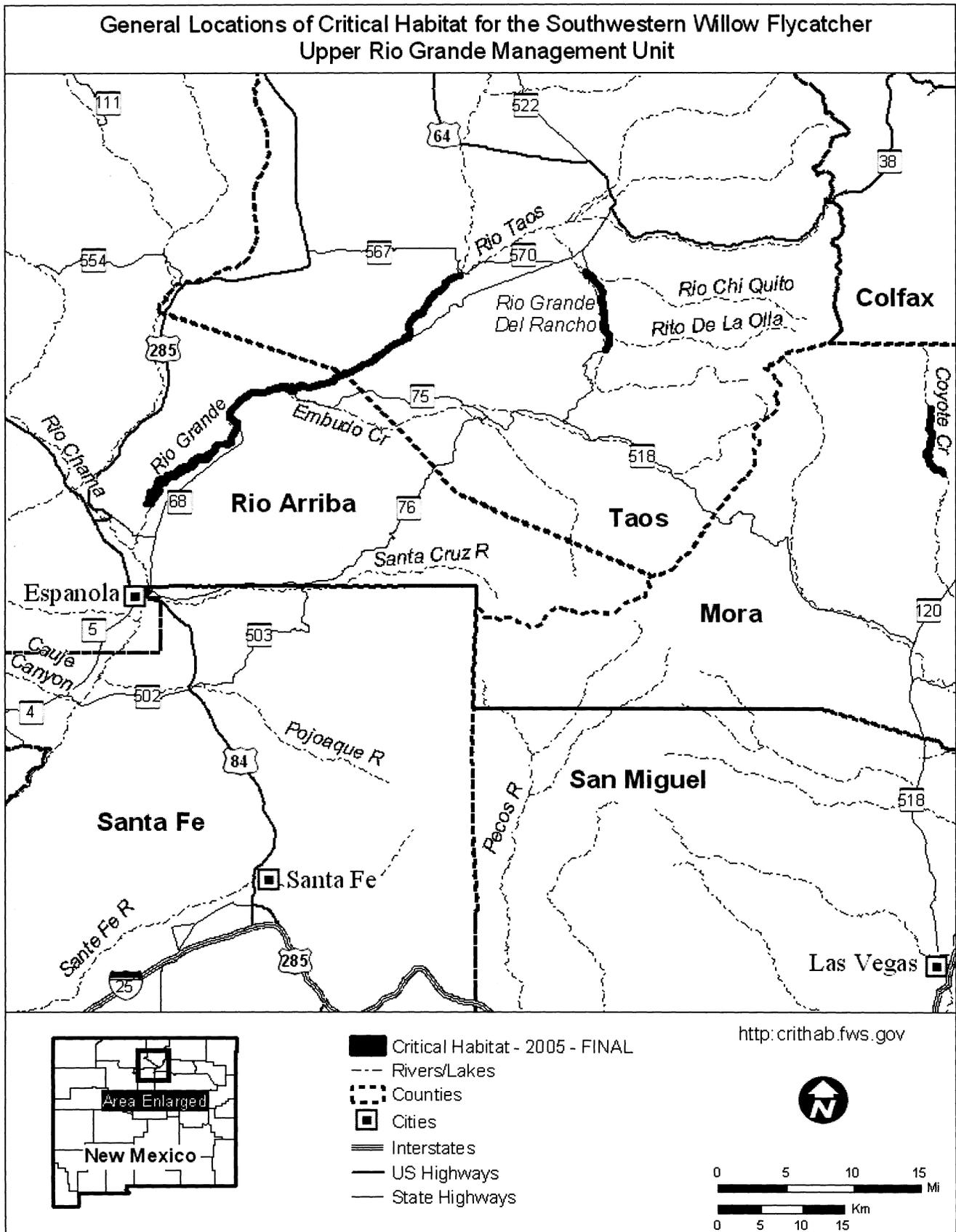
<http://crithab.fws.gov>



(15) Upper Rio Grande Management  
 Unit.  
 (i)

Management unit	Rivers	Start lat	Start lon	End lat	End lon
Upper Rio Grande .....	Coyote Creek .....	36.193960	- 105.230880	36.122910	- 105.217570
	Rio Grande—North segment .....	36.336150	- 105.733810	36.090460	- 106.066250
	Rio Grande del Rancho .....	36.338610	- 105.601060	36.254780	- 105.579670

(ii) Upper Rio Grande Map  
Management Unit Map follows:

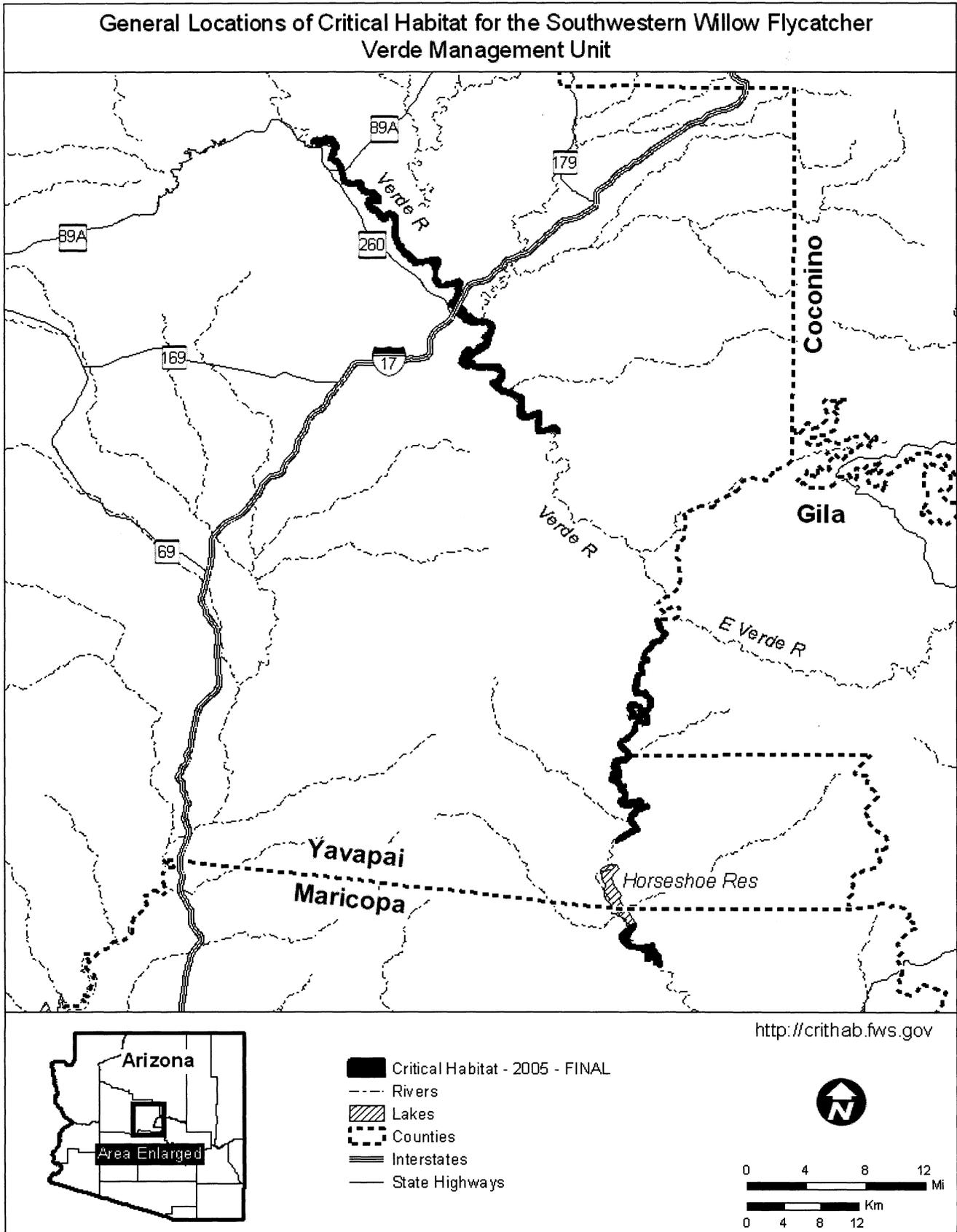


(16) Verde Management Unit.

(i)

Management unit	River	Start lat	Start lon	End lat	End lon
Verde .....	Verde River—North segment—1 .....	34.750760	- 112.017580	34.628670	- 111.899680
	Verde River—North segment—2 .....	34.614280	- 111.898960	34.465930	- 111.781330
	Verde River—South segment—1 .....	34.282320	- 111.685650	34.072320	- 111.716420
	Verde River—South segment—2 .....	33.984470	- 111.708580	33.944900	- 111.682380

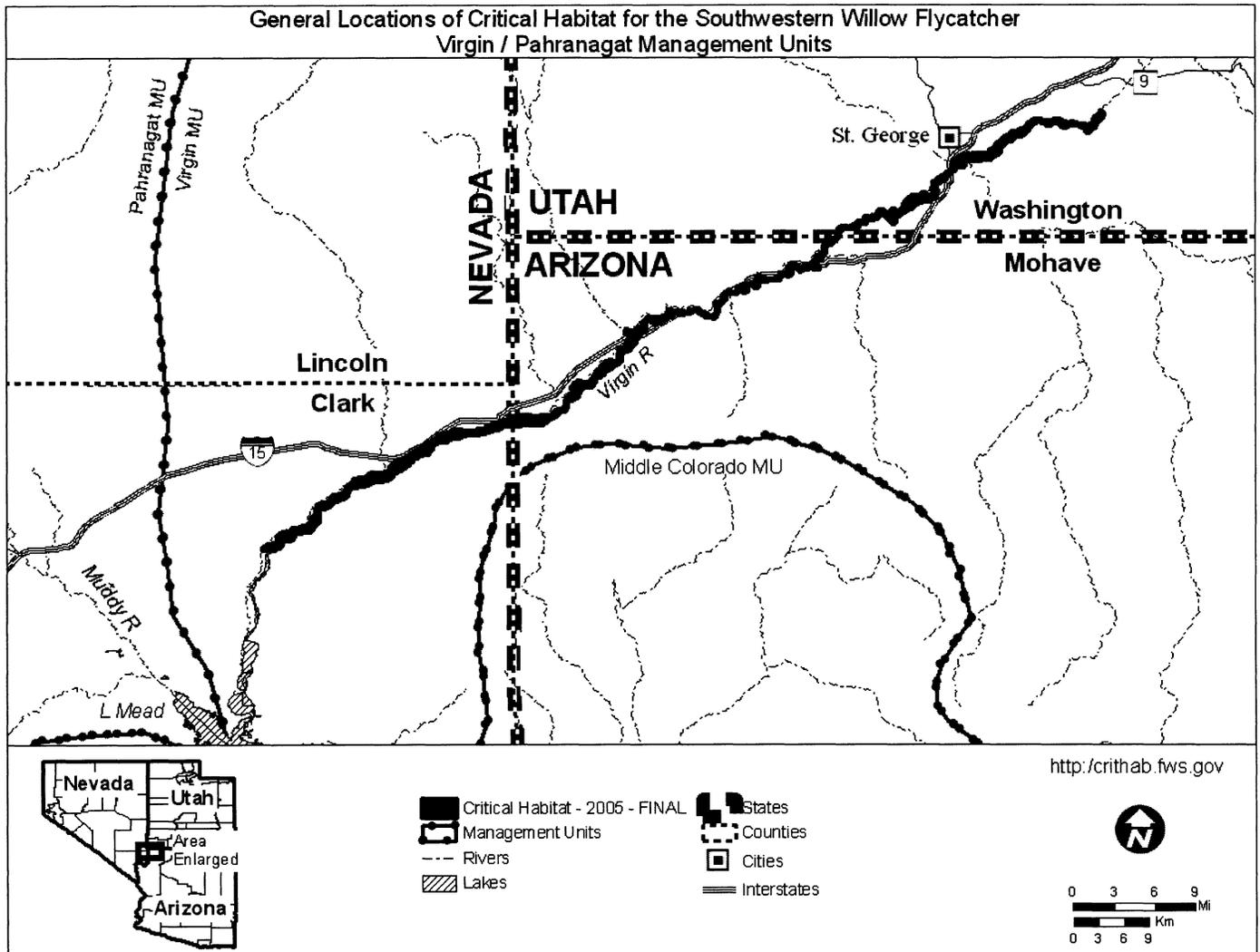
(ii) Verde Management Unit Map follows:



(17) Virgin River/Pahranagat Management Unit.  
 (i)

Management unit	River	Start lat	Start lon	End lat	End lon
Virgin .....	Virgin River .....	37.132920	- 113.422990	36.666210	- 114.310410

(ii) Virgin River/Pahranagat Management Unit Map follows:



Dated: September 30, 2005.

**Craig Manson,**  
 Assistant Secretary for Fish and Wildlife and  
 Parks.  
 [FR Doc. 05-20144 Filed 10-18-05; 8:45 am]  
 BILLING CODE 4310-55-C



# Federal Register

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**Wednesday,  
October 19, 2005**

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## **Part III**

## **The President**

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**Proclamation 7946—National Character Counts Week, 2005**

**Proclamation 7947—National Employer Support of the Guard and Reserve Week, 2005**

**Proclamation 7948—National Forest Products Week, 2005**

**Proclamation 7949—White Cane Safety Day, 2005**



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**Presidential Documents**

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**Title 3—****Proclamation 7946 of October 14, 2005****The President****National Character Counts Week, 2005****By the President of the United States of America****A Proclamation**

During National Character Counts Week, we focus on ways to reach out to our fellow Americans, especially children. Parents are the first and best example of character in a child's life. By volunteering and performing other acts of service in their communities, parents can teach children about the good that comes from helping others. By extending a hand to those who suffer, parents can demonstrate kindness and compassion and help children learn the importance of serving a cause greater than themselves.

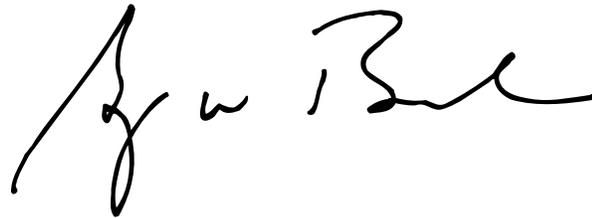
Our schools also play a vital part in providing children with the principles they need to grow and succeed. The Department of Education supports character education through its Partnerships in Character Education Program. During my Administration, over 60 State and local education agencies have received funding from the Department of Education to provide programs that teach important values to our youth.

Many citizens around the country are helping in the effort to teach character to children. One of the most important ways to contribute is to become a mentor. By showing love, support, and compassion, one person can make a difference in the life of a child.

During National Character Counts Week and throughout the year, I encourage children and all Americans to make good choices in life, set high standards, and serve as leaders. By working together, we can all contribute to a culture of good citizenship and responsibility that strengthens our Nation.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim October 16 through October 22, 2005, as National Character Counts Week. I call upon public officials, educators, librarians, parents, students, and all Americans to observe this week with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.



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## Presidential Documents

**Proclamation 7947 of October 14, 2005**

### **National Employer Support of the Guard and Reserve Week, 2005**

**By the President of the United States of America**

#### **A Proclamation**

In times of crisis, our Nation depends on the courage and determination of the members of our National Guard and Reserve. Across our country, these dedicated citizen-soldiers are answering the call to serve. During National Employer Support of the Guard and Reserve Week, we honor the vital contributions of members of our Guard and Reserve, and we express our gratitude for the support shown to them by their employers.

In every generation, America has turned to the National Guard and Reserve to help respond to natural disasters, secure our homeland, and defend our liberty. Today, National Guard and Reserve personnel are serving on the front lines of freedom in the war on terror, and they have provided vital relief to our citizens affected by Hurricanes Katrina and Rita. Balancing the demands of their families, civilian careers, and military assignments, members of our Guard and Reserve demonstrate personal courage, love of country, and a commitment to duty that inspires all Americans.

Employers play a critical role in helping the men and women of the National Guard and Reserve carry out their mission. In offices, schools, hospitals, and other workplaces, employers provide time off, pay, health-care benefits, and job security to their Guard and Reserve employees. These patriotic efforts allow our men and women in uniform to focus on their military assignments and help strengthen our country. Americans are grateful to these employers for putting the needs of our citizens and our country's safety and security first.

As we continue to fight terrorism and advance peace around the world, Americans stand strongly and proudly behind the men and women of the National Guard and Reserve, and we express our appreciation for the commitment of their employers.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim October 16 through October 22, 2005, as National Employer Support of the Guard and Reserve Week. I encourage all Americans to join me in expressing our thanks to members of our National Guard and Reserve and their civilian employers for their patriotism and sacrifices on behalf of our Nation. I also call upon State and local officials, private organizations, businesses, and all military commanders to observe this week with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.

A handwritten signature in black ink, appearing to read "G. W. Bush". The signature is written in a cursive style with a large, sweeping initial "G" and a distinct "W".

[FR Doc. 05-21029  
Filed 10-18-05; 8:45 am]  
Billing code 3195-01-P

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## Presidential Documents

**Proclamation 7948 of October 14, 2005**

### **National Forest Products Week, 2005**

**By the President of the United States of America**

#### **A Proclamation**

America's forests are a source of pride, and they provide crucial products and materials for our citizens and communities. As we celebrate National Forest Products Week, we recognize the importance of our forests to our economy and way of life, and we reaffirm our commitment to protecting them through wise stewardship and sensible land management.

Across our Nation, people and businesses use forest products to meet their daily needs. Forests provide paper for books and newspapers, lumber for homes and buildings, and materials for countless other items. As good citizens, we have a shared responsibility to cultivate and sustain our forests and minimize the risk of catastrophic fires that harm people, property, and the environment.

My Administration has made good forest stewardship a priority. Through the Healthy Forests Initiative, we are reducing the frequency and severity of wildfires by thinning out and removing forest undergrowth before disaster strikes. The commonsense management practices we are implementing are helping to strengthen our economy, keep communities safe, save the lives of firefighters, and protect threatened and endangered habitats and wildlife.

Sound conservation policies and responsible maintenance provide improved protection for our forests and greater economic prosperity for our citizens. During National Forest Products Week, we renew our commitment to sustain America's forests.

Recognizing the importance of our forests, the Congress, by Public Law 86-753 (36 U.S.C. 123), as amended, has designated the week beginning on the third Sunday in October of each year as "National Forest Products Week" and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim October 16 through October 22, 2005, as National Forest Products Week. I call upon all Americans to observe this week with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.

A handwritten signature in black ink, appearing to read "G. W. Bush". The signature is written in a cursive style with a large, sweeping initial "G" and a distinct "W".

[FR Doc. 05-21030  
Filed 10-18-05; 8:45 am]  
Billing code 3195-01-P

## Presidential Documents

Proclamation 7949 of October 14, 2005

### White Cane Safety Day, 2005

By the President of the United States of America

#### A Proclamation

Americans who are blind or visually impaired are valuable and contributing members of our society, and many use a white cane to help them succeed at school, home, or work. White canes give these individuals greater mobility and enable them to participate in more aspects of community life. On White Cane Safety Day, we celebrate the progress that has been made for those who are blind or visually impaired, and we reaffirm our commitment to ensuring that these citizens can live and work with greater freedom and independence.

One of our Nation's defining values is compassion, and we must make certain that all our citizens are able to harness their talents, engage in productive work, and participate fully in society. My Administration is working to fulfill this goal for individuals with disabilities through the New Freedom Initiative. This comprehensive program helps increase the development and use of assistive and universally designed technologies, expand educational and employment opportunities, and improve access into daily community life. By working to reduce barriers and change old ways of thinking, we can help ensure that our Nation's opportunities are more accessible to all.

The Congress, by joint resolution (Public Law 88-628) approved on October 6, 1964, as amended, has designated October 15 of each year as "White Cane Safety Day."

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim October 15, 2005, as White Cane Safety Day. I call upon public officials, business leaders, educators, librarians, and all the people of the United States to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.





# Federal Register

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**Wednesday,  
October 19, 2005**

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**Part IV**

## **The President**

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**Notice of October 17, 2005—Intention To  
Enter Into a Free Trade Agreement With  
Oman**



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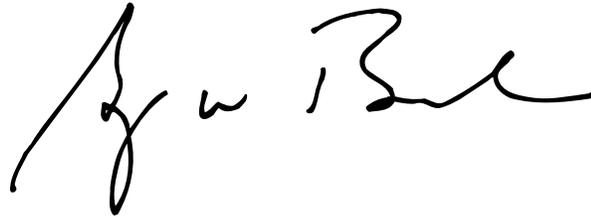
**Presidential Documents**

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**Title 3—****Notice of October 17, 2005****The President****Intention To Enter Into a Free Trade Agreement With Oman**

Consistent with section 2105(a)(1)(A) of the Trade Act of 2002, I have notified the Congress of my intention to enter into a Free Trade Agreement (FTA) with the Sultanate of Oman.

Consistent with section 2105(a)(1)(A) of that Act, this notice shall be published in the **Federal Register**.



THE WHITE HOUSE,  
*October 17, 2005.*

# Reader Aids

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Wednesday, October 19, 2005

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-741-6043. This list is also available online at <http://www.archives.gov/federal-register/laws.html>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-1808). The text will also be made available on the Internet from GPO Access at <http://www.gpoaccess.gov/plaws/index.html>. Some laws may not yet be available.

**S. 1413/P.L. 109-89**

To redesignate the Crowne Plaza in Kingston, Jamaica as the Colin L. Powell Residential Plaza. (Oct. 13, 2005; 119 Stat. 2063)

**Last List October 12, 2005**

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