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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.

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 531, 535, and 536

RIN 3206–AK87

Critical Position Pay Authority

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to govern the use of a critical position pay authority that allows higher rates of pay for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to the agency's mission. By law, agency requests for critical position pay authority must be approved by OPM in consultation with the Office of Management and Budget.

DATES: The regulations are effective on September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Joe Ratcliffe, (202) 606–2838; FAX: (202) 606–4264; or *e-mail: pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On April 25, 2007, the U.S. Office of Personnel Management issued proposed regulations (72 FR 20440) to govern the use of a critical position pay authority that enables the head of a Federal agency to request higher rates of pay for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to an agency's mission. The 60-day comment period ended on June 25, 2007. OPM received comments from nine individuals, one employee association, and five agencies. The comments are addressed in this final rule.

One commenter did not approve of the critical pay authority statute and recommended the authority not be used. OPM disagrees with that assessment and believes the Government must use all available human resources management tools at its disposal to ensure Federal agencies are able to recruit and retain qualified employees.

Several commenters asked whether specific positions might qualify for a critical position pay rate or recommended the critical position pay authority be used for certain positions. Employing agencies will decide internally whether to request use of a critical position pay authority. While OPM encourages use of a critical position pay authority wherever it might be needed and will consider all agency requests for the authority, we cannot speculate in advance as to whether particular positions might qualify.

An agency wrote a letter supporting the proposed regulations.

Section 535.106(a) of the proposed regulations provided a critical position pay rate is not considered a rate of basic pay for application of any saved pay or pay retention provisions (e.g., 5 U.S.C. 5363). An employee association and an agency expressed concern about an employee's pay if a critical position pay authority is terminated. Both the employee association and the agency recommended revising the regulations to allow for pay retention in such cases. We disagree. Under 5 U.S.C. 5377(e), a critical position pay authority must be terminated if conditions no longer warrant payment of the critical pay rate. Providing an entitlement to a saved rate or retained rate based on a critical position pay rate would be inconsistent with the requirement to terminate the authority. To conform with § 535.106(a), these final regulations revise § 536.102(b) to clarify that an agency may not provide grade or pay retention under 5 CFR part 536 to an employee in a covered pay system who is reduced in pay upon termination of a critical position pay authority. However, upon termination of critical position pay authority the employee's pay will be set under § 535.105(e) at the rate to which the employee would be entitled had he or she not received critical pay. We also note 5 U.S.C. 5377(e)(2) provides that termination of a critical position pay authority may not take effect until the authority has been available for the position for at least 1 calendar year, so long as the conditions justifying the authority are still met.

An employee association recommended that all efforts be made to utilize current employees and create opportunities within all career paths necessary to meet the needs of the agency prior to using the critical position pay authority. We agree, but no changes to the proposed regulations are needed. Section 535.104(a) provides that an agency may request a critical position pay authority only after determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Section 535.104(d)(11) requires an agency applying for a critical position pay authority to document why it could not, through diligent and comprehensive recruitment efforts and without using a critical position pay authority, fill the position within a reasonable period with an individual who could perform the duties and responsibilities in a manner sufficient to fulfill the agency's mission.

An employee association recommended amending § 535.107 to provide for public access to reports to Congress on the use of the critical position pay authority. OPM provides for public access to reports to Congress through the OPM Web site. No revision to § 535.107 is necessary.

An agency asked whether the critical position pay authority can be applied to a group or class of positions. Under 5 U.S.C. 5377(b)(1), each individual position must be analyzed to determine eligibility. However, relevant factors considered may be similar for a group of similar positions. In such cases, OPM would assess each position in the group against common factors. Once each individual position in a group has been certified as meeting the section 5377(b)(1) requirements, approval may apply to the group. Each individual employee approved for a critical position pay rate must be ''exceptionally well qualified for the position'' as required by 5 U.S.C. 5377(b)(2).

An agency commented that the proposed regulations did not address whether positions with a critical position pay authority are affected by adjustments to levels I and II of the Executive Schedule. We disagree. Section 535.105(c) provides that the

head of an agency may make subsequent adjustments in the rate of pay for a position with a critical position pay authority each January at the same time general pay adjustments are authorized for Executive Schedule employees under 5 U.S.C. 5318. Also, such adjustments may not exceed the new rate for Executive Schedule level II or other applicable maximum rate established for the critical position. We added a sentence to § 535.104(c) to clarify that the President may establish a maximum limitation on a critical rate of pay that is approved at a rate above level I of the Executive Schedule.

An agency asked OPM to consider whether the proposed regulations could allow for more timely and meaningful use of a critical position pay authority and whether the proposed regulations might be revised so that agencies could use the authority more quickly to better compete with non-Federal employers. It is not feasible, given the level of review required under 5 U.S.C. 5377, for the regulations to provide for immediate application of a critical position pay authority. However, OPM will work with agencies to provide pre-hire approval under the critical position pay authority.

Two agencies asked whether the documentation requirements might be substantially reduced for agencies applying for a critical position pay authority. Government programs involving increased spending are appropriately subject to considerable public scrutiny. OPM believes the documentation requirements in the proposed regulations are appropriate.

An agency said the proposed regulations appeared not to preclude use of a critical position pay authority for excepted service positions, and asked whether this was correct. Agencies are not restricted from seeking use of a critical position pay authority for excepted service positions.

An agency said that some of its staff believed the term *administrative field* in § 535.103(b) should be defined in the regulations. OPM believes such a definition is unnecessary. In considering whether to apply for a critical position pay authority, an agency is free to decide internally whether it believes the position is one that requires a very high level of expertise in a scientific, technical, professional, or administrative field. OPM will consider all agency requests for a critical position pay authority.

An agency asked whether a critical position pay authority could be approved for a particular geographic area or across the board for certain types of positions rather than for one position at a time. By statute, the authority is intended to be applied by position and not by geographic area. In addition, under 5 U.S.C. 5377 only 800 positions Governmentwide may be approved for a critical position pay authority at any given time. An agency asked whether the regulations could be revised so that heads of agencies could delegate the decision of whether to apply for a critical position pay authority to subordinate positions, such as heads of major components. The definition of *head of an agency* in § 535.102 already provides for such delegated authority.

An agency asked OPM to clarify how recruitment, relocation, and retention incentives are to be calculated in conjunction with a critical position pay authority, particularly in calculating the locality pay portion. Employees receiving critical position pay may not receive locality pay under 5 U.S.C. 5304 or similar authority. However, employees who are eligible for recruitment, relocation, or retention incentives under 5 CFR 575 subparts A, B, and C will remain eligible for the incentives while receiving critical position pay, subject to applicable pay limitations (e.g., the aggregate limitation on pay under 5 U.S.C. 5307). An employee's rate of basic pay is used to compute the maximum amount of a recruitment or relocation incentive that may be paid to an employee. Retention incentive lump sum and installment payments are computed by multiplying the retention incentive percentage rate established for the employee by the total amount of the basic pay the employee earned during the service or installment period. A critical position pay rate would be the rate of basic pay used for these recruitment, relocation, or retention incentive calculations. There are examples of calculating incentives in the fact sheets ''Recruitment and Relocation Incentive Payment and Termination Calculations'' and ''Retention Incentive Payment and Termination Calculations'' on OPM's Web site.

An agency recommended revising § 535.105 to clarify eligibility for premium pay. OPM believes that such revision of the regulations is unnecessary. However, we note in response to the comment that eligibility for premium pay under 5 U.S.C. chapter 55, subchapter V, depends on the employee's pay system (disregarding the use of the critical pay authority) and the coverage rules in 5 U.S.C. 5541(2) and 5 CFR 550.101.

An agency recommended revising § 535.104(d) to specify procedures and circumstances for submitting urgent requests for a critical position pay authority, such as in cases where expedited processing of requests for a critical position pay authority is in the interest of national security or public health or safety. OPM believes that handling of cases where expedited processing might be warranted is an administrative matter that need not be addressed in the regulations. However, if an agency believes expedited processing of a request for a critical position pay authority is in the interest of national security or public health or safety or is otherwise warranted, the agency should indicate that in its request.

An agency recommended revising § 535.105(e) to address agency flexibility to apply highest previous rate rules in setting basic pay if a critical position pay authority is discontinued for a General Schedule (GS) position. We agree. Revised § 535.105(e) provides if an agency discontinues critical position pay for a given GS position (on its own initiative or because OPM, in consultation with OMB, terminates the authority), the employee's rate of basic pay will be set at the rate to which the employee would be entitled had he or she not received critical pay, as determined by the head of the agency, unless the employee is eligible for a higher payable rate under the GS maximum payable rate rule in § 531.221 and the agency chooses to apply that rule. The pay set under the maximum payable rate rule may not exceed step 10 of the GS grade. To conform with the revised § 535.105(e), these final regulations revise § 531.221(a) to provide that the GS maximum payable rate rule may be used upon ''termination of a critical position pay authority under 5 CFR part 535''. These final regulations also revise § 531.221(a) to provide that when highest previous rate is based on a critical position pay rate, an agency must follow the rules in § 531.221(d). Section 531.221(d) provides the rules for when highest previous rate is based on a rate under a non-GS pay system. It is appropriate to follow the rules in § 531.221(d) even though GS employees who receive critical position pay will be covered by the GS pay plan code because a critical pay rate is not considered a GS rate.

An agency recommended revising § 535.105(e) to require agencies to provide documentation to employees under a critical position pay authority showing the rate of basic pay the employee would receive absent the critical position pay authorization, since the responsibility for subsequent pay rate determinations could rest with another agency should the employee transfer to another agency. The agency

said that such documentation might appear in the ''remarks'' section of the employee's SF–50. We think such a requirement is not necessary in the regulations.

An agency recommended revising § 535.106 to address daily and biweekly aggregate limitations to ensure internal pay equity. We are not making such a revision because the limitations on critical position pay in 5 U.S.C. 5377 are on annual rates, not daily or biweekly aggregate pay.

An agency suggested that OPM issue guidance that discusses the process of reviewing requests for a critical position pay authority and provides greater detail concerning the review process and its standards and timelines. OPM believes the regulations provide sufficient detail for agencies that might consider requesting an authority. The broad language used in the regulations to describe the types of positions that might be considered for a critical position pay authority allows for flexibility, and it is not practical to publish detailed standards that could apply effectively in every situation. Timing in the review process is an administrative matter and may vary by request.

An agency suggested OPM define what constitutes ''a very high level of expertise.'' OPM believes it is not possible to write a definition of that term that would cover all the different positions and contexts for which it might be appropriate to apply a critical position pay authority. This is a matter for agency judgment.

In § 535.107, we removed language regarding the use of estimated rates to make the regulation conform with the language in the statute at 5 U.S.C. 5377(h)(2). Also, we made certain other minor changes in the language of the proposed regulations to improve clarity.

Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Parts 531, 535, and 536

Administrative practice and procedure; Freedom of information; Government employees; Law enforcement officers; Reporting and recordkeeping requirements; Wages.

U.S. Office of Personnel Management.

Michael W. Hager,

Acting Director.

■ Accordingly, the U.S. Office of Personnel Management amends title 5, Code of Federal Regulations, by amending part 531, adding a new part 535, and amending part 536 as follows:

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 1. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

Subpart B—Determining Rate of Basic Pay

■ 2. Amend § 531.221 as follows:

■ a. Revise the first sentence of paragraph (a)(1) to read as follows; and

■ b. Add paragraph (a)(4) to read as follows:

§ 531.221 Maximum payable rate rule.

(a) *General.* (1) An agency may apply the maximum payable rate rule as described in this section to determine an employee's payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon reemployment, transfer, reassignment, promotion, demotion, change in type of appointment, or termination of a critical position pay authority under 5 CFR part 535. * * *

* * * * *

(4) In applying this section, an agency must follow the rules in paragraph (d) of this section when highest previous rate is based on a critical position pay rate under 5 CFR part 535.

* * * * *

■ 3. Add part 535 to read as follows:

PART 535—CRITICAL POSITION PAY AUTHORITY

Sec.

535.101 Purpose.
535.102 Definitions.
535.103 Authority.
535.104 Requests for and granting critical position pay authority.
535.105 Setting and adjusting rates of basic pay.
535.106 Treatment as a rate of basic pay.
535.107 Annual reporting requirements.

Authority: 5 U.S.C. 5377; E.O. 13415, 71 FR 70641.

§ 535.101 Purpose.

The purpose of this part is to provide a regulatory framework for the critical position pay authority authorized by 5 U.S.C. 5377. The Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions under this part.

§ 535.102 Definitions.

Agency has the meaning given that term in 5 U.S.C. 5102.

Critical position means a position for which OPM has granted authority to the head of an agency to exercise the pay-setting authority provided in 5 U.S.C. 5377.

Critical position pay authority means the authority that may be granted to the head of an agency by OPM under 5 U.S.C. 5377 to set the rate of basic pay for a given critical position under the provisions of that section.

Critical position pay rate means the specific rate of pay established by the head of an agency for an employee in a critical position based upon the exercise of the critical position pay authority. A critical position pay rate is a rate of basic pay to the extent provided in § 535.106.

Employee means an employee (as defined in 5 U.S.C. 2105) in or under an agency.

Head of an agency means the agency head or an official who has been delegated the authority to act for the agency head in the matter concerned.

§ 535.103 Authority.

(a) Subject to a grant of authority from OPM in consultation with OMB and all other requirements in this part, the head of an agency may fix the rate of basic pay for a critical position at a rate not less than the rate of basic pay that would otherwise be payable for the position, but not greater than—

(1) The rate payable for level II of the Executive Schedule (unless paragraph (a)(2) or (a)(3) of this section applies);

(2) The rate payable for level I of the Executive Schedule in exceptional circumstances based on information and data that justify a rate higher than the rate payable for level II of the Executive Schedule; or

(3) A rate in excess of the rate for level I of the Executive Schedule that is established in rare circumstances with the written approval of the President.

(b) The head of an agency may exercise his or her critical position pay authority only—

(1) When such a position requires expertise of an extremely high level in

a scientific, technical, professional, or administrative field and is critical to the agency's successful accomplishment of an important mission; and

(2) To the extent necessary to recruit or retain an individual exceptionally well-qualified for the critical position.

(c) If critical position pay authority is granted for a position, the head of an agency may determine whether it is appropriate to exercise the authority with respect to any proposed appointee or incumbent of the position.

(d) An agency granted critical position pay authority may continue to use the authority for an authorized position as long as needed. OPM will monitor the use of critical position pay authorities annually, through the agency's required reports under § 535.107, and will terminate the authority associated with a given position after notifying the agency if, in OPM's judgment in consultation with OMB, the authority is no longer needed.

§ 535.104 Requests for and granting critical position pay authority.

(a) An agency may request critical position pay authority only after determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Agency requests must include the information in paragraph (d) of this section. OPM, in consultation with OMB, will review agency requests. OPM will advise the requesting agency as to whether the request is approved and when the agency's critical position pay authority becomes effective.

(b) A request for critical position pay authority (or authorities) must be signed by the head of an agency and submitted to OPM. Requests covering multiple positions must include a list of the positions in priority order. The head of an agency may request coverage of positions of a type not listed in 5 U.S.C. 5377(a)(2), as authorized by 5 U.S.C. 5377(i)(2) and Executive Order 13415.

(c) Requests for critical position pay authority to set pay above the rate for level II of the Executive Schedule and up to the rate for level I of the Executive Schedule because of exceptional circumstances require information and data that justify the higher pay. Requests for critical position pay authority to set pay above the rate for level I of the Executive Schedule due to rare circumstances require approval by the President. The head of an agency must submit such requests to OPM with the information required in paragraph (d) of this section. If OPM, in consultation with OMB, concurs with a request to set pay above the rate for level I of the Executive Schedule, OPM will seek the President's approval. The President may establish a maximum limitation on the critical pay rate.

(d) At a minimum, all requests for critical position pay authority must include:

(1) Position title;

(2) Position appointment authority (for Senior Executive Service positions, appointment authority for any incumbent);

(3) Pay plan and grade/level;

(4) Occupational series of the position;

(5) Geographic location of the position;

(6) Current salary of the position or incumbent;

(7) Name of incumbent (or ''Vacant'');

(8) Length of time the incumbent has been in the position or length of time the position has been vacant;

(9) A written evaluation of the need to designate the position as critical. Such an evaluation must include—

(i) The kinds of work required by the position and the context within which it operates;

(ii) The range of positions and qualification requirements that characterize the occupational field, including those that require extremely high levels of expertise;

(iii) The rates of pay reasonably and generally required in the public and private sectors for similar positions; and

(iv) The availability of individuals who possess the qualifications to do the work required by the position;

(10) Documentation, with appropriate supporting data, of the agency's experience and, as appropriate, the experience of other organizations, in efforts to recruit or retain exceptionally well-qualified individuals for the position or for a position sufficiently similar with respect to the occupational field, required qualifications, and other pertinent factors, to provide a reliable comparison;

(11) Assessment of why the agency could not, through diligent and comprehensive recruitment efforts and without using the critical position pay authority, fill the position within a reasonable period with an individual who could perform the duties and responsibilities in a manner sufficient to fulfill the agency's mission. This assessment must include a justification as to why the agency could not, as an effective alternative, use other human resources flexibilities and pay authorities, such as recruitment, relocation, and retention incentives under 5 CFR part 575;

(12) An explanation regarding why the position should be designated a critical position and made eligible for a higher rate of pay under this part within its organizational context (i.e., relative to other positions in the organization) and, when applicable, how it compares with other critical positions in the agency. The agency must include an explanation of how it will deal with perceived inequities among agency employees (e.g., situations in which employees in positions designated as critical would receive higher rates of pay than their peers, supervisors, or other employees in positions with higher-level duties and responsibilities);

(13) Documentation of the effect on the successful accomplishment of important agency missions if the position is not designated as a critical position, including an explanation and justification for OPM and OMB to expedite processing in cases where the agency believes that urgency warrants expedited processing;

(14) Any additional information the agency may deem appropriate to demonstrate that higher pay is needed to recruit or retain an employee for a critical position;

(15) Unless the position is an Executive Schedule position, a copy of the position description and qualification standard for the critical position; and

(16) The desired rate of basic pay for requests to set pay above the rate for level II of the Executive Schedule and justification to show that such a rate is necessary to recruit and retain an individual exceptionally well-qualified for the critical position.

§ 535.105 Setting and adjusting rates of basic pay.

(a) The rate of basic pay for a critical position may not be less than the rate of basic pay, including any locality-based comparability payments established under 5 U.S.C. 5304 or special rate supplement under 5 U.S.C. 5305 (or other similar payment or supplement under other legal authority) that would otherwise be payable for the position.

(b) If critical position pay authority is granted for a position, the head of an agency may set pay initially at any amount up to the rate of pay for level II or level I of the Executive Schedule, as applicable, without further approval unless a higher maximum rate is approved by the President under § 535.104(c).

(c) The head of an agency may make subsequent adjustments in the rate of basic pay for a critical position each January at the same time general pay adjustments are authorized for Executive Schedule employees under section 5318 of title 5, United States

Code. Such adjusted rates may not exceed the new rate for Executive Schedule level II or other applicable maximum established for the critical position. However, the employee must have at least a rating of Fully Successful or equivalent, and subsequent adjustments must be based on labor market factors, recruitment and retention needs, and individual accomplishments and contributions to an agency's mission.

(d) Employees receiving critical position pay are not entitled to locality-based comparability payments established under 5 U.S.C. 5304, special rate supplements under 5 U.S.C. 5305, or other similar payments or supplements under other legal authority.

(e) If an agency discontinues critical position pay for a given position (on its own initiative or because OPM, in consultation with OMB, terminates the authority under § 535.103(d)), the employee's rate of basic pay will be set at the rate to which the employee would be entitled had he or she not received critical pay, as determined by the head of the agency, unless the employee is eligible for a higher payable rate under the General Schedule maximum payable rate rule in § 531.221 and the agency chooses to apply that rule.

§ 535.106 Treatment as rate of basic pay.

A critical position pay rate is considered a rate of basic pay for all purposes, including any applicable premium pay, except—

(a) Application of any saved pay or pay retention provisions (e.g., 5 U.S.C. 5363); or

(b) Application of any adverse action provisions (e.g., 5 U.S.C. 7512).

§ 535.107 Annual reporting requirements.

(a) OPM must submit an annual report to Congress on the use of the critical position pay authority. Agencies must submit the following information to OPM by January 31 of each year on their use of critical position pay authority for the previous calendar year:

(1) The name, title, pay plan, and grade/level of each employee receiving a higher rate of basic pay under this subpart;

(2) The annual rate or rates of basic pay paid in the preceding calendar year to each employee in a critical position;

(3) The beginning and ending dates of such rate(s) of basic pay, as applicable;

(4) The rate or rates of basic pay that would have been paid but for the grant of critical position pay. This includes what the rate or rates of basic pay were, or would have been, without critical position pay at the time critical position pay is initially exercised and any subsequent adjustments to basic pay that would have been made if critical position pay authority had not been exercised; and

(5) Whether the authority is still needed for the critical position(s).

PART 536—GRADE AND PAY RETENTION

■ 4. The authority citation for part 536 continues to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103–89, 107 Stat. 981; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92–502; § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004, Pub. L. 108–411, 118 Stat. 2305.

Subpart A–General Provisions

■ 5. Amend § 536.102 as follows:

■ a. Remove ''or'' at the end of paragraph (b)(7);

■ b. Remove the period at the end of paragraph (b)(8) and add ''; or'' in its place; and

■ c. Add paragraph (b)(9) to read as follows:

§ 536.102 Coverage.

* * * * *

(b) * * *

(9) Is reduced in pay upon termination of a critical position pay authority under 5 CFR part 535.

* * * * *

[FR Doc. E8–19758 Filed 8–25–08; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 894

RIN 3206–AL03

Federal Employees Dental and Vision Insurance Program

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to administer the Federal Employee Dental and Vision Benefits Enhancement Act of 2004, signed into law December 23, 2004. This law establishes dental and vision benefits programs for Federal employees, annuitants, and their eligible family members.

DATES: September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Nataya Battle, (202) 606–1874, or e-mail at *nataya.battle@opm.gov*.

SUPPLEMENTARY INFORMATION:

Background

On December 23, 2004, Public Law 108–496, 118 Stat. 4001, was signed into law. This law established a dental benefits and vision benefits program for Federal employees, annuitants, and their eligible family members. The first effective date of coverage was December 31, 2006.

On October 15, 2007, OPM published interim regulations in the **Federal Register** (72 FR 58243–58248) to administer the Federal Employees Dental and Vision Insurance Program (FEDVIP). Comments were requested by December 15, 2007. OPM received comments from an employee union, a participating health plan in the FEHB Program, and an independent organization.

One comment addressed the role of the carriers and the Administrator in the handling of the enrollment process. OPM contracts with the Administrator which has agreed to handle all aspects of the enrollment process on behalf of the carriers. Therefore the regulations have been revised to substitute ''Administrator'' for ''carrier'' wherever there is a reference to the enrollment process.

Another comment addressed concerns that OPM does not review appeals for denial of a claim. The dental and vision carriers conduct their own disputed claims process and are required to use an independent third party to conduct a final analysis of any dispute, upon appeal. This process was established to ensure an independent evaluation is conducted, but at minimal cost to Program enrollees.

A comment indicated that it was not clear whether enrollment or coverage would be denied for preexisting dental conditions. Under this Program, neither enrollment nor benefits coverage is denied due to a preexisting dental condition. However, since the dental program was established in order to provide benefits for dental services for teeth and their surrounding tissues, a carrier may determine that coverage does not extend to replacements for teeth missing before the effective date of enrollment in the Program.

Another comment suggested revising the language in § 894.601(a) to remove the reference to coverage ending at the end of the pay period ''in which you were last eligible'' and in § 894.601(b) to remove the reference to coverage ending at the end of the pay period for which the last premium allotment was made;

and replace them each with coverage ending ''at the end of the period covered by your last premium payment.'' It is not our intention to terminate an enrollment prior to the end of an enrollees' eligibility for coverage. Therefore, we did not adopt this suggestion.

The regulations have also been revised at § 894.602 to provide for a Qualifying Life Event that allows cancellation of enrollment when an enrollee or his or her spouse is called to active military service, and at § 894.704(d) to advise an annuitant if his or her reemployment terminates, he or she must notify the Administrator within 30 days to have his or her FEDVIP allotments withheld from his or her annuity payments. Otherwise, their FEDVIP coverage will terminate due to non-payment of premiums.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only affects dental and vision benefits of Federal employees and annuitants.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or Tribal governments.

List of Subjects in 5 CFR Part 894

Administrative practice and procedure, Employee benefit plans, Government employees, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Howard Weizmann,

Deputy Director.

■ For the reasons stated in the Preamble, OPM is revising part 894 to title 5, Code of Federal Regulations, to read as follows:

PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

Subpart A—Administration and General Provisions

Sec.

894.101 Definitions.
894.102 If I have a preexisting dental or vision condition, may I join FEDVIP?
894.103 How do I enroll?
894.104 Who makes enrollment decisions?
894.105 Who may correct an error in my enrollment?

Subpart B—Coverage and Types of Enrollment

894.201 What types of enrollments are available under FEDVIP?
894.202 If I enroll for self plus one, may I decide which family member to cover?
894.203 If I have a self plus one enrollment, when may I change which family member I want to cover or change to self only?
894.204 May I be enrolled in more than one dental or vision plan at a time?

Subpart C—Eligibility

894.301 Am I eligible to enroll in FEDVIP?
894.302 What is an excluded position?
894.303 What happens to my enrollment if I transfer to an excluded position?
894.304 Am I eligible to enroll if I'm retired or receiving workers' compensation?
894.305 Am I eligible to enroll if I am a former spouse receiving an apportionment of annuity?
894.306 Are foster children eligible as family members?
894.307 Are disabled children age 22 or over eligible as family members?

Subpart D—Cost of Coverage

894.401 How do I pay premiums?
894.402 Do the premiums I pay reflect the cost of providing benefits?
894.403 Are FEDVIP premiums paid on a pre-tax basis?
894.404 May I opt out of premium conversion?
894.405 What happens if I go into nonpay status or if my pay/annuity is insufficient to cover the allotments?

Subpart E—Enrolling and Changing Enrollment

894.501 When may I enroll?
894.502 What are the Qualifying Life Events (QLEs) that allow me to enroll?
894.503 Are belated enrollments or changes allowed?
894.504 When is my enrollment effective?
894.505 Are retroactive premiums paid with pre-tax dollars (premium conversion)?
894.506 How often will there be open seasons?
894.507 After I'm enrolled, may I change from one dental or vision plan or plan option to another?
894.508 When may I increase my type of enrollment?
894.509 What are the QLEs that are consistent with increasing my type of enrollment?
894.510 When may I decrease my type of enrollment?
894.511 What are the QLEs that are consistent with decreasing my type of enrollment?
894.512 What happens if I leave Government and then return?

Subpart F—Termination or Cancellation of Coverage

894.601 When does my FEDVIP coverage stop?
894.602 May I cancel my enrollment at any time?
894.603 Is there an extension of coverage and right to convert when my coverage stops or when a covered family member loses eligibility?

Subpart G—Annuitants and Compensationers

894.701 May I keep my dental and/or vision coverage when I retire or if I start receiving workers' compensation?
894.702 May I participate in open seasons and make changes to my enrollment as an annuitant or compensationer?
894.703 How long does my coverage as an annuitant or compensationer last?
894.704 What happens if I retire and then come back to work for the Federal Government?

Subpart H—Benefits in Underserved Areas

894.801 Will benefits be available in underserved areas?

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992.

Subpart A—Administration and General Provisions

§ 894.101 Definitions.

This part is written as if the reader were an applicant or enrollee. Accordingly, the terms ''you,'' ''your,'' etc., refer, as appropriate, to the applicant or enrollee.

Acquiring an eligible child means one of the following:

(1) Birth of a child;

(2) Adoption of a child;

(3) Acquisition of a foster child as described in § 890.101(a)(8) of this chapter;

(4) Residence change of the enrollee's stepchild or recognized natural child who moves in with the enrollee;

(5) Establishment of dependency of a recognized natural child as described in § 890.302(b) of this chapter; and

(6) An otherwise eligible child's loss of spouse due to divorce or annulment of marriage, or death.

Administrator means the entity with which the Office of Personnel Management contracts to manage the enrollment and premium payment process for the Federal Employees Dental and Vision Insurance Program (FEDVIP).

Annuitant means an individual defined at 5 U.S.C. 8901(3). Generally, the term means a former employee who is entitled to an immediate annuity or a disability annuity under a retirement system established for employees. The term also generally includes those receiving a survivor annuity due to the death of a Federal employee or

annuitant (survivor annuitants) and those receiving compensation from the Office of Workers' Compensation Programs (compensationers). The term does not include former employees who retire with a deferred annuity under 5 U.S.C. 8413, or former spouses of annuitants.

Carrier means a company with which the Office of Personnel Management contracts to provide dental and/or vision benefits.

Child means one of the following:

(1)(i) A child born within marriage;

(ii) An adopted child;

(iii) A stepchild or foster child who lives with the enrollee in a regular parent-child relationship; or

(iv) A recognized natural child.

(2) This definition does not include a grandchild (unless the grandchild meets all the requirements of a foster child as stated in § 890.101(a)(8) of this chapter).

(3) The child must be unmarried and under age 22. A child age 22 or over is eligible if the child is incapable of self-support because of a physical or mental disability that existed before the child reached age 22.

Compensation has the same meaning as found under subchapter I of chapter 81 of title 5, United States Code, which is payable because of an on-the-job injury or disease.

Compensationer means an individual who is receiving compensation and who the Department of Labor determines is unable to return to duty.

Covered position means a position in which an employee is not excluded from FEDVIP eligibility by law or regulation.

Days means calendar days.

Dependent means an unmarried child who is living with or receiving regular and substantial support from the enrollee.

Employee means an individual defined in 5 U.S.C. 8901. For the purposes of this subpart, the term employee additionally means an employee of the United States Postal Service and an employee of the District of Columbia courts.

Enrollment reconsideration means the Administrator's review of its initial enrollment decision to determine if it followed the law and regulations correctly in making the initial decision concerning FEDVIP eligibility.

Family member means a spouse (including a spouse under a valid common law marriage) and/or unmarried dependent child(ren).

OPM means the Office of Personnel Management.

OWCP means the Office of Workers' Compensation Programs, U.S. Department of Labor.

Premium conversion means the payment of FEDVIP premiums using pre-tax dollars. See § 892.102 of this chapter for a discussion of how premium conversion works.

QLE means a qualifying life event.

Recognized natural child means a biological child born outside of marriage. A recognized natural child is an eligible family member if the child lives with the enrollee or receives financial support from the enrollee.

Regular parent-child relationship means that the enrollee is exercising parental authority, responsibility, and control over the child; is caring for, supporting the child; and is making the decisions about the child's education and medical care.

Type of enrollment means one of the following:

(1) Self only;

(2) Self plus one; or

(3) Self and family.

§ 894.102 If I have a pre-existing dental or vision condition, may I join FEDVIP?

Yes. Pre-existing conditions do not exclude you from coverage under FEDVIP. The *Administrator* may not deny an individual the right to enroll solely because of a preexisting dental or vision condition.

§ 894.103 How do I enroll?

You may enroll through an *Administrator* contracted by OPM to facilitate the enrollment process. Your Federal agency, retirement system, or *OWCP* office will advise you of the enrollment process available to you.

§ 894.104 Who makes enrollment decisions and reconsiderations?

The *Administrator* makes enrollment decisions and the *Administrator* reviews requests for reconsideration of an enrollment decision. The *Administrator's* initial enrollment decision denying enrollment or an opportunity to change coverage must be in writing and must inform you about your right to reconsideration.

§ 894.105 Who may correct an error in my enrollment?

(a) The *Administrator* may correct administrative errors about the processing of your enrollment or changes in enrollment.

(b) OPM may order correction of an administrative error if it receives evidence that it would be against equity (fairness) and good conscience not to order the correction. This decision is made at the discretion of OPM and is not subject to review.

(c) If the correction gives you retroactive coverage, you must pay the premiums for all periods of the retroactive coverage. These premiums will not be on a pre-tax basis (they are not subject to premium conversion).

Subpart B—Coverage and Types of Enrollment

§ 894.201 What types of enrollments are available under FEDVIP?

FEDVIP has three *types of enrollment:*

(a) Self only, which covers only the enrolled *employee* or *annuitant;*

(b) Self plus one, which covers the enrolled *employee* or *annuitant* plus one eligible family member; and

(c) Self and family, which covers the enrolled *employee* or *annuitant* and all eligible *family members.*

§ 894.202 If I enroll for self plus one, may I decide which family member to cover?

Yes, if you enroll for self plus one, you must state at the time you enroll which eligible *family member* you want to cover under your enrollment.

§ 894.203 If I have a self plus one enrollment, when may I change which family member I want to cover or change to self only?

You may change your covered *family member* under a self plus one enrollment or change to self only coverage in the following situations:

(a) During the annual open season;

(b) If your covered *family member* dies during the year; or

(c) If your covered *family member* loses eligibility during the year.

§ 894.204 May I be enrolled in more than one dental or vision plan at a time?

You may be enrolled in a FEDVIP dental plan and a separate FEDVIP vision plan at the same time. But no one may enroll or be covered as a family member in a FEDVIP dental or vision plan if he or she is covered under another person's FEDVIP dental or vision self plus one or self and family enrollment, except as provided under § 890.302 (a)(2) through (4) of this chapter, with respect to dual enrollments.

Subpart C—Eligibility

§ 894.301 Am I eligible to enroll in the FEDVIP?

You are eligible if you meet the definition of *employee* in 5 U.S.C. 8901(1), unless you are in an excluded position. You are eligible if you are an employee of the United States Postal Service or the District of Columbia courts.

§ 894.302 What is an excluded position?

Excluded positions are described in 5 U.S.C. 8901 (1)(I) and 5 CFR 890.102 (c), except that employees of the United

States Postal Service and District of Columbia courts are not excluded positions.

You are in an excluded position if you are:

(a) An *employee* of a corporation supervised by the Farm Credit Administration, if private interests elect or appoint a member of the board of directors.

(b) An *employee* who is not a citizen or national of the United States and your permanent duty station is outside the United States. *Exception:* You are eligible if you met the definition of *employee* on September 30, 1979, by service in an Executive agency, the United States Postal Service, or the Smithsonian Institution in the area that was then known as the Canal Zone.

(c) An *employee* of the Tennessee Valley Authority.

(d) An individual first employed by the Government of the District of Columbia on or after October 1, 1987, except employees of the District of Columbia Courts and those employees defined at § 890.102 (c)(8) of this chapter.

(e) Serving under an appointment limited to 1 year or less. *Exceptions:* You are eligible if:

(1) You are an acting postmaster;

(2) You are a Presidential appointee appointed to fill an unexpired term;

(3) You are an *employee* with a provisional appointment, as defined in § 316.401 and § 316.403 of this chapter; or

(4) You have completed 1 year of current continuous employment, excluding any break in service of 5 *days* or less.

(f) You are expected to work fewer than 6 months in each year. *Exception:* You are eligible if you are employed under an OPM-approved career-related work-study program under Schedule B. To qualify, your work-study program must last at least 1 year, and you must be expected to be in pay status for at least one-third of the total period of time from the date of your first appointment to the date you complete the work-study program.

(g) An intermittent *employee* (a non-full-time *employee* without a prearranged regular tour of duty).

(h) A beneficiary or patient *employee* in a Government hospital or home.

(i) Paid on a contract or fee basis. *Exception:* You are eligible if you are a United States citizen, and you are appointed by a contract between you and the Federal employing authority. To qualify, your contract must require your personal service, and you must be paid on the basis of units of time.

(j) Paid on a piecework basis. *Exception:* You are eligible if your work schedule provides for full-time or part-time service, and you have a regularly scheduled tour of duty.

(k) The following positions are not excluded positions:

(1) An employee appointed to perform ''part-time career employment,'' as defined in section 3401 (2) of title 5, U.S.C., and 5 CFR part 430, subpart B; or

(2) An employee serving under an interim appointment established under § 772.102 of this chapter.

§ 894.303 What happens to my enrollment if I transfer to an excluded position?

(a) If you have FEDVIP coverage and you transfer to a position excluded under § 894.302(a) through (d), your enrollment stops.

(b) If you have FEDVIP coverage and you transfer to a position excluded under § 894.302(e) through (j) with no break in service of more than 3 days, your enrollment is not affected. If you have a break in service of more than 3 days, your enrollment stops.

(c) If you did not elect to enroll in FEDVIP and then transfer to an excluded position, you lose all rights to enroll at that time.

§ 894.304 Am I eligible to enroll if I'm retired or receiving workers' compensation?

If you are retired, receiving workers' *compensation*, or are a survivor *annuitant*, you are eligible if you meet the definition of *annuitant* in 5 U.S.C. 8901(3).

§ 894.305 Am I eligible to enroll if I am a former spouse receiving an apportionment of annuity?

No. Former spouses receiving an apportionment of annuity are not eligible to enroll in FEDVIP.

§ 894.306 Are foster children eligible as family members?

Yes, foster children may be eligible for coverage as family members under FEDVIP.

§ 894.307 Are disabled children age 22 or over eligible as family members?

A *child* age 22 or over is an eligible family member if the *child* is incapable of self-support because of a physical or mental disability that existed before the *child* reached age 22.

Subpart D—Cost of Coverage

§ 894.401 How do I pay premiums?

(a) *Employees* pay premiums through payroll allotments.

(b) *Annuitants* and survivor *annuitants* pay premiums through annuity allotments.

(c) *Compensationers* pay premiums through allotments from *compensation* payments.

(d) In limited circumstances, individuals may make direct premium payments. See § 894.405.

§ 894.402 Do the premiums I pay reflect the cost of providing benefits?

The premiums you pay shall reasonably and equitably reflect the cost of the benefits provided.

§ 894.403 Are FEDVIP premiums paid on a pre-tax basis?

(a) Your FEDVIP premiums are paid on a pre-tax basis (called premium conversion) if you are an active *employee*, your salary is sufficient to make the premium allotments, and your agency is able to make pre-tax allotments.

(b) Your FEDVIP premiums are *not* paid on a pre-tax basis if:

(1) You are an *employee* in nonpay status or an *employee* whose salary is not high enough to make premium allotments, or your agency is unable to make pre-tax allotments;

(2) You are an *annuitant*, a survivor *annuitant*, or a *compensationer*;

(3) Your enrollment change was made effective retroactively which resulted in additional premium withholdings, unless it is as a result of birth or adoption of a *child*.

(4) You have been approved to pay premiums directly to the *Administrator*.

§ 894.404 May I opt out of premium conversion?

No, all enrolled employees whose salary is sufficient to make premium allotments and whose agency is able to make pre-tax allotments must participate in premium conversion.

§ 894.405 What happens if I go into nonpay status or if my pay/annuity is insufficient to cover the allotments?

(a) If your pay, *annuity*, or *compensation* is too low to cover the premium allotments, or if you go into a nonpay status, contact the *Administrator* to arrange to pay your premiums directly to the Administrator.

(b) If you do not make the premium payments, your FEDVIP coverage will stop. You will not be able to reenroll until the next open season after:

(1) You are in pay status; or

(2) Your pay is sufficient to make the premium allotments.

Subpart E—Enrollment and Changing Enrollment

§ 894.501 When may I enroll?

You may enroll:

(a) During the annual open season;

(b) Within 60 *days* after you first become eligible as:

(1) A new *employee*;

(2) A previously ineligible *employee* who transfers to a covered position; or

(3) A new survivor *annuitant*, if not already covered under FEDVIP.

(c) Within 60 *days* of when you return to service following a break in service of at least 30 days; or

(d) Within 60 *days* of a QLE that allows you to enroll.

§ 894.502 What are the Qualifying Life Events (QLEs) that allow me to enroll?

(a) You or an eligible *family member* lose other dental/vision coverage;

(b) Your annuity or *compensation* is restored after having been terminated; or

(c) You return to pay status after being on leave without pay due to deployment to active military duty.

§ 894.503 Are belated enrollments or changes allowed?

(a) The time limit for enrolling or changing your enrollment may be extended up to 3 months after the date you became newly eligible or had a *QLE* or after the end of an open season. To qualify, you must demonstrate to the *Administrator* that you were not able to enroll or change your enrollment on time for reasons beyond your control.

(b) If the *Administrator* allows you to make a belated enrollment or enrollment change, you must enroll or change within 30 *days* after the *Administrator* notifies you of its determination.

§ 894.504 When is my enrollment effective?

(a) Open season enrollments are effective on the date set by OPM.

(b) If you enroll when you first become eligible your enrollment is effective the 1st *day* of the pay period following the one in which the *Administrator* receives your enrollment, but no earlier than December 31, 2006.

(c)(1) A belated open season enrollment is effective retroactive to the date it would have been effective if you had made a timely enrollment or request for a change.

(2) Any other belated enrollment or change is effective retroactive to the 1st *day* of the pay period following the one in which you became newly eligible or the date of your *QLE*.

(3) You are responsible for any retroactive premiums due to a belated enrollment or request for a change.

§ 894.505 Are retroactive premiums paid with pre-tax dollars (premium conversion)?

Retroactive premiums are not paid under premium conversion, except when you are changing your enrollment retroactively as a result of birth or adoption of a *child*. Any additional withholdings for retroactive premiums that are due must be made with after-tax dollars. The *Administrator* will bill you directly for any retroactive premiums that must be paid with after-tax dollars.

§ 894.506 How often will there be open seasons?

There will be an annual open season for FEDVIP at the same time as the annual Federal Benefits Open Season.

§ 894.507 After I'm enrolled, may I change from one dental or vision plan or plan option to another?

(a) You may change from one dental and/or vision plan to another plan or one plan option to another option in that same plan during the annual open season.

(b)(1) If you are enrolled in a dental or vision plan with a geographically restricted service area, and you or a covered eligible *family member* move out of the service area, you may change to a different dental or vision plan that serves that area.

(2) You may make this change at any time before or after the move, once you or a covered eligible *family member* has a new address.

(3) The enrollment change is effective the first day of the pay period following the pay period in which you make the change.

(4) You may not change your *type of enrollment* unless you also have a *QLE* that allows you to change your *type of enrollment*.

§ 894.508 When may I increase my type of enrollment?

(a) You may increase your *type of enrollment:*

(1) during the annual open season; or

(2) If you have a *QLE* that is consistent with increasing your *type of enrollment*.

(b) Increasing your *type of enrollment* means going from:

(1) Self only to self plus one;

(2) Self only to self and family; or

(3) Self plus one to self and family.

(c) You may increase your *type of enrollment* during the time period beginning 31 *days* before the *QLE* and ending 60 *days* after the *QLE*.

(d) Your new *type of enrollment* is effective the 1st *day* of the pay period following the pay period in which you make the change.

(e) You may not change from one dental or vision plan to another, except as stated in § 894.507(b).

§ 894.509 What are the QLEs that are consistent with increasing my type of enrollment?

(a) Marriage;

(b) *Acquiring an eligible child*; or

(c) Loss of other dental or vision coverage by an eligible *family member*.

§ 894.510 When may I decrease my type of enrollment?

(a) You may decrease your type of enrollment

(1) during the annual open season; or

(2) If you have a *QLE* that is consistent with decreasing your *type of enrollment*,

(b) Decreasing your *type of enrollment* means going from:

(1) Self and family to self plus one;

(2) Self and family to self only; or

(3) Self plus one to self only.

(c) You may decrease your *type of enrollment* during the time period beginning 31 *days* before your *QLE* and ending 60 *days* after your *QLE*.

(d) Your new *type of enrollment* is effective the 1st *day* of the pay period following the one in which you make the change.

(e) You may not change from one dental or vision plan or option to another, except as stated in § 894.507(b).

§ 894.511 What are the QLEs that are consistent with decreasing my type of enrollment?

(a) Loss of an eligible *family member* due to:

(1) Divorce;

(2) Death; or

(3) Loss of eligibility of a previously enrolled *child*.

(b) Your spouse deploys to active military service.

§ 894.512 What happens if I leave Federal Government and then return?

(a) Your FEDVIP coverage terminates at the end of the pay period in which you separate from government service. *Exception:* If you separate for retirement or while in receipt of workers' *compensation* as defined in § 894.701, your FEDVIP coverage continues.

(b)(1) If you return to Federal service after a break in service of fewer than 30 *days*, and you were not previously enrolled in FEDVIP, you may not enroll until the next open season or unless you have a *QLE* that allows you to enroll.

(2) If you return to Federal service after a break in service of fewer than 30 *days*, and you were previously enrolled in FEDVIP, you may reenroll in the same plan(s) and plan option and with the same *type of enrollment* you had before you separated. *Exceptions:*

(i) If you were enrolled in a dental or vision plan with a restricted geographic service area, and you have since moved out of the plan's service area, you may

change to a different dental or vision plan that serves that area.

(ii) If you have since gained or lost an eligible *family member*, you may change your *type of enrollment* consistent with the change in the number of eligible *family members*.

(3) If you return to Federal service as a new hire after a break in service of 30 *days* or more, you may enroll if you were not previously enrolled, change your dental or vision plan, and/or change your *type of enrollment*.

Subpart F—Termination or Cancellation of Coverage

§ 894.601 When does my FEDVIP coverage stop?

(a) If you no longer meet the definition of an eligible *employee* or *annuitant*, your FEDVIP coverage stops at the end of the pay period in which you were last eligible.

(b) If you go into a period of nonpay or insufficient pay, and you do not make direct premium payments, your FEDVIP coverage stops at the end of the pay period for which your agency, retirement system, or *OWCP* last made a premium allotment from your pay.

(c) If you are making direct premium payments, and you stop making the payments, your FEDVIP coverage stops at the end of the pay period for which you last made a payment.

(d) If you cancel your enrollment during an open season, your FEDVIP coverage stops at midnight of the *day* before the effective date of an open season change as set by OPM.

(e) If you are enrolled with a combination dental and vision *carrier* with a restricted service area, and you move outside the *carrier's* service area to a service area that does not offer a combination *carrier* and you change to a dental only or vision only *carrier*, your existing combination plan coverage will stop at midnight of the *day* before the effective date of your new plan coverage.

(f) If your FEDVIP carrier discontinues participation in the program at the end of the contract year, then you must change to another *carrier* during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM will establish a time and effective date for you to change your carrier. If you do not change your carrier within the time set by OPM, your coverage will stop at midnight of the *day* before the effective date set by OPM for coverage with another *carrier*.

§ 894.602 May I cancel my enrollment at any time?

No. You may only cancel your enrollment during an open season. *Exceptions:* You may cancel your dental and/or vision enrollment if you transfer to an eligible position with a Federal agency that provides dental and/or vision coverage with 50 percent or more employer-paid premiums. You may also cancel upon your deployment or your spouse's deployment to active military duty. These cancellations will become effective at the end of the pay period that you submit your request.

§ 894.603 Is there an extension of coverage and right to convert when my coverage stops or when a covered family member loses eligibility?

No. There is no extension of coverage or right to convert to an individual policy or Temporary Continuation of Coverage (TCC) when your FEDVIP coverage stops or when a *family member* loses eligibility under the Program.

Subpart G—Annuitants and Compensationers

§ 894.701 May I keep my dental and/or vision coverage when I retire or start receiving workers' compensation?

(a) Your FEDVIP coverage continues if you retire on an immediate annuity or on a disability annuity, or start receiving *compensation* from OWCP.

(b) If you retire on a Minimum Retirement Age +10 annuity that you elect to postpone in accordance with 5 U.S.C. 8412(g), your FEDVIP coverage will stop when you separate from service. However, you may enroll again within 60 *days* of when your annuity starts.

(c) If you retire on a deferred annuity in accordance with 5 U.S.C. 8413, your FEDVIP coverage stops and you are not eligible to enroll.

§ 894.702 May I participate in open season and make changes to my enrollment as an annuitant or compensationer?

Yes. *Annuitants* and *compensationers* may participate in open season and make enrollment changes under the same circumstances as active *employees*.

§ 894.703 How long does my coverage as an annuitant or compensationer last?

Your coverage as an *annuitant* or *compensationer* continues as long as you continue receiving an annuity or *compensation* and pay your premiums, unless you cancel your coverage during an open season or terminate coverage due to insufficient annuity or *compensation*.

§ 894.704 What happens if I retire and then come back to work for the Federal Government?

(a) If you have FEDVIP coverage as an *annuitant*, and you become reemployed in an eligible position in Federal service, you must contact the *Administrator* so it can send the request for allotments to your agency so your agency can start making the allotments from your pay.

(b) If you did not enroll in FEDVIP coverage as an *annuitant* and become reemployed in an eligible Federal position, you have 60 *days* to enroll in FEDVIP.

(c) If you enroll as an employee the *Administrator* will stop sending requests for allotments from your annuity.

(d) If your reemployment terminates, you must notify the *Administrator* within 30 days to have your allotments withheld from your annuity payments. Otherwise, your FEDVIP coverage will terminate due to non-payment of premiums.

Subpart H—Benefits in Underserved Areas

§ 894.801 Will benefits be available in underserved areas?

(a) Dental and vision plans under FEDVIP will include underserved areas in their service areas and provide benefits to enrollees in underserved areas.

(b) In any area where a FEDVIP dental or vision plan does not meet OPM access standards, including underserved areas, enrollees may receive services from non-network providers.

(c) Contracts under FEDVIP shall include access standards as defined by OPM and payment levels for services to non-network providers in areas that do not meet access standards.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Docket No. AMS–FV–08–0056; FV08–987–1 IFR]

Domestic Dates Produced or Packed in Riverside County, CA; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the California Date Administrative Committee (Committee) for the 2008–09 and subsequent crop years from $0.75 to $0.60 per hundredweight of dates handled. The Committee locally administers the marketing order which regulates the handling of dates grown or packed in Riverside County, California. Assessments upon date handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year begins October 1 and ends September 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective August 27, 2008. Comments received by October 27, 2008, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938; or *Internet*: *http://www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901, *Fax:* (559) 487–5906, or *E-mail: Terry.Vawter@usda.gov* or *Kurt.Kimmel@usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, *Fax:* (202) 720–8938, or *E-mail: Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 987, as amended (7 CFR part 987), regulating the handling of dates grown or packed in Riverside County, California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California date handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable dates beginning October 1, 2008, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2008–09 and subsequent crop years from $0.75 per to $0.60 per hundredweight of dates.

The California date marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California dates. They are familiar with the Committee's needs and with the costs for goods and services in their local area, and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2007–08 and subsequent crop years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 29, 2008, and unanimously recommended 2008–09 expenditures of $176,384 and an assessment rate of $0.60 per hundredweight of California dates. In comparison, last year's budgeted expenditures were $209,182. The assessment rate of $0.60 is $0.15 lower than the rate currently in effect. The Committee recommended a lower assessment rate because the 2007 crop was larger than expected, resulting in excess assessment income and thus a larger reserve. Income generated through the lower assessment rate combined with reserve funds should be sufficient to cover anticipated 2008–09 expenses.

Section 987.72(c) states that the reserve may not exceed 50 percent of the average of expenses incurred during the most recent five preceding crop years. With the larger 2007 crop, the reserve at the end of the 2007–08 crop year is projected to exceed this limit. Excess assessment funds will be refunded to handlers to reduce the reserve and bring it in line with order requirements.

Proceeds from sales of cull dates are deposited in a surplus account for subsequent use by the Committee in covering the surplus pool share of the Committee's expenses. Handlers may also dispose of cull dates of their own production within their own livestock-feeding operation; otherwise, such cull dates must be shipped or delivered to the Committee for sale to non-human food product outlets. Pursuant to § 987.72(b), the Committee is authorized to temporarily use funds derived from assessments to defray expenses incurred in disposing of surplus dates. All such expenses are required to be deducted from proceeds obtained by the Committee from the disposal of surplus dates. For the 2008–09 crop year, the Committee estimated that $4,500 from the surplus account would be needed to temporarily defray expenses incurred in disposing of surplus dates.

The major expenditures recommended by the Committee for the 2008–09 crop year include $66,384 for general and administrative programs, $82,000 for promotional programs, and $28,000 for marketing and media consulting. The Committee also budgeted $10,000 as a contingency reserve for other marketing and promotion projects that it may wish to

support later in the year. By comparison, expenditures recommended by the Committee for the 2007–08 crop year include $87,312 for general and administrative programs, $67,870 for promotional programs, $24,000 for marketing and media consulting, $5,000 for moving expenses, and $5,000 for updating marketing materials. The Committee budgeted $20,000 as a contingency reserve for other marketing and promotion projects.

The assessment rate of $0.60 per hundredweight of assessable dates was derived by applying the following formula where:

A= 2007–08 estimated reserve on 09/30/08 ($134,757);

B= 2008–09 estimated reserve on 10/01/09 ($78,996);

C= 2008–09 expenses ($176,384);

D= Cull Surplus Fund ($4,500);

E= Assessment Refund ($15,877); and

F= 2008–09 expected shipments (22,000,000 pounds).

[(B − A+C − D+E)/F] *100.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2008–09 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 85 producers of dates in the production area and 9 handlers subject to regulation under the marketing order. The Small Business Administration (13 CFR 121.201) defines small agricultural producers as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those having annual receipts of less than $6,500,000.

According to the National Agricultural Statistics Service (NASS), data for the most recently completed crop year (2006) shows that about 3.12 tons, or 6,240 pounds, of dates were produced per acre. The 2006 grower price published by the NASS was $1,320 per ton, or $.66 per pound. Thus, the value of date production per acre in 2006 averaged about $4,118 (6,240 pounds times $.66 per pound). At that average price, a producer would have to farm over 182 acres to receive an annual income from dates of $750,000 ($750,000 divided by $4,118 per acre equals 182 acres). According to Committee staff, the majority of California date producers farm less than 182 acres. Thus, it can be concluded that the majority of date producers could be considered small entities. The majority of handlers of California dates may also be considered small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2008–09 and subsequent crop years from $0.75 to $0.60 per hundredweight of dates handled. The Committee unanimously recommended 2008–09 expenditures of $176,384 and an assessment rate of $0.60 per hundredweight of dates, which is $0.15 lower than the 2007–08 rate, currently in effect. The quantity of assessable dates for the 2008–09 crop year is estimated at 22,000,000 pounds. Thus, the $0.60 rate should provide $132,000 in assessment income and, with reserve funds of $39,884 and the $4,500 contribution from the surplus program, will be adequate to meet the 2008–09 crop year expenses.

The major expenditures recommended by the Committee for the 2008–09 crop year include $66,384 for general and administrative programs, $82,000 for promotional programs, and $28,000 for marketing and media consulting. The Committee also budgeted $10,000 as a contingency reserve for other marketing and promotion projects that it may wish to support later in the year.

The Committee recommended a lower assessment rate because the 2007 crop was larger than expected, resulting in excess assessment income and thus a larger reserve. Income generated through the lower assessment rate combined with reserve funds should be sufficient to cover anticipated 2008–09 expenses.

The Committee reviewed and unanimously recommended 2008–09 crop year expenditures of $176,384. Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Marketing Subcommittee. Alternative expenditure levels were an option available to the Committee, but given the extra assessment income generated from the larger-than-expected 2007–08 crop, it was ultimately determined that a $176,384 budget would be appropriate. The assessment rate of $0.60 per hundredweight of dates was then derived, based upon the Committee's estimates of the incoming reserve, income, and anticipated expenses.

According to the NASS, the season average grower price for 2007 crop dates is projected at $1,800 per ton, or $90 per hundredweight. No official NASS estimate is available yet for 2008. The average grower price for 2005–07 is $1,517 per ton, or $76 per hundredweight.

To calculate the percentage of grower revenue represented by the assessment rate for 2007, the assessment rate of $0.75 (per hundredweight) is divided by the estimated average grower price. This results in estimated assessment revenue for the 2007–08 crop year as a percentage of grower revenue of .83 percent ($0.75 divided by $90 per hundredweight). As previously mentioned, NASS data for 2008 is not yet available. However, applying the same calculations above using the average grower price for 2005–07 would result in estimated assessment revenue as a percentage total grower revenue of .79 percent for the 2008–09 crop year ($0.60 divided by $76 per hundredweight). Thus, the assessment revenue should be well below 1 percent of estimated grower revenue in 2008.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the California date industry and all interested persons were invited to attend the meeting and

participate in Committee deliberations on all issues. Like all Committee meetings, the May 29, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large California date handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2008–09 crop year begins on October 1, 2008, and the marketing order requires that the rate of assessment for each crop year applies to all assessable dates handled during such crop year; (2) the action decreases the assessment rate for assessable dates beginning with the 2008–09 crop year; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 987 is amended as follows:

PART 987—DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

■ 1. The authority citation for 7 CFR part 987 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 987.339 is revised to read as follows:

§ 987.339 Assessment rate.

On and after October 1, 2008, an assessment rate of $0.60 per hundredweight is established for California dates.

Dated: August 20, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–19697 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Docket No. AMS–FV–08–0060; FV08–993–1 IFR]

Dried Prunes Produced in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Prune Marketing Committee (Committee) for the 2008–09 and subsequent crop years from $0.60 to $0.30 per ton of salable dried prunes. The Committee locally administers the marketing order that regulates the handling of dried prunes in California. Assessments upon dried prune handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective August 27, 2008. Comments received by October 27, 2008, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938; or *Internet: http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Maureen Pello, Assistant Regional Manager, or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901, *Fax:* (559) 487–5906; or E-mail: *Maureen.Pello@usda.gov* or *Kurt.Kimmel@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, *Fax:* (202) 720–8938, or *E-mail: Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 110 and Marketing Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California dried prune handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is

intended that the assessment rate as issued herein will be applicable to all assessable dried prunes beginning on August 1, 2008, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2008–09 and subsequent crop years from $0.60 to $0.30 per ton of salable dried prunes handled.

The California dried prune marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers of California dried prunes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2007–08 and subsequent crop years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 26, 2008, and unanimously recommended an assessment rate of $0.30 per ton of salable dried prunes and expenditures totaling $51,587 for the 2008–09 crop year. In comparison, last year's approved expenses were $102,523. The assessment rate of $0.30 per ton of salable dried prunes is one-half of the rate currently in effect.

The Committee recommended a lower assessment rate because the 2008–09 crop is estimated at 120,000 tons, which is over 35,000 tons larger than the 2007–08 crop. Income generated from the lower assessment rate combined with excess assessment income carried into the new crop year should be adequate to cover the Committee's 2008–09 expenses.

The Committee's budget of expenses of $51,587 includes a decrease in personnel expenses, and a slight decrease in operating expenses. Combined salaries and expenses are almost 50 percent lower than last year, or about $26,248. The Committee also included $12,446 for contingencies. Most of the Committee's expenses reflect its portion of the joint administrative costs of the Committee and the California Dried Plum Board (CDPB). Based on the Committee's reduced activities in recent years, it is funding only 5 percent of the shared expenses of the two programs. This level was reduced from last year's level of 10 percent to reflect a more accurate figure. The Committee believes that extra assessment income carried in from the 2007 crop year, plus interest income and 2008 assessment income, is adequate to cover its estimated expenses of $51,587.

The major expenditures recommended by the Committee for the 2008–09 crop year include $26,248 for salaries and benefits, $12,893 for operating expenses, and $12,446 for contingencies. For the 2007–08 crop year, the Committee's budgeted expenses were $50,505 for salaries and benefits, $15,075 for operating expenses, and $36,943 for contingencies.

The assessment rate recommended by the Committee was derived by considering the handler assessment revenue needed to meet anticipated expenses, the estimated salable tons of California dried prunes, excess funds carried forward into the 2008–09 crop year, and estimated income from other sources such as interest. Dried prune production for the year is estimated to be 120,000 salable tons, which should provide $36,000 in assessment income at $0.30 per ton of salable dried prunes. Income derived from handler assessments, plus excess funds from the 2007–08 crop year should be adequate to cover budgeted expenses.

The Committee is authorized under § 993.81(c) of the order to use excess assessment funds from the 2007–08 crop year (currently estimated at $15,487) for up to 5 months beyond the end of the crop year to meet 2008–09 crop year expenses. At the end of the 5 months, the Committee either refunds or credits excess funds to handlers.

The assessment rate established in this rule is effective indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the Committee's recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committees' 2008–09 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 800 producers of dried prunes in the production area and approximately 22 handlers subject to regulation under the marketing order. The Small Business Administration (13 CFR 121.201) defines small agricultural producers as those whose annual receipts are less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $6,500,000.

Committee data indicates that about 64 percent of the handlers ship under $6,500,000 worth of dried prunes.

Dividing the average prune crop value for 2007–08 reported by the National Agricultural Statistics Service (NASS) of $111,650,000 by the number of producers (800) yields an average annual producer revenue estimate of about $139,562. Based on the foregoing, the majority of handlers and dried prune producers may be classified as small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2008–09 and subsequent crop years from $0.60 to $0.30 per ton of salable dried prunes.

The Committee met on June 26, 2008, and unanimously recommended estimated expenses for 2008–09 of $51,587 and a decreased assessment rate of $0.30 per ton of salable dried prunes. The Committee's recommended budget was based on a decrease in personnel expenses and a decrease in operating expenses. Combined salaries and expenses are almost 50 percent lower than last year, or about $26,248. The Committee also included $12,446 for contingencies. Most of the Committee's expenses reflect its portion of the joint administrative costs of the Committee and the CDPB. Based on the Committee's reduced activities in recent years, it is funding only 5 percent of the shared expenses of the two programs. This level was reduced from last year's level of 10 percent to reflect a more accurate figure. The Committee believes that extra assessment income carried in from the 2007 crop year, plus interest income and 2008 assessment income, is adequate to cover its estimated expenses of $51,587.

The assessment rate of $0.30 per ton of salable dried prunes is one-half of the rate currently in effect. The quantity of salable dried prunes for the 2008–09 crop year is currently estimated at 120,000 tons, compared to 95,000 tons of salable dried prunes for the 2007–08 crop year.

The major expenditures recommended by the Committee for the 2008–09 crop year include $26,248 for salaries and benefits, $12,893 for operating expenses, and $12,446 for contingencies. Budgeted expenses for these items in 2007–08 were $50,505 for salaries and benefits, $15,075 for operating expenses, and $36,943 for contingencies.

The 2008–09 assessment rate was derived by considering the handler assessment revenue needed to meet anticipated expenses, the estimated salable tons of California dried prunes, excess funds carried forward into the 2008–09 crop year, and estimated income from other sources such as interest. Therefore, the Committee recommended an assessment rate of $0.30 per ton of salable dried prunes.

Prior to arriving at its budget of $51,587, the Committee considered information from various sources, including the Committee's Executive Subcommittee. The Executive Subcommittee reviewed the administrative expenses shared between the Committee and the CDPB in recent years. Accordingly, the Executive Subcommittee recommended reducing the share of expenses allocated to the Committee from 10 to 5 percent. The Executive Subcommittee then recommended the $51,587 budget and $0.30 per ton assessment rate to the Committee. The Committee recommended the same budget and assessment rate to USDA.

Section 993.81(c) of the order provides the Committee the authority to use excess assessment funds from the 2007–08 crop year (estimated at $15,487) for up to 5 months beyond the end of the crop year to meet 2008–09 crop year expenses. At the end of the 5 months, the Committee either refunds or credits excess funds to handlers.

To calculate the percentage of grower revenue represented by the assessment rate for 2007, the assessment rate of $0.60 per ton is divided by the estimated average grower price (according to the NASS). This results in estimated assessment revenue for the 2007–08 crop year as a percentage of grower revenue of.05 percent ($0.60 divided by $1,450 per ton). NASS data for 2008 is not yet available. However, applying the same calculations above using the average grower price for 2005–07 would result in estimated assessment revenue as a percentage of total grower revenue of.02 percent for the 2008–09 crop year ($0.30 divided by $1,437 per ton). Thus, the assessment revenue should be well below 1 percent of estimated grower revenue in 2008.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the California dried prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 26, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting the rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2008–09 crop year began on August 1, 2008, and the marketing order requires that the rate of assessment for each year apply to all assessable prunes handled during the year; (2) this action decreases the assessment rate for assessable prunes beginning with the 2008–09 crop year; (3) handlers are aware of this action which was unanimously recommended at a public meeting and is similar to actions recommended by the Committee in past years, and (4) this interim final rule provides for a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 993 is amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 993.347 is revised to read as follows:

§ 993.347 Assessment rate.

On and after August 1, 2008, an assessment rate of $0.30 per ton of salable dried prunes is established for California dried prunes.

Dated: August 20, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–19695 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 6328]

RIN 1400–AC04

Aliens Inadmissible Under the Immigration and Nationality Act, as Amended: Unlawful Voters

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule adopts as final the Department interim rule which amended the regulations concerning visa ineligibility for aliens who vote unlawfully. The amendment was necessary to comply with the provisions of the Child Citizenship Act of 2000.

DATES: This rule is effective August 26, 2008.

FOR FURTHER INFORMATION CONTACT: Penafrancia D. Salas, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520–0106, (202) 663–2878.

SUPPLEMENTARY INFORMATION:

What is the Authority and Exception for this rule?

On June 21, 2005, the Department published an interim rule [70 FR 35526] that implemented Section 201(b)(1) of Public Law 106–395, Child Citizenship Act of 2000 [February 27, 2001]. This Act amended Section 212(a)(10) of the Immigration and Nationality Act (INA) by adding an exception to the ground of inadmissibility, INA 212(a)(10)(D), for aliens who voted in violation of the U.S. law. Under INA 212(a)(10)(D), in general, an alien will continue to be inadmissible, and therefore, ineligible for a visa, if the alien has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation. Nevertheless, pursuant to the new exception, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen.

Were comments solicited in the Departments Interim rule?

Yes, the Department solicited comments; however, no comments were received.

The final rule is unchanged from the interim rule which amended the Departments regulations at 22 CFR 40.104, published in the **Federal Register** on June 21, 2005 (70 FR 35526–35527). The interim rule is hereby adopted as final.

Dated: August 14, 2008.

Janice L. Jacobs,

Assistant Secretary for Consular Affairs, Department of State.

[FR Doc. E8–19755 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 630

[FHWA Docket No. FHWA–2007–0020]

RIN 2125–AF23

Advance Construction of Federal-Aid Projects

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulation for advance construction of Federal-aid projects by: (a) Removing the restriction that a State must obligate all of its allocated or apportioned funds, or demonstrate that it will use all obligation authority allocated to it for Federal-aid highways and highway safety construction, prior to the approval of advance construction projects; and (b) clarifying that advance construction procedures may be used for all categories of Federal-aid highway funds, and that any available Federal-aid funds for which a project is eligible may be used when a project is converted to a Federal-aid project. These revisions make the regulation consistent with the advance construction statute, which was amended by a provision enacted in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU).

DATES: *Effective Date:* September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Dale Gray, Federal-aid Financial Management Division, (202) 366–0978, or Mr. Steven Rochlis, Office of the Chief Counsel, (202) 366–1395, Federal Highway Administration, 1200 New Jersey Avenue, SE., 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:

Electronic Access

An electronic copy of the NPRM, the comments received and a copy of this document may be viewed at *www.regulations.gov.* A copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *http://www.archives.gov* or the Government Printing Office's Web page at *http://www.gpoaccess.gov/nara.*

Background

Section 115 of title 23, United States Code, permits the Secretary to authorize States to advance the construction of Federal-aid highway projects without requiring that Federal funds be obligated at the time the FHWA approves a project. The State may proceed with an advance construction project using State funds as no present or future Federal funds are actually committed to the project. At any time the State may request that the project be converted to a Federal-aid project provided that sufficient Federal-aid funds and obligation authority are available. A State also may request a partial conversion where only a portion of the Federal share of project costs is obligated and reimbursed; and the remainder may be converted at a later time provided that funds and associated obligation authority are available. Only the amount converted to a Federal-aid project becomes an obligation of the Federal Government.

Section 1501 of SAFETEA–LU (Pub. L. 109–59, 119 Stat. 1144) amended 23 U.S.C. 115 to remove a restriction that a State must obligate all of its allocated or apportioned funds, or demonstrate that it will use all obligation authority allocated to it for Federal-aid highways and highway safety construction, prior to the approval of advance construction projects. Section 1501 also amended the statute to clarify that advance construction procedures can be used for all categories of Federal-aid highway funds and that when a project is converted to a regular Federal-aid project, any available Federal-aid funds may be used to convert a project which is eligible for that funds class. The FHWA regulations concerning advance construction, which reflect the advance construction requirements prior to the enactment of SAFETEA–LU, are therefore no longer consistent with the statute.

The FHWA published a notice of proposed rulemaking (NPRM) on March 6, 2008, at 73 FR 12038. In the NPRM, the FHWA proposed to (a) remove the restriction that a State must obligate all of its allocated or apportioned funds, or demonstrate that it will use all obligation authority allocated to it for Federal-aid highways and highway safety construction, prior to the approval of advance construction projects; and (b) provide clarification that advance construction procedures may be used for all categories of Federal-aid highway funds, and that any available Federal-aid funds for which a project is eligible may be used when a project is converted to a Federal-aid project.

Discussion of Comments

We received comments from the West Virginia Department of Transportation and Pennsylvania Department of Transportation (PennDOT) who supported the proposed revisions in the NPRM. Both respondents noted that the proposal would result in increased flexibility in the use of Federal-aid highway funds. Additionally, PennDOT mentioned increased cash flow possibilities, removal of the restrictions on the use of funds, clarification that advance construction may be used for all categories of Federal-aid highway funds, and the ability to convert projects using any available Federal-aid funds which a project may be eligible, as additional benefits resulting from the changes proposed in the NPRM.

The docket did not receive any comments opposing the language in the NPRM. The FHWA is adopting the revisions as proposed in the NPRM as final.

Rulemaking Analyses and Notices

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

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This final rule will not adversely affect, in a material way, any sector of the economy. This action would revise the regulation for advance construction of Federal-aid projects by removing the restriction that a State must obligate all of its allocated or apportioned funds, or demonstrate that it will use all obligation authority allocated to it for Federal-aid highways and highway safety construction, prior to the approval of advance construction projects. This action also clarifies that advance construction procedures may be used for all categories of Federal-aid highway funds, and that any available Federal-aid funds for which the project is eligible may be used when a project is converted to a Federal-aid project. There will not be any additional costs incurred by any affected group as a result of this final rule. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees or loan programs. Consequently, a regulatory evaluation is not required.

Regulatory Flexibility Act

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

Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action would not warrant the preparation of a Federalism assessment. The FHWA has determined that this action would not affect the States' ability to discharge traditional State government functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act of 1995

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

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year. (2 U.S.C. 1532)

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

The FHWA has analyzed this action for the purposes of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of the environment.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the final rule would not have substantial direct effects on one or more Indian tribes; would not impose substantial compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

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

List of Subjects in 23 CFR Part 630

Reimbursement, Grants programs—transportation, Highways and roads.

Issued on: August 15, 2008.

James D. Ray,

Acting Federal Highway Administrator.

■ In consideration of the foregoing, the FHWA amends Chapter I of title 23, Code of Federal Regulations, by revising Part 630, as set forth below.

PART 630—PRECONSTRUCTION PROCEDURES

■ 1. The authority citation for part 630 is revised to read as follows:

Authority: 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1501 and 1503 of Public Law 109–59, 119 Stat. 1144; Public Law 105–178, 112 Stat. 193; Public Law 104–59, 109 Stat. 582; Public Law 97–424, 96 Stat. 2106; Public Law 90–495, 82 Stat. 828; Public Law 85–767, 72 Stat. 896; Public Law 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.48(b).

■ 2. Revise § 630.703 to read as follows:

§ 630.703 Eligibility.

(a) The State Department of Transportation (DOT) may proceed with a project authorized in accordance with title 23, United States Code:

(1) Without the use of Federal funds; and

(2) In accordance with all procedures and requirements applicable to the project other than those procedures and requirements that limit the State to implementation of a project—

(i) With the aid of Federal funds previously apportioned or allocated to the State; or

(ii) With obligation authority previously allocated to the State.

(b) The FHWA, on the request of a State and execution of a project agreement, may obligate all or a portion of the Federal share of a project authorized to proceed under this section from any category of funds for which the project is eligible.

§ 630.709 [Amended]

■ 3. Amend § 630.709 by removing the term ''SHA'' in each place it appears, and add in its place the term ''State Department of Transportation.''

[FR Doc. E8–19636 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0823]

RIN 1625–AA87

Security Zone: Rocket Launch, NASA Wallops Flight Facility (WFF), Wallops Island, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The U. S. Coast Guard is establishing a security zone extending 12 nautical miles offshore from the Mid-Atlantic Regional Spaceport (MARS) Pad 0B launch complex for the launch of a large suborbital test rocket by the National Aeronautics and Space Administration (NASA). The NASA rocket launch is scheduled to occur between 2 a.m. and 4 p.m. on August 21, 2008, on Wallops Island, VA. If the launch is postponed because of inclement weather or technical difficulties, it will be attempted between 2 a.m. and 4 p.m. on each subsequent day after August 21, 2008, until the launch takes place or until 4 p.m. August 30, 2008. After August 30, 2008, the rule will no longer be in effect. This action is necessary to ensure the safety of persons and property, and to prevent terrorist acts or incidents on U.S. navigable waters during the rocket launch. This rule prohibits vessels and people from entering the security zone and requires vessels and persons in the security zone to depart the security zone.

DATES: This rule is effective from 2 a.m. on August 21, 2008, through 4 p.m. on August 30, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0823 and are available online at *http://www.regulations.gov.* They are also available for inspection or copying in two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; and the Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Norfolk, VA 23510 between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call LT Tiffany Duffy, Chief Waterways Management Division, Sector Hampton Roads at (757) 668–5580. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any

delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to prevent traffic from transiting the waters in the vicinity of Wallops Island, Virginia, in order to provide for the security of the launch and protection of life and property on navigable waters.

This temporary security zone of short duration is necessary to coordinate security operations and establish a secure environment for NASA personnel and the public at large. If the launch occurs as planned on August 21, 2008, the duration of the effective period for this temporary security zone on all subsequent days will not be enforced. The zone should have minimal impact on vessel transit since vessels can safely transit around the zone and are not precluded from using any portion of the waterway except the security zone itself.

For the same reasons discussed above, the Coast Guard finds under 5 U.S.C. 553(d)(3) that good cause exists for making this regulation effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule are intended to protect NASA personnel and the public from waterborne security threats. Any delay in the effective date of this rule is contrary to public and national interests.

Background and Purpose

On August 21, 2008, NASA will attempt to launch a large suborbital rocket from Wallops Island, VA. As the lead federal agency for maritime homeland security, the Coast Guard has determined that the Coast Guard Captain of the Port must have the means to be aware of, deter, detect, intercept, and respond to asymmetric threats, acts of aggression, and attacks by terrorists on the American homeland while still maintaining our freedoms and sustaining the flow of commerce. This temporary security zone is to safeguard human life, vessels, and waterfront facilities against sabotage or terrorist attacks.

Additionally, spectators will be observing from both land and sea. Due to the need to provide security for a satellite launch of a NASA rocket, and for the need to protect the launch vehicle and equipment, access in the vicinity of this event will be temporarily restricted.

Discussion of Rule

The U.S. Coast Guard is establishing a security zone on the navigable waters of the Atlantic Ocean east of Wallops and Assawoman Islands in Virginia, and southeast of Assateague Island. This security zone, which extends out 12-nautical miles from shore, encompasses all navigable waters within a line beginning near the southeast tip of Assateague Island at37°51′89″ N/75°27′38″ W;, thence southeasterly to a point 37°51′64″ N/75°17′56″ W, thence southeasterly to a point 37°39′32″ N/75°05′96″ W, thence southwesterly to a point 37°30′94″ N/75°16′72″ W, thence northwesterly to a point 37°40′21″ N/75°31′96″ W, thence north to a point 37°46′62″ N/75°30′71″ W, thence back to the point of origin.

There is an existing Army Corps of Engineers danger zone in 33 CFR 334.130 that restricts access to waters closer to Wallops Islands. That regulation provides for a visual notice of intent to conduct rocket-launching operations involving the area. An intent to launch is indicated—

> By a signal consisting of a large orange-colored, ''blimp-shaped'' balloon by day and a signal rotating alternately red and white beacon by night. The balloon shall be flown at latitude 37°50′38″, longitude75°28′47″ and the beacon shall be displayed about 200 feet above mean high water at latitude 37°50′16″, longitude 75°29′07″. The appropriate one of these signals shall be displayed 30 minutes prior to rocket-launching time and shall remain displayed until danger no longer exists.

33 CFR 334.130(b)(3). In addition to watching for that intent to launch visual clue, for purposes of this security zone, mariners should listen for Coast Guard notifications of attempts to launch via maritime advisories.

This temporary security zone will be in effect from 2 a.m. on August 21, 2008, to 4 p.m. on August 30, 2008. The zone will be enforced from 2 a.m. until 4 p.m. on August 21, 2008, and if the launch is postponed, the zone will be enforced, between 2 a.m. and 4 p.m., on each subsequent day the launch is attempted or until 4 p.m. August 30, 2008.

After 4 p.m. on August 30, 2008, this rule will no longer be in effect. Except for participants and vessels authorized by the Captain of the Port Representative, no person or vessel may enter or remain in the security zone.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the security zone, the effect of this rule will not be significant because: (i) The security zone will be in effect for a limited duration; (ii) the zone is of limited size; and (iii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

The U.S. Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

However, this rule may affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in the described portion of the security zone during the enforcement periods from 2 a.m. to 4 p.m. from August 21, 2008, through August 30, 2008. The security zone will not have a significant impact on a substantial number of small entities. Maritime advisories will be issued, so the mariners can adjust their plans accordingly.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The

Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the U.S. Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (34)(g), of the Instruction, an environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

■ 2. Add Temporary § 165.T05–0823, to read as follows:

§ 165.T05–0823 Security Zone; Rocket Launch, NASA Wallops Flight Facility (WFF), Wallops Island, VA.

(a) *Location.* The following area is a security zone: All waters of the Atlantic Ocean east of Wallops and Assawoman Islands in Virginia, and southeast of Assateague Island encompassed by a line beginning near the southeast tip of Assateague Island at 37°51′89″ N/75°27′38″ W, thence southeasterly to a point 37°51′64″ N/75°17′56″ W, thence southeasterly to a point 37°39′32″ N/75°05′96″ W, thence southwesterly to a point 37°30′94″ N/75°16′72″ W, thence northwesterly to a point 37°40′21″ N/75°31′96″ W, thence north to a point 37°46′62″ N/75°30′71″ W, thence back to the point of origin.

(b) *Definition:* For purposes of enforcement of this section, *Captain of the Port Representative* means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:* (1) In accordance with the general regulations in § 165.33 of this part, entry into the security zone described in paragraph (a) of this section is prohibited unless authorized by the Captain of the Port, Hampton Roads, Virginia, or the *Captain of the Port Representative.*

(2) The operator of any vessel granted permission to enter this security zone must:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign; and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads, Virginia can be contacted at telephone number (757) 668–5555.

(4) U.S. Coast Guard vessels enforcing the security zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) *Effective period:* This section is effective from 2 a.m. on August 21, 2008 to 4 p.m. on August 30, 2008.

(e) *Enforcement period:* This section will be enforced from 2 a.m. to 4 p.m. on August 21, 2008, and each subsequent day a rocket launch at the NASA Wallops Flight Facility, Wallops Island, VA, is attempted until 4 p.m. August 30, 2008.

Dated: August 18, 2008.

Jeffrey P. Novotny,

Commander, U.S. Coast Guard, Acting Captain of the Port, Hampton Roads.

[FR Doc. E8–19739 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2740

[WO–350–08 1430 PN–24 1A]

RIN 1004–AE03

Recreation and Public Purposes Act; Solid Waste Disposal

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) amends a procedural regulation pertaining to the issuance of patents for public lands leased on or before November 9, 1988, for solid waste disposal or related purposes. The existing regulation requires the express approval of the Director of the Bureau of Land Management (BLM) before the lessee may receive a patent to such lands. In 1992, when the regulation was promulgated, most of the BLM's employees with the necessary expertise were centralized in the BLM's headquarters in Washington, DC, and express approval by the Director was deemed necessary. This is no longer the case, since employees with the necessary expertise are now located in State Offices of the BLM. Consistent with Department of the Interior policy to delegate responsibility to the lowest appropriate organizational levels, this rule removes the requirement for express approval by the Director. As this administrative final rule amends an internal agency procedure, it is exempt from the usual requirement for notice and an opportunity for public comment, under the Administrative Procedure Act.

DATES: This rule is effective October 27, 2008.

ADDRESSES: Information or questions regarding this final rule should be addressed in writing to the Director, Bureau of Land Management, 1849 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: For information on the substance of the proposed rule, please contact Jeff Holdren at 202–452–7779. For information on procedural matters, please contact Jean Sonneman at 202–785–6577. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals during business hours. FIRS is available twenty-four hours a day, seven days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of the Final Rule
III. Procedural Matters

I. Background

The Secretary of the Interior is authorized to transfer or lease certain public lands to State and local governmental agencies and to nonprofit corporations and associations for recreation and public purposes under the Act of June 14, 1926 (43 U.S.C. 869 *et seq.*), commonly known as the Recreation and Public Purposes (R&PP) Act. Regulations implementing the Secretary of the Interior's authority to sell or lease lands under the R&PP Act are located in 43 CFR part 2740. These regulations explain the following:

- Policies pertaining to the BLM's implementation of the R&PP Act (43 CFR 2740.0–6);
- Definitions of applicable terms (43 CFR 2740.0–5);
- Lands subject to disposition (43 CFR 2741.1);
- The criteria for qualified applicants (43 CFR 2741.2);
- The guidelines for conveyance and lease under the act (43 CFR 2741.5); and
- Certain other procedural matters and requirements relating to public lands conveyed by patent for the purpose of solid waste disposal. (43 CFR subpart 2743).

The BLM promulgated the regulations at 43 CFR subpart 2743 in order to reduce or avoid Federal liabilities that might arise from the conveyance of landfills contaminated by hazardous substances. Some of the regulations directly implement amendments to the R&PP Act that became effective on November 10, 1988. One such regulation is 43 CFR 2743.2(a)(5), which requires an investigation to determine whether or not any hazardous substance is present on public lands before conveying them by patent for new solid waste disposal sites. 43 U.S.C. 869–2(b)(2).

With respect to lands leased before November 9, 1988, the BLM exercised its rulemaking discretion to promulgate a similar investigative requirement, and to require the express approval of the Director of the BLM before the lessee may receive a patent to such lands. 43 CFR 2743.3. Neither of these requirements appears in the R&PP Act. However, at the time, the BLM deemed both provisions necessary because the Bureau's environmental expertise was concentrated at its headquarters in Washington, DC. In contrast, each BLM State Office now employs one or more environmental professionals with the expertise to review locally conducted investigations. It is for this reason that this rule removes the requirement for express approval by the Director.

In general, the Administrative Procedure Act (APA) requires that Federal agencies give notice and provide an opportunity for the public to comment before promulgating a final rule. However, the APA provides that prior notice and comment are not required for ''interpretive rules, general statements of policy or rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). This exception applies in this instance because this final rule simply amends the BLM's internal administrative procedures for patenting land. As discussed below, this final rule is also an action that is categorically excluded from certain requirements of the National Environmental Policy Act (NEPA). See 42 U.S.C. 4332(2)(C); 40 CFR 1508.4; 516 Departmental Manual (DM), Chapter 2, Appendix 1, CX 1.10.

II. Discussion of the Final Rule

The existing regulation states that when a lessee requests or concurs in the issuance of a patent to lands included in a lease, or portion of a lease, issued on or before November 9, 1988, that have been used, as specified in the plan of development, for solid waste disposal or for any other purposes that may have

resulted in or included the disposal, placement, or release of any hazardous substance on the land, the patent may only be issued with the express approval of the Director, BLM. This rule was adopted following enactment of Public Law 100–648 which provided special procedures for conveyance of public lands for solid waste disposal purposes. The rule was promulgated in 1992 at a time when BLM State Offices did not routinely have qualified environmental specialists on staff and most of the BLM's environmental expertise was located in its headquarters in Washington, DC. The environmental investigative report which precedes patent approval was, at that time, submitted to and reviewed in the BLM's headquarters in Washington, DC.

The requirement for express approval by the Director, BLM, is no longer needed because each BLM State Office now employs one or more environmental professionals with the expertise necessary to evaluate and document the conditions of the leased lands prior to patent. The existing requirement is inconsistent with Department of the Interior policy to delegate authority to the lowest appropriate organizational levels, and impedes the BLM policy goal to process requests for patents expeditiously. This final rule removes a procedural step that has become superfluous, as it is no longer necessary for full compliance with statutory intent.

III. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

This final rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget under Executive Order 12866. This final rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This final rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This final rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; nor does it raise novel legal or policy issues.

National Environmental Policy Act

The BLM has determined that this final rule removing the requirement for express approval by the Director of BLM prior to patent issuance for lands leased prior to November 9, 1988, is of a procedural nature whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis; further, the action(s) of patent issuance will later be subject to the NEPA process, either collectively or case-by-case. Therefore, this rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act, pursuant to 516 DM, Chapter 2, Appendix 1, CX 1.10. In addition, this rule does not present any of the 12 extraordinary circumstances listed in 516 DM, Chapter 2, Appendix 2. Pursuant to the Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term ''categorical exclusion'' means a category of actions which do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The BLM has determined that this final rule, removing the requirement for the Director of the BLM to expressly approve a patent to lands leased prior to November 9, 1988, will not have a significant economic impact on a substantial number of small entities under the RFA. As stated above in the preamble, the final rule only changes the administrative process for patent approval in a limited number of instances.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This final rule is not a ''major rule'' as defined at 5 U.S.C. 804(2) because it will not have an annual effect on the economy greater than $100 million; it will not result in major cost or price increases for consumers, industries, government agencies, or regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector, in the aggregate, of $100 million or more per year; nor does the rule have a significant or unique effect on state, local, or tribal governments. The rule would impose no requirements on these entities. The BLM has already shown in the previous paragraphs of this section of the preamble that the change effected by this rule would not have effects approaching $100 million per year on the private sector. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Report Act (2 U.S.C. 1531 *et seq.*).

Executive Order 12630, Government Action and Interference With Constitutionally Protected Property Rights (Takings)

This rule is not a government action capable of interfering with constitutionally protected property rights. The purpose of the rule is to be able to respond more quickly to requests for issuance of patent documents. Therefore, the BLM has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The rule will 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 levels of government. It would not apply to states or local governments or state or local governmental entities. Therefore, in accordance with Executive Order 13132, the BLM has determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

In accordance with Executive Order 12988, the BLM 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 Executive Order 12988.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, the BLM finds that this rule will

not result in significant changes to BLM policy and that Tribal Governments will not be unduly affected by this rule. This rulemaking has no bearing on trust lands, or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs.

Information Quality Act

In developing this rule, the BLM did not conduct or use a study, experiment or survey requiring peer review under the Information Quality Act, 44 U.S.C. 3516 note.

Executive Order 13211, Effects on the Nation's Energy Supply

This rule is a purely administrative regulatory action and has no implications under Executive Order 13211.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined that this rule is administrative in content, effecting only procedural change affecting issuance of land patents. This rule does not impede facilitating cooperative conservation; takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provides that the programs, projects, and activities are consistent with protecting public health and safety.

Paperwork Reduction Act

The BLM has determined that this regulation does not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Executive Order 12866, Clarity of Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make this regulation easier to understand, including answers to questions such as the following:

1. Are the requirements in the final regulation clearly stated?
2. Does the final regulation contain technical language or jargon that interferes with its clarity?
3. Does the format of the final regulation (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?
4. Would the regulation be easier to understand if it was divided into more (but shorter) sections?
5. Is the description of the final regulation in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the regulation? How could this description be more helpful in making the regulation easier to understand?

Please send any comments you have on the clarity of the regulation to the address specified above in the **ADDRESSES** section.

Authors

The principal author of this rule is Linda Resseguie of the BLM's Division of Lands and Realty, Washington Office, assisted by Jean Sonneman of the BLM's Division of Regulatory Affairs, Washington Office.

List of Subjects in 43 CFR Part 2740

Intergovernmental relations; Land Management Bureau; Public lands—sale; Recreation and recreation sites; Reporting and recordkeeping requirements.

Julie Jacobson,

Deputy Assistant Secretary, Land and Minerals Management.

■ Accordingly, for the reasons stated in the preamble and under the authority of the R&PP Act (43 U.S.C. 869 *et seq.*), the BLM amends part 2740 of Title 43 of the Code of Federal Regulations as set forth below:

PART 2740—RECREATION AND PUBLIC PURPOSES ACT

■ 1. The authority citation for part 2740 continues to read as follows:

Authority: 43 U.S.C. 869 *et seq.,* 43 U.S.C. 1701 *et seq.,* and 31 U.S.C. 9701.

■ 2. Amend § 2743.3 by revising the introductory text of paragraph (a) to read as follows:

§ 2743.3 Leased disposal sites.

(a) Upon request by or with the concurrence of the lessee, the authorized officer may issue a patent for those lands covered by a lease, or portion thereof, issued on or before November 9, 1988, that have been or will be used, as specified in the plan of development, for solid waste disposal or for any other purpose that the authorized officer determines may result in or include the disposal, placement, or release of any hazardous substance, subject to the following provisions:

* * * * *

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 08–65; FCC 08–182]

Assessment and Collection of Regulatory Fees for Fiscal Year 2008

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we amend our Schedule of Regulatory Fees to collect $312,000,000 in regulatory fees for Fiscal Year (FY) 2008, pursuant to section 9 of the Communications Act of 1934, as amended (the Act). These fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.

DATES: Effective September 25, 2008.

FOR FURTHER INFORMATION CONTACT: CORES Helpdesk at (877) 480–3201, option 4, or *ARINQUIRIES@fcc.gov.*

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I. Introduction

1. In this Report and Order we conclude a proceeding to collect $312,000,000 in regulatory fees for Fiscal Year (''FY'') 2008, pursuant to section 9 of the Communications Act of 1934, as amended (the ''Act''). Section 9 regulatory fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.[1] In this annual regulatory fee proceeding, we retain the established methods, policies, and procedures for collecting section 9 regulatory fees adopted by the Commission in prior years. Consistent with our established practice, we intend to collect these regulatory fees during a filing window in September 2008 in order to collect the required amount by the end of our fiscal year.

2. As a general matter, our annual regulatory fee rulemakings must be concluded in a short time frame to allow regulatees to make their payments for the relevant fiscal year that fund Commission operations. These yearly rulemaking proceedings are not conducive to exploring more general regulatory fee issues. We have not conducted an in-depth review of our regulatory fee methodology since 1994.[2] We, however, adopt a Further Notice of Proposed Rulemaking (''FNPRM'') to explore how we can comprehensively make the Commission's regulatory fee process more equitable.

II. Report and Order

3. On May 8, 2008, we released a Notice of Proposed Rulemaking and Order (''*FY 2008 NPRM*'') seeking comment on regulatory fee issues for FY 2008.[3] The section 9 regulatory fee proceeding is an annual rulemaking process to ensure the Commission collects the fee amount required by Congress each year. In the *FY 2008 NPRM*, we proposed to largely retain the section 9 regulatory fee methodology used in the prior fiscal year. We received nine comments and 12 reply comments.[4] We address the issues raised in our *FY 2008 NPRM* below.

A. Calculation of Revenue and Fee Requirements

4. In our FY 2008 regulatory fee assessment, we use the same section 9 regulatory fee assessment methodology adopted for FY 2007. Each fiscal year, the Commission proportionally allocates the total amount that must be collected via section 9 regulatory fees. The results of our FY 2008 regulatory fee assessment methodology (including a comparison to the prior year's results) are contained in Attachment B. To collect the $312,000,000 required by Congress, we adjust the FY 2007 amount upward by approximately 7.5 percent. Consistent with past practice, we then divide the FY 2008 amount by the number of payment units in each fee category to determine the unit fee.[5] As in prior years, for cases involving small fees, *e.g.*, licenses that are renewed over a multiyear term, we divide the resulting unit fee by the term of the license and then round these unit fees consistent with the requirements of section 9(b)(2) of the Act.

B. Additional Adjustments to Payment Units

5. In calculating the FY 2008 regulatory fees listed in Attachment C, we further adjusted the FY 2007 list of payment units (Attachment A) based upon licensee databases and industry and trade group projections. In some instances, Commission licensee databases were used; in other instances, actual prior year payment records and/or industry and trade association projections were used in determining the payment unit counts.[6] Where appropriate, we adjusted and rounded our final estimates to take into consideration events that may impact the number of units for which regulatees submit payment, such as waivers and exemptions that may be filed in FY 2008, and fluctuations in the number of licensees or station operators due to economic, technical, or other reasons. Therefore, our estimated FY 2008 payment units are based on FY 2007 actual payment units, but the number may have been rounded or adjusted slightly to account for these variables.

6. We consider additional factors in determining regulatory fees for AM and FM radio stations. These factors are facility attributes and the population served by the radio station. The calculation of the population served is determined by coupling current U.S. Census Bureau data with technical and engineering data, as detailed in Attachment D. Consequently, the population served, as well as the class and type of service (AM or FM), determines the regulatory fee amount to be paid.[7]

1. Commercial Mobile Radio (''CMRS'') Messaging Service

7. CMRS Messaging Service, which replaced the CMRS One-Way Paging fee category in 1997, includes all

[1] 47 U.S.C. 159(a).

[2] *See Implementation of Section 9 of the Communications Act*, Report and Order, 9 FCC Rcd 5333 (1994).

[3] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 7987 (2008) (''*FY 2008 NPRM*'').

[4] *See* Appendix C for the list of commenters and abbreviated names.

[5] In many instances, the regulatory fee amount is a flat fee per licensee or regulatee. In some instances, the fee amount represents a per-unit fee (such as for International Bearer Circuits), a per-unit subscriber fee (such as for Cable, Commercial Mobile Radio Service (''CMRS'') Cellular/Mobile and CMRS Messaging), or a fee factor per revenue dollar (Interstate Telecommunications Service Provider (''ITSP'') fee). The payment unit is the measure upon which the fee is based, such as a licensee, regulatee, or subscriber fee.

[6] The databases we consulted include, but are not limited to, the Commission's Universal Licensing System (''ULS''), International Bureau Filing System (''IBFS''), Consolidated Database System (''CDBS'') and Cable Operations and Licensing System (''COALS''). We also consulted industry sources including, but not limited to, *Television & Cable Factbook* by Warren Publishing, Inc., and the *Broadcasting and Cable Yearbook* by Reed Elsevier, Inc., as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast* and *Annual CMRS Competition Report.*

[7] In addition, beginning in FY 2005, we established a procedure by which we set regulatory fees for AM and FM radio and VHF and UHF television Construction Permits each year at an amount no higher than the lowest regulatory fee in that respective service category. For example, the regulatory fee for a Construction Permit for an AM radio station will never be more than the regulatory fee for an AM Class C radio station serving a population of less than 25,000.

narrowband services.[8] In the *FY 2008 NPRM*, we proposed maintaining the messaging service regulatory fee at $0.08 per subscriber; the rate first established for this service in FY 2002.[9]

8. One commenter, AAPC, addressed this issue.[10] AAPC agrees with our proposal and observes that maintaining the fee at the existing level is a reasonable and appropriate action due to the paging industry's declining subscriber base.[11] We conclude that for FY 2008 we should continue this regulatory fee rate at $0.08 per subscriber due to the declining subscriber base in this industry.[12]

2. Private Land Mobile Radio Service (''PLMRS'')

9. Commenters observe that the proposed FY 2008 fees for a PLMRS applicant are $40 per year for exclusive use PLMRS and $20 per year for shared use PLMRS.[13] Regulatory fees for this service have increased significantly over the past three years;[14] however, there are 74 percent fewer licensees in 2008 than there were in 2005.[15] PCIA also ''perceives'' a decline in Commission staffing devoted to PLMRS, which would correlate with the reduction in licensees.[16] Enterprise observes that there are few rulemakings associated with these licensees and the Commission has not allocated additional spectrum for these users since the mid-1980s.[17] In addition, because these licenses are site-specific, licensees often require multiple authorizations, which further increases the regulatory fee assessment.[18] Further, these Part 90 licenses are generally private internal systems used to support businesses and are not commercial communications systems with a substantial revenue stream.[19] For these reasons, commenters contend that we should not substantially increase the regulatory fees for PLMRS.

10. Instead of freezing the regulatory fees, we are going to address this matter more comprehensively in the attached FNPRM in the context of our entire regulatory fee structure. At this time; however, we are adopting the proposals in the *FY 2008 NPRM* for FY 2008.

3. Regulatory Fee Obligations for AM Expanded Band Broadcasters

11. Currently, AM expanded band stations in the 1610–1700 kHz range are exempt from regulatory fees, as a matter of Commission policy. In the *FY 2008 NPRM*, we sought comment on the most efficient way of assessing a regulatory fee on expanded band AM stations.[20] We sought comment on whether we should assess regulatory fees when the licensee has chosen to retain the expanded band station while no longer keeping the standard AM station as well as where the licensee continues to operate the standard AM station as well as the expanded band station.[21]

12. Two commenters addressed the AM expanded band issue. MRB is concerned with the situation where an expanded band licensee has relinquished its expanded band license but continues to operate under special temporary authority (''STA'').[22] In such a situation, the licensee is operating the standard band and the expanded band stations, but only holds a license to the standard band station. The five-year transition period for allowing lower band AM licensees to continue to operate the AM expanded band and the lower band has not yet expired for all licensees.[23]

13. There is no compelling reason to permanently exempt AM expanded band licensees from paying regulatory fees. As a general matter, it would be appropriate to treat the AM expanded band and the AM standard band similarly for regulatory fee purposes. We note, however, that currently only 20 licensees out of 54 have surrendered one of their dual licenses. The remaining 34 licensees have either conditionally surrendered one license and are operating under an STA permitting dual operation or have retained both licenses and are continuing dual operation under STAs. The Commission has before it the pending issue of whether we should permit licensees to continue to hold both standard band and expanded band licenses.[24] This issue should be resolved before we can assess regulatory fees on the expanded band AM licensees; therefore, we are not assessing regulatory fees on expanded band AM licenses at this time.

4. International Bearer Circuits

a. Background

14. In our *FY 2006 NPRM*,[25] we observed that VSNL Telecommunications (US) Inc. (''VSNL'') had filed a Petition for Rulemaking urging the Commission to revise its regulatory fee methodology for international bearer circuits (''IBCs'').[26] In the Petition, VSNL proposes that the Commission: (1) Reclassify non-common carrier submarine cable service as a new fee category[27] (all other carriers subject to IBC fees would be in the second category);[28] (2) apportion the IBC fee revenue requirement between the two categories, based on a comparative assessment of the regulatory services used by the entities in each category;[29] and (3) assess a flat annual fee per cable system for non-common carrier submarine cable operators.[30]

15. In our *FY 2008 NPRM*, we granted VSNL's petition and sought comment on the methodology used to calculate

[8] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96–186, Report and Order, 12 FCC Rcd 17161, 17184–85, para. 60 (1997) (''*FY 1997 Report and Order*'').

[9] *FY 2008 NPRM* at para. 5.

[10] AAPC Comments at 1–4.

[11] *Id.* at 2.

[12] The subscriber base in the paging industry declined 83 percent from 40.8 million to 7.1 million, from FY 1997 to FY 2007, according to FY 2007 collection data, as of Sept. 30, 2007.

[13] PCIA Comments at 2; Enterprise Reply Comments at 2–3.

[14] PCIA Comments at 2.

[15] PCIA Comments at 3; Enterprise Reply Comments at 3.

[16] PCIA Comments at 3.

[17] Enterprise Reply Comments at 4.

[18] Enterprise Reply Comments at 4–5.

[19] Enterprise Reply Comments at 5–6.

[20] *FY 2008 NPRM* at para. 7.

[21] *Id.*

[22] MRB has petitioned the Commission to waive the requirement that either the expanded band or the standard band license be returned.

[23] Chisholm Reply Comments at 1.

[24] *See* Petition for Stay of Effective Dates, filed Mar. 27, 2006; Request for Waiver of Rules Requiring Return of AM Licenses,'' filed Mar. 27, 2006.

[25] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Docket No. 06–68, Notice of Proposed Rulemaking, 21 FCC Rcd 3708, 3718, n.20 (2006) (''*FY 2006 NPRM*'').

[26] *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM–11312 (filed Feb. 6, 2006) (''VSNL Petition''). VSNL Telecommunications is now Tata Communications. We released a Public Notice designating the proceeding as RM–11312 and seeking comment on the Petition. *See* Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice*, Report No. 2759 (rel. Feb. 15, 2006). In our *FY 2006 Report and Order* we stated that the issues presented in the Petition warranted consideration separately from the Commission's annual regulatory fee proceeding. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Docket No. 06–68, Report and Order, 21 FCC Rcd 8092, 8098–99, para. 18 (2006) (''*FY 2006 Report and Order*'').

[27] Petition at 5. *See also* Apollo RM–11312 Comments at 2–4. AT&T filed comments disagreeing with this proposal and observing that the proposed new fee category would likely exclude all or most facilities-based carrier circuits on non-common carrier cables as well as the international bearer circuits on common carrier cables. AT&T RM–11312 Comments at 6. SIA agrees that regulatory fee reform is needed, but contends that such reform should extend to the treatment on non-common carrier satellite operators as well. SIA RM–11312 Comments at 1–4.

[28] Petition at 5.

[29] *Id.* at 5–6. *See also* Level 3 RM–11312 Comments at 6–7.

[30] Petition at 6. *See also* Hibernia Atlantic RM–11312 Comments at 7–8; Level 3 RM–11312 Comments at 8–10 (supporting a flat per-system fee on all submarine cable systems); Level 3 RM–11312 Reply Comments at 8–9.

regulatory fees for providers of international bearer circuits.[31] We specifically sought comment on whether the Commission should retain the current methodology used to assess these regulatory fees, or modify the methodology.[32] In addition to the comments filed to the *FY 2008 NPRM*, a Revised Joint Proposal for amending our IBC regulatory fee methodology was filed as an ex parte by a group of carriers on July 11, 2008.[33]

16. This proposal modified the earlier joint proposal to address several concerns raised by the parties. The Revised Joint Proposal would do the following: (1) Create a new regulatory fee category for submarine cablesystems, a new SCS fee, for both common carrier and non-common carrier systems.[34] The new SCS fee would be a flat fee, per cable landing license, with a reduced fee amount for ''small-capacity systems.'' In addition, a consortium would be considered one cable landing license for SCS fee purposes, regardless of how many licensees were members of the consortium. (2) The SCS fee would be based originally on one-half of the current IBC category. According the Revised Joint Proposal, this would subsequently be revised downward based on the Commission's internal calculations of regulatory effort expended to regulate this industry.[35] (3) In addition, there would be a new IBC fee based on active circuits, originally based on the remaining one-half of the current fee category, for common carriers. Thus, under the Revised Joint Proposal, common carriers would pay the flat SCS per license fee and a per circuit fee and non-common carriers would pay only the flat SCS per license fee.

17. Our current rules provide that regulatory fees for international bearer circuits are to be paid by facilities-based common carriers that have active international bearer circuits in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates.[36] Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (''IRU'') basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services.[37] Regulatory fees are based on the number of active 64 kbps international bearer circuits as of December 31 of the previous year.

18. We agree with the commenters who argue that our methodology for calculating IBC regulatory fees needs to be reformed and we intend to adopt a revised methodology to be effective for FY 2009. We recognize that an in-depth review of our IBC regulatory fee methodology may be long overdue. We also note that there appears to be significant non-compliance with our current regulatory fee requirements. One issue raised by several commenters is that the regulatory fee for IBCs is far too high. We will need to address the issue of non-compliance to determine if the fee is still considered unreasonably high after non-payors are contributing as well.[38] As we mentioned earlier, if some do not pay their share of regulatory fees, the amount of fees due is increased for the remaining parties. We consider rule non-compliance a serious issue affecting all regulatees.

b. Discussion

19. Several commenters argue that non-common carrier submarine cable operators generate only a fraction of the regulatory costs common carriers generate, yet they pay the same per unit regulatory fees.[39] AT&T and Verizon disagree, and argue that due to recent deregulation such as elimination of tariff filing requirements, the reduced disparities between the Commission's treatment of these services support the continued application of the same regulatory fees to all international bearer circuits.[40] AT&T observes that the private carriers' argument ignores the regulatory costs incurred in connection with the Commission's international representational activities, work with foreign regulators, and other activities in support of the Commission's international regulatory goals to promote effective competition in the global marketplace.[41] AT&T contends that the same fees should be applied to all types of submarine cable systems.[42] The difference in size between common carrier systems and private carrier systems, contends AT&T, is even larger now than when VSNL filed its petition.[43] AT&T, Verizon, and Qwest

[31] The Commission's website provides the following information regarding International and Satellite License Fees, for FY 2007:

International Bearer Circuits

Who Must Pay: Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active international bearer circuits *as of December 31, 2006* in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. If you are required to pay regulatory fees, you should pay based on your active 64 KB circuit count *as of December 31, 2006.*

For more information regarding compliance with regulatory fee payment requirements for international bearer circuits, refer to *FCC Public Notice: Compliance with Regulatory Fee Requirements by Cable Landing Licensees Operating on a Non-Common Carrier Basis (DA 04–2027, released July 6, 2004).*

Fee Calculation: $1.05 per active 64 KB circuit or equivalent.

See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–275938A6. pdf.

[32] *FY2008 NPRM* at para. 8. Comments filed earlier in response to the VSNL Petition are referred to as ''RM–11312 Comments.'' Many of the same commenters filed comments on this issue in response to our *FY 2008 NPRM.* On May 30, 2008, a joint proposal for reforming International Bearer Circuit fees was submitted by Level 3 Communications, LLC, Brasil Telecom of America, Inc., Columbus Networks USA, Inc., ARCOS–1 USA, Inc., A.SUR Net, Inc., Hibernia Atlantic U.S. LLC, Pacific Crossing Limited, and PC Landing Corp. *See* Joint Proposal, MD Docket No. 08–65, Attach. (filed May 30, 2008).

[33] *See* Letter from Kent D. Bressie, Counsel, Level 3 Communications, LLC to Marlene H. Dortch, Secretary, FCC, MD Docket No. 08–65, Attach. (filed July 11, 2008). This revised joint proposal was submitted by Brasil Telecom of America, Inc., Columbus Networks USA, Inc., ARCOS–1 USA Inc., A.SUR Net, Inc., Global Crossing Ltd., Level 3 Communications, LLC, Hibernia-Atlantic U.S. LLC, Marine Cable Corp., Pacific Crossing Limited and PC Landing Corp., Reliance Globalcom Limited (fka FLAG Telecom Group Limited), and Tata Communications (US) Inc. (formerly VSNL International (US) Inc.) (''Revised Joint Proposal'').

[34] Revised Joint Proposal at 1.

[35] *Id.*

[36] *See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, Report and Order, 21 FCC Rcd 8092, 8107, n. 62 (2006) (''*FY 2006 Report and Order*''); *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, MD Docket No. 01–76, *Report and Order*, 16 FCC Rcd 13525, 13593 (2001); *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2005* at 3 (rel. July 2005) (the fact sheet is available on the FCC Web site at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC_249904A4.pdf*).

[37] *FY 2006 Report and Order*, 21 FCC Rcd at 8107, n. 62.

[38] We note that the flat fee proposed by commenters may address the non-compliance issue as well.

[39] *See, e.g.*, Petition at 10; Flag RM–11312 Comments at 3; SIA RM–11312 Comments at 4; Level 3 RM–11312 Reply Comments at 6–7; Level 3 Comments at 11–14.

[40] AT&T RM–11312 Comments at 8; Verizon RM–11312 Reply Comments at 2–3; Verizon Reply Comments at 4.

[41] AT&T RM–11312 Comments at 9; Verizon RM–11312 Reply Comments at 3; AT&T Reply Comments at 17; Verizon Reply Comments at 5.

[42] AT&T RM–11312 Reply Comments at 7.

[43] AT&T Comments at 3. AT&T observes that that the average capacity of the 27 U.S.-licensed non-common carrier systems is approximately 3.2 million circuits, almost ten times larger than the

oppose any new fee structure that would impose higher fees on facilities-based common carriers, such as the proposal that non-common carriers would no longer pay fees on active circuits.[44]

20. VSNL argues in its Petition that the number of active 64 kpbs circuits bears no relationship to the regulatory costs that operators generate.[45] For example, one commenter explains, if a licensee doubles its cable's capacity through a technology upgrade, the regulatory fee obligations will nearly double even though the regulatory costs to the Commission do not change.[46] Pacific contends that there is no correlation between cable system size and the Commission's regulatory effort.[47] Commenters observe that the 64 kbps increment measurement is an artifact of the original channelized telephone systems, but is not relevant to the current broadband environment where data passes unchannelized in packetized form.[48]

21. The flat annual fee proposed by VSNL as an alternative to our current circuit-based fee would be derived by dividing the revenue requirement for non-common carrier submarine cable systems by the number of licensed systems.[49] The Joint Proposal suggested by Level 3 and others and the Revised Joint Proposal *ex parte* would assess a per-system fee on common carriers and private carriers (regardless of system size) and would also impose a per-circuit fee for active circuits common carriers own or lease.[50] The net effect of either of the flat fee proposals would be to provide significant advantages to private carriers.[51] Global Crossing observes that the Joint Proposal would result in double counting where a common carrier has capacity from an affiliated private operator.[52] Common carriers disagree with the flat fee proposal on the grounds that this would require smaller systems to pay higher fees per circuit and would adversely affect common carrier systems which are generally smaller than non-common carrier systems.[53] The Joint Commenters contend that a flat per-system fee would discourage investment in the deployment of new submarine cable systems in the Caribbean or South America.[54] Instead, the Joint Commenters argue, the Commission should adopt a two-tiered approach.[55]

22. Pacific contends that the rate proposed in our *FY 2008 NPRM* of $1.09 is too high because the number of active circuits used in the calculation was far too low.[56] According to Pacific, international common carriers alone maintained 7.55 million active 64 kpbs circuits, so our estimate of 7.5 million for common carrier and non-common carrier combined must be revised upward.[57] Pacific concludes that if the Commission used more realistic estimates of active circuits, the per unit fee would be $.20 per circuit instead of $1.09 per circuit.[58] Several commenters observe that the prices for higher-capacity circuits have dropped more steeply than the prices for low-capacity circuits, thus the regulatory fee is an increasing percentage of the price of higher-capacity circuits.[59] The current IBC regulatory fee methodology discourages new investment to increase the capacity of existing undersea cables.[60] Verizon observes that under our current regulatory fee methodology, the IBC fee has dropped from $7.00 per circuit in 2000 to $1.09 per circuit in 2008, showing that increased demand has resulted in lower per circuit fees.[61] AT&T notes that private carriers have continued to rapidly expand their U.S. underseas cable capacity.[62]

23. Commenters also observe that the Commission has no way to monitor active IBCs and therefore cannot enforce compliance with regulatory fee requirements.[63] More stringent reporting requirements, generally opposed by private carriers, could eliminate the fee avoidance problem and further reduce the per circuit fee.[64] Pacific contends that the total number of active circuits is more than five times the number of payment units counted by the Commission.[65] Such significant undercounting of active circuits results in certain providers overpaying while others are underpaying.[66] Qwest observes that the Commission's reliance on section 43.82 reports of active circuits do not capture the circuits of private carriers.[67] The current practice of assessing fees based on a snapshot of active capacity on December 31 encourages operators to take capacity off line on December 31st to avoid having such capacity considered active.[68]

24. We agree with the commenters who argue that our methodology for calculating IBC regulatory fees needs to be reformed. We intend to resolve this issue within 60 days of adoption of this Order. Our rules should treat all providers subject to our regulatory fees in a nondiscriminatory and competitively neutral manner. If our rules permit certain entities to avoid complying with our regulatory fee requirements, the remaining carriers must pay a higher amount to compensate for those within the fee

average capacity of U.S. common carrier systems. *Id.* at note 4.

[44] AT&T Reply Comments at 1–6; Verizon Reply Comments at 2; Qwest Reply Comments at 2.

[45] Petition at 7–8. Level 3 contends that this fee timing issue can make owners base their capacity turn-up decisions on non-market factors, such as activating circuits only at certain times of the year. Level 3 RM–11312 Comments at 5.

[46] Flag RM–11312 Comments at 6. Reliance observes that, with respect to high-capacity leases, the per 64 kbps circuit fee distorts the market. Reliance Reply Comments at 5.

[47] Pacific Reply Comments at 5.

[48] Joint Commenters RM–11312 Reply Comments at 4–5; Global Crossing Comments at 2; Pacific Comments at 11; Tata Comments at 2–4. Commenters also observe that IBC operators sell services as a ''back up'' or restoration service, which does not fit the definition of ''active'' circuits. Level 3 Comments at 15. AT&T and Qwest, on the other hand, contend that IBC fees are based on ''active'' capacity, which provides a reasonable and nondiscriminatory method to allocate fees and is similar to the fee structure for other licensees. AT&T RM–11312 Comments at 11–13; Qwest Reply Comments at 3.

[49] Petition at 6. Apollo agrees with VSNL and argues that a fee per cable landing license, rather than a per 64 kpbs international bearer circuit, should be adopted. Apollo RM–11312 Comments at 6. SIA suggests assessing a flat fee based on section 214 authorizations and cable landing licenses. SIA RM–11312 Comments at 2. Pacific agrees that a per system fee would be fair, equitable, and easily administrated. Pacific Comments at 4. Telstra suggests that if we adopt a flat fee, we should establish a two-year ramp up period for newly-licensed systems. Telstra Reply Comments at 2–3.

[50] Level 3 Comments at 18; Level 3 Reply Comments at 5; Verizon Reply Comments at 3; Global Crossing Reply Comments at 2–3; Qwest Reply Comments at 4. Reliance supports the Joint Proposal. Reliance Reply Comments at 7.

[51] AT&T Reply Comments at 5. Qwest observes that the Joint Proposal contains different fee structures for submarine cable operators based on their common carrier or non-common carrier status and is not competitively neutral. Qwest Reply Comments at 5.

[52] Global Crossing Reply Comments at 2.

[53] AT&T RM–11312 Comments at 10–11; Qwest RM–11312 Reply Comments at 4; AT&T Comments at 3; AT&T Reply Comments at 1–6; Verizon Reply Comments at 1–3. The Joint Commenters, who operate smaller systems, contend that they would be unfairly prejudiced by a flat per-system fee. Joint Commenters at 2.

[54] Joint Commenters at 2.

[55] *Id.* at 3.

[56] Pacific Comments at 7–8.

[57] *Id.* citing the Commission's ''International Bureau Report on 2006 Section 43.82 Circuit Status Data,'' at 29, table 5.

[58] Pacific Comments at 8.

[59] Hibernia Atlantic RM–11312 Comments at 6–7; Apollo RM–11312 Comments at 6–7; Level 3 RM–11312 Comments at 3; Joint Commenters RM–11312 Reply Comments at 3–7; Global Crossing Comments at 3; Reliance Reply Comments at 5–6; Qwest Reply Comments at 2.

[60] Reliance Reply Comments at 6.

[61] Verizon Reply Comments at 5.

[62] AT&T Reply Comments at 10.

[63] Level 3 Comments at 16. Nonpayment by some operators raises the costs for others. Verizon Reply Comments at 5–6.

[64] AT&T Reply Comments at 7–8; Qwest Reply Comments at 3, note 9.

[65] Pacific Reply Comments at 3.

[66] Pacific Reply Comments at 4.

[67] Qwest Reply Comments at 3.

[68] Level 3 Comments at 17.

category who avoid payment. For FY 2008, however, we are using our current methodology and the rate set forth in Attachment C.[69]

Appendix A—Final Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act (''RFA''),[1] the Commission prepared an Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules proposed in its Notice of Proposed Rulemaking.[2] Written public comments were sought on the FY 2008 fees proposal, including comments on the IRFA. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.[3]

I. Need for, and Objectives of, the Proposed Rules

26. This rulemaking proceeding is initiated to amend the Schedule of Regulatory Fees in the amount of $312,000,000, the amount that Congress has required the Commission to recover. The Commission seeks to collect the necessary amount through its revised Schedule of Regulatory Fees in the most efficient manner possible and without undue public burden.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

27. No parties have raised significant issues in response to the IRFA.

III. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

28. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] 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 SBA.[7]

29. Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[8] A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''[9] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[10] The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[11] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[12] We estimate that, of this total, 84,377 entities were ''small governmental jurisdictions.''[13] Thus, we estimate that most governmental jurisdictions are small. Below, we further describe and estimate the number of small entities, applicants and licensees, that may be affected by our action.

30. Incumbent Local Exchange Carriers (''ILECs''). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[14] According to Commission data,[15] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by these rules.

31. Competitive Local Exchange Carriers (''CLECs''), Competitive Access Providers (''CAPs''), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.'' Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[16] According to Commission data,[17] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by these rules.

32. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[18] According to Commission data,[19] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by these rules.

33. Toll Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[20] According to Commission data,[21] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by these rules.

34. Payphone Service Providers (''PSPs''). Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[22] According to Commission data,[23] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers

[69] $0.93 per active 64 KB circuit.

[1] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612 has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (''CWAAA''). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'').

[2] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08–65, Notice of Proposed Rulemaking, (''*FY 2008 NPRM*'').

[3] 5 U.S.C. 604.

[4] 5 U.S.C. 603(b)(3).

[5] 5 U.S.C. 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[7] 15 U.S.C. 632.

[8] *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at p. 40 (July 2002).

[9] 5 U.S.C. 601(4).

[10] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[11] 5 U.S.C. 601(5).

[12] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[13] We assume that the villages, school districts, and special districts are small and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[14] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110.

[15] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, Page 5–5 (June 2005) (hereinafter ''*Trends in Telephone Service*'').

[16] 13 CFR 121.201, NAICS code 517110.

[17] ''Trends in Telephone Service'' at Table 5.3.

[18] 13 CFR 121.201, NAICS code 517310.

[19] ''Trends in Telephone Service'' at Table 5.3.

[20] 13 CFR 121.201, NAICS code 517310.

[21] ''Trends in Telephone Service'' at Table 5.3.

[22] 3 CFR 121.201, NAICS code 517110.

[23] ''Trends in Telephone Service'' at Table 5.3.

are small entities that may be affected by these rules.

35. Interexchange Carriers (''IXCs''). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[24] According to Commission data,[25] 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by these rules.

36. Operator Service Providers (''OSPs''). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to Commission data,[27] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by these rules.

37. Prepaid Calling Card Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[28] According to Commission data,[29] 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 88 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by these rules.

38. 800 and 800-Like Service Subscribers.[30] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (''toll free'') subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[31] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission receives from Database Service Management on the 800, 866, 877, and 888 numbers in use.[32] According to our data, at the end of December 2004, the number of 800 numbers assigned was 7,540,453; the number of 888 numbers assigned was 5,947,789; the number of 877 numbers assigned was 4,805,568; and the number of 866 numbers assigned was 5,011,291. We do not have data specifying the number of these subscribers that are independently owned and operated or have 1,500 or fewer employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,540,453 or fewer small entity 800 subscribers; 5,947,789 or fewer small entity 888 subscribers; 4,805,568 or fewer small entity 877 subscribers, and 5,011,291 or fewer entity 866 subscribers.

39. International Service Providers. There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of ''Satellite Telecommunications'' and ''Other Telecommunications.'' Under both categories, such a business is small if it has $13.5 million or less in average annual receipts.[33]

40. The first category of Satellite Telecommunications ''comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.''[34] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[35] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[36] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

41. The second category of Other Telecommunications ''comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.''[37] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[38] Of this total, 259 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[39] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

42. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[40] Prior to that time, such firms were within the now-superseded categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.''[41] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[42] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[43] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[44] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[45] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[46] Thus, we

[24] 13 CFR 121.201, NAICS code 517110.

[25] ''Trends in Telephone Service'' at Table 5.3.

[26] 13 CFR 121.201, NAICS code 517110.

[27] ''Trends in Telephone Service'' at Table 5.3.

[28] 13 CFR 121.201, NAICS code 517310.

[29] ''Trends in Telephone Service'' at Table 5.3.

[30] We include all toll-free number subscribers in this category, including those for 888 numbers.

[31] 13 CFR 121.201, NAICS code 517310.

[32] ''Trends in Telephone Service'' at Tables 18.4, 18.5, 18.6, and 18.7.

[33] 13 CFR 121.201, NAICS codes 517410 and 517910.

[34] U.S. Census Bureau, 2002 NAICS Definitions, ''517410 Satellite Telecommunications;'' *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[35] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517410.

[36] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[37] U.S. Census Bureau, 2002 NAICS Definitions, ''517910 Other Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[38] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517910.

[39] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[40] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[41] U.S. Census Bureau, 2002 NAICS Definitions, ''517211 Paging''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM*; U.S. Census Bureau, 2002 NAICS Definitions, ''517212 Cellular and Other Wireless Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[42] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS)).

[43] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005)).

[44] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[45] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005)).

[46] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

estimate that the majority of wireless firms are small.

43. Internet Service Providers. The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.''[47] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[48] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[49] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[50] Thus, under this size standard, the great majority of firms can be considered small entities.

44. Television Broadcasting. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [51] The SBA has created a small business size standard for Television Broadcasting entities, which is: such firms having $13 million or less in annual receipts.[52] According to Commission staff review of the BIA Publications, Inc., Media Access Pro Television Database as of December 7, 200, about 825 (66 percent) of the 1,250 commercial television stations in the United States had revenues of $13 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business (control) affiliations [53] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

45. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

46. There are also 2,117 low power television stations (''LPTV'').[54] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

47. Radio Broadcasting. The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business.[55] Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.[56] According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations [57] are included.[58] Our estimate, therefore likely overstates the number of small businesses that might be affected by the rules adopted herein.

48. Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[59]

49. The Commission estimates that there are approximately 5,618 FM translators and boosters.[60] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($6.5 million for a radio station or $13.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[61]

50. Cable and Other Program Distribution. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.'' [62] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[63] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[64] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[65] Thus, under this size standard, the majority of firms can be considered small.

51. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[66] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[67] In addition, under the

[47] Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 518111, ''On-Line Information Services.''

[48] 13 CFR 121.201, NAICS code 518111.

[49] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191.

[50] *Id.*

[51] U.S. Census Bureau, 2002 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/epcd/naics02/def/NDEF515.HTM.*

[52] 13 CFR 121.201, NAICS code 515120.

[53] ''Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.'' 13 CFR 21.103(a)(1).

[54] *FCC News Release*, ''Broadcast Station Totals as of September 30, 2007.''

[55] *See* OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 515112).

[56] *Id.*

[57] ''Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.'' 13 CFR 121.103(a)(1).

[58] ''SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.'' 13 CFR 121(a)(4).

[59] 13 CFR 121.201, NAICS codes 513111 and 513112.

[60] FCC News Release, ''Broadcast Station Totals as of September 30, 2007.''

[61] 15 U.S.C. 632.

[62] U.S. Census Bureau, 2002 NAICS Definitions, ''517510 Cable and Other Program Distribution;'' *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[63] 13 CFR 121.201, NAICS code 517510.

[64] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[65] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[66] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[67] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2; Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[68] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have less than 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[69] Thus, under this second size standard, most cable systems are small.

52. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [70] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[71] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[72] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[73] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

53. Open Video Services. Open Video Service (''OVS'') systems provide subscription services.[74] The SBA has created a small business size standard for Cable and Other Program Distribution.[75] This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[76] Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

54. Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[77] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[78] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[79] Thus, under this size standard, the majority of firms can be considered small.

55. Multichannel Video Distribution and Data Service (''MVDDS''). MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[80] These definitions were approved by the SBA.[81] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[82] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[83]

56. Amateur Radio Service. These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

57. Aviation and Marine Services. Small businesses in the aviation and marine radio services use a very high frequency (''VHF'') marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[84] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998, and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[85] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

58. Personal Radio Services. Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[86] These services include Citizen Band Radio Service (''CB''), General Mobile Radio Service (''GMRS''), Radio Control Radio Service (''R/C''), Family Radio Service (''FRS''), Wireless Medical Telemetry Service (''WMTS''), Medical

[68] 47 CFR 76.901(c).

[69] Warren Communications News, *Television & Cable Factbook 2006*, ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[70] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[71] 47 CFR 76.901(f); *see* Public Notice, ''*FCC Announces New Subscriber Count for the Definition of Small Cable Operator*,'' 16 FCC Rcd 2225 (Cable Services Bureau, 2001).

[72] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2; Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[73] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[74] *See* 47 U.S.C. 573.

[75] 13 CFR 121.201, NAICS code 517510.

[76] *See http://www.fcc.gov/csb/ovs/csovscer.html.*

[77] 13 CFR 121.201, NAICS code 517510.

[78] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[79] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[80] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide A Fixed Service in the 12.2–12.7 GHz Band, ET Docket No. 98–206,* Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[81] *See* Letter from Hector V. Barreto, Administrator, SBA, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

[82] *See* ''Multichannel Video Distribution and Data Service Auction Closes,'' *Public Notice,* 19 FCC Rcd 1834 (2004).

[83] *See* ''Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,'' *Public Notice,* 20 FCC Rcd 19807 (2005).

[84] 13 CFR 121.201, NAICS code 517212.

[85] *Amendment of the Commission's Rules Concerning Maritime Communications,* Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[86] 47 CFR Part 90.

Implant Communications Service (''MICS''), Low Power Radio Service (''LPRS''), and Multi-Use Radio Service (''MURS'').[87] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being adopted. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons.[88] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the rules adopted herein.

59. Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[89] There are a total of approximately 127,540 licensees in these services. Governmental entities[90] 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.[91]

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

60. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. Most licensees will be required to count the number of licenses or call signs authorized, complete and submit an FCC Form 159 Remittance Advice, and pay a regulatory fee based on the number of licenses or call signs.[92] Interstate telephone service providers must compute their annual regulatory fee based on their interstate and international end-user revenue using information they already supply to the Commission on the FCC Form 499–A, Telecommunications Reporting Worksheet, and they must complete and submit the FCC Form 159. Compliance with the fee schedule will require some licensees to tabulate the number of units (*e.g.*, cellular telephones, pagers, cable TV subscribers) they have in service, and complete and submit an FCC Form 159. Licensees ordinarily will keep a list of the number of units they have in service as part of their normal business practices. No additional outside professional skills are required to complete the FCC Form 159, and it can be completed by the employees responsible for an entity's business records.

61. Each licensee must submit the FCC Form 159 to the Commission's lockbox bank after computing the number of units subject to the fee. Licensees may also file electronically to minimize the burden of submitting multiple copies of the FCC Form 159. Applicants who pay small fees in advance and provide fee information as part of their application must use FCC Form 159.

62. Licensees and regulatees are advised that failure to submit the required regulatory fee in a timely manner will subject the licensee or regulatee to a late payment penalty of 25 percent in addition to the required fee.[93] If payment is not received, new or pending applications may be dismissed, and existing authorizations may be subject to rescission.[94] Further, in accordance with the Debt Collection Improvement Act of 1996 (''DCIA''), Public Law 194–134, federal agencies may bar a person or entity from obtaining a federal loan or loan insurance guarantee if that person or entity fails to pay a delinquent debt owed to any federal agency.[95] Nonpayment of regulatory fees is a debt owed the United States pursuant to 31 U.S.C. 3711 *et seq.*, and the DCIA. Appropriate enforcement measures as well as administrative and judicial remedies, may be exercised by the Commission. Debts owed to the Commission may result in a person or entity being denied a federal loan or loan guarantee pending before another federal agency until such obligations are paid.[96]

63. The Commission's rules currently provide for relief in exceptional circumstances. Persons or entities may request a waiver, reduction or deferment of payment of the regulatory fee.[97] However, timely submission of the required regulatory fee must accompany requests for waivers or reductions. This will avoid any late payment penalty if the request is denied. The fee will be refunded if the request is granted. In exceptional and compelling instances (where payment of the regulatory fee along with the waiver or reduction request could result in reduction of service to a community or other financial hardship to the licensee), the Commission will defer payment in response to a request filed with the appropriate supporting documentation.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

64. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (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.[98] In the *NPRM,* we sought comment on alternatives that might simplify

[87] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[88] 13 CFR 121.201, NAICS Code 517212.

[89] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments that are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (''EMRS'') use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[90] 47 CFR 1.1162.

[91] 5 U.S.C. 601(5).

[92] The following categories are exempt from the Commission's Schedule of Regulatory Fees: Amateur radio licensees (except applicants for vanity call signs) and operators in other non-licensed services (*e.g.*, Personal Radio, part 15, ship and aircraft). Governments and non-profit (exempt under section 501(c) of the Internal Revenue Code) entities are exempt from payment of regulatory fees and need not submit payment. Non-commercial educational broadcast licensees are exempt from regulatory fees as are licensees of auxiliary broadcast services such as low power auxiliary stations, television auxiliary service stations, remote pickup stations and aural broadcast auxiliary stations where such licenses are used in conjunction with commonly owned non-commercial educational stations. Emergency Alert System licenses for auxiliary service facilities are also exempt as are Educational Broadband Service (EBS) (previously referred to as instructional television fixed service licensees). Regulatory fees are automatically waived for the licensee of any translator station that: (1) Is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from members of the community served for support. Receive only earth station permittees are exempt from payment of regulatory fees. A regulatee will be relieved of its fee payment requirement if its total fee due, including all categories of fees for which payment is due by the entity, amounts to less than $10.

[93] 47 CFR 1.1164.

[94] 47 CFR 1.1164(c).

[95] Public Law 104–134, 110 Stat. 1321 (1996).

[96] 31 U.S.C. 7701(c)(2)(B).

[97] 47 CFR 1.1166.

[98] 5 U.S.C. 603.

our fee procedures or otherwise benefit filers, including small entities, while remaining consistent with our statutory responsibilities in this proceeding.

65. Several categories of licensees and regulatees are exempt from payment of regulatory fees. Also, waiver procedures provide regulatees, including small entity regulatees, relief in exceptional circumstances.

66. *Report to Small Business Administration:* The Commission will send a copy of this Report and Order, including a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. The Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

67. *Report to Congress:* The Commission will send a copy of this FRFA, along with this *Report and Order,* in a report to Congress pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Appendix B

List of Commenters

INITIAL COMMENTS

Party	Abbreviated name
American Association of Paging Carriers	AAPC.
AT&T, Inc	AT&T.
Global Crossing North America, Inc	Global Crossing.
Level 3 Communications, LLC	Level 3.
Multicultural Radio Broadcasting Licensee, LLC and Way Broadcasting Licensee, LLC	MRB.
Pacific Crossing Limited and PC Landing Corp	Pacific.
PCIA—The Wireless Infrastructure Association	PCIA.
Satellite Industry Association	SIA.
Tata Communications (US) Inc	Tata.

REPLY COMMENTS

Party	Abbreviated name
AT&T Inc	AT&T.
Brasil Telecom of America, Hibernia Atlantic U.S. LLC, Columbus Networks USA, Inc., ARCOS–1 USA, Inc., A.SUR Net, Inc.	Joint Commenters.
Chisholm Trail Broadcasting Co	CTBC.
Enterprise Wireless Alliance	Enterprise.
Global Crossing North America, Inc	Global Crossing.
Independent Telephone and Telecommunications Alliance	ITTA.
Level 3 Communications, LLC	Level 3.
Pacific Crossing Limited and PC Landing Corp	Pacific.
Quest Communications International, Inc	Quest.
Reliance Globalcom Limited	Reliance.
Telstra Incorporated	Telstra.
Verizon	Verizon.

PARTIES FILING INITIAL COMMENTS IN RESPONSE TO VSNL PETITION, RM–11312

Party	Abbreviated name
Apollo Submarine Cable System, Inc	Apollo.
AT&T, Inc	AT&T.
Flag Telecom Group Limited	Flag.
Hibernia Atlantic	Hibernia.
Level 3 Communications, LLC	Level 3.
Satellite Industry Association	SIA.

PARTIES FILING REPLY COMMENTS TO VSNL PETITION, RM–11312

Apollo Submarine Cable System, Inc	Apollo.
ARCOS–1 USA, Inc., *et al*	Joint Commenters.
AT&T, Inc	AT&T.
Level 3 Communications, LLC	Level 3.
Versión	Versión.
Quest Communications Internacional	Qwest.
VSNL Communications (US) Inc	VSNL.

ATTACHMENT A

Sources of Payment Unit Estimates for FY 2008

In order to calculate individual service fees for FY 2008, we adjusted FY 2007 payment units for each service to more accurately reflect expected FY 2008 payment liabilities. We obtained our updated estimates through a variety of means. For example, we used Commission licensee databases, actual prior year payment records and industry and trade association projections when available. The databases we consulted include our Universal Licensing System (''ULS''), International Bureau Filing System (''IBFS''), Consolidated Database System (''CDBS'') and Cable Operations and Licensing System (''COALS''), as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone*

Service and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast.*

We tried to obtain verification for these estimates from multiple sources and, in all cases; we compared FY 2008 estimates with actual FY 2007 payment units to ensure that our revised estimates were reasonable. Where appropriate, we adjusted and/or rounded our final estimates to take into consideration the fact that certain variables that impact on the number of payment units cannot yet be estimated exactly. These include an unknown number of waivers and/or exemptions that may occur in FY 2008 and the fact that, in many services, the number of actual licensees or station operators fluctuates from time to time due to economic, technical, or other reasons. When we note, for example, that our estimated FY 2008 payment units are based on FY 2007 actual payment units, it does not necessarily mean that our FY 2008 projection is exactly the same number as FY 2007. We have either rounded the FY 2008 number or adjusted it slightly to account for these variables.

Fee category	Sources of payment unit estimates
Land Mobile (All), Microwave, 218–219 MHz, Marine (Ship & Coast), Aviation (Aircraft & Ground), GMRS, Amateur Vanity Call Signs, Domestic Public Fixed.	Based on Wireless Telecommunications Bureau ("WTB") projections of new applications and renewals taking into consideration existing Commission licensee databases. Aviation (Aircraft) and Marine (Ship) estimates have been adjusted to take into consideration the licensing of portions of these services on a voluntary basis.
CMRS Cellular/Mobile Services	Based on WTB projection reports, and FY 07 payment data.
CMRS Messaging Services	Based on WTB reports, and FY 07 payment data.
AM/FM Radio Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
UHF/VHF Television Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
AM/FM/TV Construction Permits	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
LPTV, Translators and Boosters, Class A Television.	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
Broadcast Auxiliaries	Based on actual FY 2007 payment units.
BRS (formerly MDS/MMDS)	Based on WTB reports and actual FY 2007 payment units.
Cable Television Relay Service ("CARS") Stations.	Based on data from Media Bureau's COALS database and actual FY 2007 payment units.
Cable Television System Subscribers	Based on publicly available data sources for estimated subscriber counts and actual FY 2007 payment units.
Interstate Telecommunication Service Providers	Based on FCC Form 499–Q data for the four quarters of calendar year 2007, the Wireline Competition Bureau projected the amount of calendar year 2007 revenue that will be reported on 2008 FCC Form 499–A worksheets in April, 2008.
Earth Stations	Based on International Bureau ("IB") licensing data and actual FY 2007 payment units.
Space Stations (GSOs & NGSOs)	Based on IB data reports and actual FY 2007 payment units.
International Bearer Circuits	Based on IB reports and actual FY 2007 payment units.
International HF Broadcast Stations, International Public Fixed Radio Service.	Based on IB reports and actual FY 2007 payment units.

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ATTACHMENT B

Calculation of FY 2008 Revenue Requirements and Pro-Rata Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment	Computed New FY 2008 Regulatory Fee	Rounded New FY 08 Regula-tory Fee	Expected FY 2008 Revenue
PLMRS (Exclusive Use)	1,150	10	437,500	469,918	41	40	460,000
PLMRS (Shared use)	11,500	10	2,325,000	2,497,278	22	20	2,300,000
Microwave	4,900	10	1,740,000	1,868,931	38	40	1,960,000
218-219 MHz (Formerly IVDS)	3	10	1,650	1,772	59	60	1,800
Marine (Ship)	8,400	10	800,000	859,278	10	10	840,000
GMRS	14,000	5	400,000	429,639	6	5	350,000
Aviation (Aircraft)	7,500	10	440,000	472,603	6	5	375,000
Marine (Coast)	310	10	108,000	116,003	37	35	108,500
Aviation (Ground)	1,700	10	165,000	177,226	10	10	170,000
Amateur Vanity Call Signs	15,000	10	171,990	184,734	1.23	1.23	184,500
AM Class A	65	1	210,800	227,355	3,498	3,500	227,500
AM Class B	1,564	1	2,546,375	2,740,081	1,752	1,750	2,737,000
AM Class C	935	1	890,150	963,919	1,031	1,025	958,375
AM Class D	1,706	1	2,983,750	3,237,984	1,898	1,900	3,241,400
FM Classes A, B1 & C3	3,040	1	6,281,025	6,788,261	2,233	2,225	6,764,000
FM Classes B, C, C0, C1 & C2	3,043	1	7,655,100	8,261,311	2,715	2,725	8,292,175
AM Construction Permits	95	1	26,000	39,253	413	415	39,425
FM Construction Permits[1]	299	1	117,875	179,400	600	600	179,400
Satellite TV	127	1	137,500	147,961	1,165	1,175	149,225
Satellite TV	3	1	1,650	1,789	596	595	1,785

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment	Computed New FY 2008 Regulatory Fee	Rounded New FY 08 Regula-tory Fee	Expected FY 2008 Revenue
Construction Permit							
VHF Markets 1-10	42	1	2,764,900	2,983,938	71,046	71,050	2,984,100
VHF Markets 11-25	57	1	2,827,350	3,051,067	53,527	53,525	3,050,925
VHF Markets 26-50	77	1	2,392,775	2,581,765	33,529	33,525	2,581,425
VHF Markets 51-100	118	1	2,300,000	2,480,777	21,024	21,025	2,480,950
VHF Remaining Markets	195	1	1,014,750	1,093,312	5,607	5,600	1,092,000
VHF Construction Permits [1]	4	1	15,375	22,400	5,600	5,600	22,400
UHF Markets 1-10	91	1	1,788,150	1,932,551	21,237	21,225	1,931,475
UHF Markets 11-25	82	1	1,478,200	1,597,692	19,484	19,475	1,596,950
UHF Markets 26-50	113	1	1,242,000	1,343,975	11,894	11,900	1,344,700
UHF Markets 51-100	168	1	1,058,400	1,142,771	6,802	6,800	1,142,400
UHF Remaining Markets	193	1	320,250	347,204	1,799	1,800	347,400
UHF Construction Permits[1]	18	1	38,500	32,400	1,800	1,800	32,400
Broadcast Auxiliaries	27,600	1	270,000	251,048	9	10	276,000
LPTV/Trans-lators/Boosters/ Class A TV	3,500	1	1,173,000	1,274,067	364	365	1,277,500
CARS Stations	750	1	144,300	155,598	207	205	153,750
Cable TV Systems	64,800,000	1	48,375,000	52,061,017	0.80341	0.80	51,840,000
Interstate Tele-communication Svc. Providers [3]	$46,700,000,000	1	135,660,000	146,636,961	0.00313998	0.00314	146,638,000
CMRS Mobile Cellular Svcs.	260,000,000	1	41,220,000	43,917,284	0.1689	0.170	44,200,000

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment	Computed New FY 2008 Regulatory Fee	Round ed New FY 08 Regula -tory Fee	Expected FY 2008 Revenue
CMRS Messag. Services	7,000,000	1	600,000	560,000	0.080	0.080	560,000
BRS[2] LMDS	1,700 335	1 1	422,500 133,250	501,500 98,825	295 295	295 295	501,500 98,825
International Bearer Circuits	8,750,000	1	7,560,000	8,149,636	.0931	.93	8,137,500
International Public Fixed	1	1	1,875	2,014	2,014	2,025	2,025
Earth Stations	4,000	1	721,500	786,409	197	195	780,000
International HF Broadcast	5	1	3,975	4,288	858	860	4,300
Space Stations (Geostationary)	85	1	9,391,200	10,140,209	119,297	119,300	10,140,500
Space Stations (Non-Geostationary	6	1	698,850	754,556	125,759	125,750	754,500
****** Total Estimated Revenue to be Collected			291,055,465	313,567,960			313,311,610
****** Total Revenue Requirement			290,295,160	312,000,000			312,000,000
Difference			760,305	1,567,960			1,311,610

[1] The FM Construction Permit revenues and the VHF and UHF Construction Permit revenues were adjusted to set the regulatory fee to an amount no higher than the lowest licensed fee for that class of service. The reductions in the FM Construction Permit revenues are offset by increases in the revenue totals for FM radio stations. Similarly, reductions in the VHF and UHF Construction Permit revenues are offset by increases in the revenue totals for VHF and UHF television stations, respectively.

[2] MDS/MMDS category was renamed Broadband Radio Service (BRS). See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report & Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169, ¶ 6 (2004).

[3] Beginning in FY 2008, regulatory fees for IVoIP will be included as part of the Interstate Telecommunications Service Provider (ITSP) fee, and these fees will be collected at the same time as ITSP fees are collected.

ATTACHMENT C

FY 2008 Schedule of Regulatory Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Fee Category	Annual Regulatory Fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	40
Microwave (per license) (47 CFR part 101)	40
218-219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	60
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	35
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	20
PLMRS (Shared Use) (per license) (47 CFR part 90)	20
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.23
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.17
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/ MDS) (per license) (47 CFR part 21)	295
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	295
AM Radio Construction Permits	415
FM Radio Construction Permits	600
TV (47 CFR part 73) VHF Commercial	
Markets 1-10	71,050
Markets 11-25	53,525
Markets 26-50	33,525
Markets 51-100	21,025
Remaining Markets	5,600

Fee Category	Annual Regulatory Fee (U.S. $'s)
Construction Permits	5,600
TV (47 CFR part 73) UHF Commercial	
Markets 1-10	21,225
Markets 11-25	19,475
Markets 26-50	11,900
Markets 51-100	6,800
Remaining Markets	1,800
Construction Permits	1,800
Satellite Television Stations (All Markets)	1,175
Construction Permits – Satellite Television Stations	595
Low Power TV, Class A TV, TV/FM Translators & Boosters (47 CFR part 74)	365
Broadcast Auxiliaries (47 CFR part 74)	10
CARS (47 CFR part 78)	205
Cable Television Systems (per subscriber) (47 CFR part 76)	.80
Interstate Telecommunication Service Providers (per revenue dollar)	.00314
Earth Stations (47 CFR part 25)	195
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100)	119,300
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	125,750
International Bearer Circuits (per active 64KB circuit)	.93
International Public Fixed (per call sign) (47 CFR part 23)	2,025
International (HF) Broadcast (47 CFR part 73)	860

FY 2008 RADIO STATION REGULATORY FEES						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	$650	$500	$450	$525	$600	$775
25,001 – 75,000	$1,325	$1,025	$650	$775	$1,225	$1,375
75,001 – 150,000	$1,975	$1,275	$875	$1,300	$1,675	$2,550
150,001 – 500,000	$2,975	$2,175	$1,325	$1,550	$2,600	$3,325
500,001 – 1,200,000	$4,300	$3,325	$2,200	$2,575	$4,125	$4,900
1,200,001 – 3,000,00	$6,600	$5,100	$3,300	$4,125	$6,700	$7,850
>3,000,000	$7,925	$6,125	$4,175	$5,150	$8,550	$10,200

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ATTACHMENT D

Factors, Measurements, and Calculations That Go Into Determining Station Signal Contours and Associated Population Coverages

AM Stations

For stations with nondirectional daytime antennas, the theoretical radiation was used at all azimuths. For stations with directional daytime antennas, specific information on each day tower, including field ratio, phasing, spacing and orientation was retrieved, as well as the theoretical pattern root-mean-square of the radiation in all directions in the horizontal plane (''RMS'') figure milliVolt per meter (mV/m) @ 1 km) for the antenna system. The standard, or modified standard if pertinent, horizontal plane radiation pattern was calculated using techniques and methods specified in section 73.150 and 73.152 of the Commission's rules.[1] Radiation values were calculated for each of 360 radials around the transmitter site. Next, estimated soil conductivity data was retrieved from a database representing the information in FCC Figure R3.[2] Using the calculated horizontal radiation values, and the retrieved soil conductivity data, the distance to the principal community (5 mV/m) contour was predicted for each of the 360 radials. The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. (A block centroid is the center point of a small area containing population as computed by the U.S. Census Bureau.) The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

FM Stations

The greater of the horizontal or vertical effective radiated power (''ERP'') (kW) and respective height above average terrain (''HAAT'') (m) combination was used. Where the antenna height above mean sea level (''HAMSL'') was available, it was used in lieu of the average HAAT figure to calculate specific HAAT figures for each of 360 radials under study. Any available directional pattern information was applied as well, to produce a radial-specific ERP figure. The HAAT and ERP figures were used in conjunction with the Field Strength (50–50) propagation curves specified in 47 CFR 73.313 of the Commission's rules to predict the distance to the principal community (70 dBu (decibel above 1 microVolt per meter) or 3.17 mV/m) contour for each of the 360 radials.[3] The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

ATTACHMENT E

FY 2007 Schedule of Regulatory Fees

Fee category	Annual regulatory fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	35
Microwave (per license) (47 CFR part 101)	40
218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	55
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	30
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	15
PLMRS (Shared Use) (per license) (47 CFR part 90)	15
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.17
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.18
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/ MDS) (per license sign) (47 CFR part 21)	325
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	325
AM Radio Construction Permits	400
FM Radio Construction Permits	575
TV (47 CFR part 73) VHF Commercial:	
Markets 1–10	64,300
Markets 11–25	46,350
Markets 26–50	31,075
Markets 51–100	20,000
Remaining Markets	5,125
Construction Permits	5,125
TV (47 CFR part 73) UHF Commercial:	
Markets 1–10	19,650
Markets 11–25	19,450
Markets 26–50	10,800
Markets 51–100	6,300
Remaining Markets	1,750
Construction Permits	1,750
Satellite Television Stations (All Markets)	1,100
Construction Permits—Satellite Television Stations	550
Low Power TV, TV/FM Translators & Boosters (47 CFR part 74)	345
Broadcast Auxiliary (47 CFR part 74)	10
CARS (47 CFR part 78)	185
Cable Television Systems (per subscriber) (47 CFR part 76)	.75
Interstate Telecommunication Service Providers (per revenue dollar)	.00266
Earth Stations (47 CFR part 25)	185
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes Direct Broadcast Satellite Service (per operational station) (47 CFR part 100)	109,200
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	116,475

[1] 47 CFR 73.150 and 73.152.

[2] *See Map of* Estimated *Effective Ground Conductivity in the United States,* 47 CFR 73.190 Figure R3.

[3] 47 CFR 73.313.

Fee category	Annual regulatory fee (U.S. $'s)
International Bearer Circuits (per active 64KB circuit)	1.05
International Public Fixed (per call sign) (47 CFR part 23)	1,875
International (HF) Broadcast (47 CFR part 73)	795

FY 2007 RADIO STATION REGULATORY FEES

Population served	AM class A	AM class B	AM class C	AM class D	FM classes A, B1 & C3	FM classes B, C, C0, C1 & C2
<=25,000	$625	$475	$400	$475	$575	$725
25,001–75,000	1,225	925	600	725	1,150	1,250
75,001–150,000	1,825	1,150	800	1,200	1,600	2,300
150,001–500,000	2,750	1,950	1,200	1,425	2,475	3,000
500,001–1,200,000	3,950	2,975	2,000	2,375	3,900	4,400
1,200,001–3,000,00	6,075	4,575	3,000	3,800	6,350	7,025
>3,000,000	7,275	5,475	3,800	4,750	8,075	9,125

Rule Changes

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303, 309.

■ 2. Section 1.1152 is revised to read as follows:

§ 1.1152 Schedule of annual regulatory fees and filing locations for wireless radio services.

Exclusive use services (per license)	Fee amount [1]	Address
1. Land Mobile (Above 470 MHz and 220 MHz Local, Base Station & SMRS) (47 CFR, Part 90):		
(a) New, Renew/Mod (FCC 601 & 159)	$40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
220 MHz Nationwide:		
(a) New, Renew/Mod (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
2. Microwave (47 CFR Pt. 101) (Private):		
(a) New, Renew/Mod (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
3. 218–219 MHz Service:		
(a) New, Renew/Mod (FCC 601 & 159)	60.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	60.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	60.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	60.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
4. Shared Use Services:		
Land Mobile (Frequencies Below 470 MHz—except 220 MHz)		
(a) New, Renew/Mod (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
General Mobile Radio Service:		
(a) New, Renew/Mod (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Rural Radio (Part 22):		
(a) New, Additional Facility, Major Renew/Mod (Electronic Filing) (FCC 601 & 159).	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) Renewal, Minor Renew/Mod (Electronic Filing) (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Marine Coast:		
(a) New Renewal/Mod(FCC 601 & 159)	35.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	35.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	35.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.

Exclusive use services (per license)	Fee amount [1]	Address
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	35.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Aviation Ground:		
(a) New, Renewal/Mod (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Only) (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Marine Ship:		
(a) New, Renewal/Mod (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Aviation Aircraft:		
(a) New, Renew/Mod (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
5. Amateur Vanity Call Signs:		
(a) Initial or Renew (FCC 605 & 159)	1.23	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) Initial or Renew (Electronic Filing) (FCC 605 & 159)	1.23	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
6. CMRS Mobile Services (per unit) (FCC 159)	[2].17	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
7. CMRS Messaging Services (per unit) (FCC 159)	[3].08	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
8. Broadband Radio Service (formerly MMDS and MDS)	295	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
9. Local Multipoint Distribution Service	295	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.

[1] Note that ''small fees'' are collected in advance for the entire license term. Therefore, the annual fee amount shown in this table that is a small fee (categories 1 through 5) must be multiplied by the 5- or 10-year license term, as appropriate, to arrive at the total amount of regulatory fees owed. It should be further noted that application fees may also apply as detailed in § 1.1102 of this chapter.

[2] These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

[3] These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

■ 3. Section 1.1153 is revised to read as follows:

§ 1.1153 Schedule of annual regulatory fees and filing locations for mass media services.

	Fee amount	Address
Radio [AM and FM] (47 CFR, Part 73)		
1. AM Class A:		
<=25,000 population	$650	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	1,325	
75,001–150,000 population	1,975	
150,001–500,000 population	2,975	
500,001–1,200,000 population	4,300	
1,200,001–3,000,000 population	6,600	
>3,000,000 population	7,925	
2. AM Class B:		
<=25,000 population	500	
25,001–75,000 population	1,025	
75,001–150,000 population	1,275	
150,001–500,000 population	2,175	
500,001–1,200,000 population	3,325	
1,200,001–3,000,000 population	5,100	
>3,000,000 population	6,125	
3. AM Class C:		
<=25,000 population	450	
25,001–75,000 population	650	
75,001–150,000 population	875	
150,001–500,000 population	1,325	
500,001–1,200,000 population	2,200	
1,200,001–3,000,000 population	3,300	
>3,000,000 population	4,175	
4. AM Class D:		
<=25,000 population	525	
25,001–75,000 population	775	
75,001–150,000 population	1,300	
150,001–500,000 population	1,550	
500,001–1,200,000 population	2,575	
1,200,001–3,000,000 population	4,125	
>3,000,000 population	5,150	
5. AM Construction Permit	415	
6. FM Classes A, B1 and C3:		
<=25,000 population	600	

	Fee amount	Address
25,001–75,000 population	1,225	
75,001–150,000 population	1,675	
150,001–500,000 population	2,600	
500,001–1,200,000 population	4,125	
1,200,001–3,000,000 population	6,700	
>3,000,000 population	8,550	
7. FM Classes B, C, C0, C1 and C2:		
<=25,000 population	775	
25,001–75,000 population	1,375	
75,001–150,000 population	2,550	
150,001–500,000 population	3,325	
500,001–1,200,000 population	4,900	
1,200,001–3,000,000 population	7,850	
>3,000,000 population	10,200	
8. FM Construction Permits	600	
TV (47 CFR, Part 73) VHF Commercial		
1. Markets 1 thru 10	71,050	FCC, TV Branch, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Markets 11 thru 25	53,525	
3. Markets 26 thru 50	33,525	
4. Markets 51 thru 100	21,025	
5. Remaining Markets	5,600	
6. Construction Permits	5,600	
UHF Commercial		
1. Markets 1 thru 10	21,225	FCC, UHF Commercial, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Markets 11 thru 25	19,475	
3. Markets 26 thru 50	11,900	
4. Markets 51 thru 100	6,800	
5. Remaining Markets	1,800	
6. Construction Permits	1,800	
Satellite UHF/VHF Commercial		
1. All Markets	1,175	FCC Satellite TV, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Construction Permits	595	
Low Power TV, Class A TV, TV/FM Translator, & TV/FM Booster (47 CFR Part 74)	365	FCC, Low Power, P.O. Box 979084, St. Louis, MO 63197–9000.
Broadcast Auxiliary	10	FCC, Auxiliary, P.O. Box 979084, St. Louis, MO 63197–9000.

■ 4. Section 1.1154 is revised to read as follows:

§ 1.1154 Schedule of annual regulatory charges and filing locations for common carrier services.

	Fee amount	Address
Radio Facilities:		
1. Microwave (Domestic Public Fixed) (Electronic Filing) (FCC Form 601 & 159).	$40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Carriers:		
1. Interstate Telephone Service Providers (per interstate and international end-user revenues (see FCC Form 499–A).	.00314	FCC, Carriers, P.O. Box 979084, St. Louis, MO 63197–9000.

■ 5. Section 1.1155 is revised to read as follows:

§ 1.1155 Schedule of regulatory fees and filing locations for cable television services.

	Fee amount	Address
1. Cable Television Relay Service	$205	FCC, Cable, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Cable TV System (per subscriber)	.80	

■ 6. Section 1.1156 is revised to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services.

	Fee amount	Address
Radio Facilities:		
1. International (HF) Broadcast	$860	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
2. International Public Fixed	2,025	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Geostationary Orbit)	119,300	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Non-Geostationary Orbit)	125,750	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Earth Stations:		
Transmit/Receive & Transmit Only (per authorization or registration)	195	FCC, Earth Station, P.O. Box 979084, St. Louis, MO 63197–9000.
Carriers:		
International Bearer Circuits (per active 64KB circuit or equivalent)	.93	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. E8–19899 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1714; MB Docket No. 07–183; RM–11394]

Radio Broadcasting Services; Cotulla and Dilley, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division grants a Petition for Rule Making issued at the request of Katherine Pyeatt, proposing the allotment of Channel 291A at Dilley, Texas, as its fourth local FM aural transmission service. The reference coordinates for vacant Channel 291A at Dilley are 28–36–06 NL and 99–06–21 WL. This site is located 9.6 kilometers (6 miles) southeast of Dilley. This site is located within 320 kilometers of the Mexican border. Although concurrence has been requested for Channel 291A at Dilley, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican government, the construction permit will include the following condition: ''Operation with the facilities specified for Dilley herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement.''

Additionally, the new reference coordinates for vacant Channel 289A at Cotulla, Texas are modified to 28–22–00 NL and 99–17–00 WL. This site is located 9.1 kilometers (5.7 miles) southwest of Cotulla. This site is located within 320 kilometers of the Mexican border. Although concurrence has been requested for Channel 289A at Cotulla, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican government, the construction permit will include the following condition: ''Operation with the facilities specified for Cotulla herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement.''

DATES: Effective September 8, 2008.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 07–183, adopted July 23, 2008, and released July 25, 2008. The *Notice of Proposed Rule Making* proposed the allotment of Channel 291A at Dilley, Texas. *See* 72 FR 59510, published October 22, 2007. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Information Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 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.

■ As stated in the preamble, the Federal Communications Commission amends 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, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 291A at Dilley.

Federal Communications Commission.

Robert A. Haynes,

Senior Attorney.

[FR Doc. E8–19544 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–2003–15245]

RIN 2105–AD55

Procedures for Transportation Workplace Drug Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Change in effective date; request for comments.

SUMMARY: In response to petitions from certain transportation industry and labor groups, the Department of Transportation is changing the effective date of 49 CFR 40.67(b) from August 25, 2008, to November 1, 2008. The Department is also requesting comments concerning the content of § 40.67(b) for 30 days. This section of the Department's drug testing procedural rule requires employers to ensure that all follow-up and return-to-duty drug tests are directly observed.

DATES: The effective date of the revision of 49 CFR 40.67(b) published June 25, 2008 (73 FR 35970) is delayed from August 25, 2008, to November 1, 2008. Comments should be submitted by September 25, 2008.

ADDRESSES: You may submit comments identified by the docket number (OST–2003–15245) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: Identify the agency and docket number (OST–2003–15245) at the beginning of your submission. Except for comments that receive confidential treatment, all comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information provided. Detailed instructions for requesting confidential treatment are provided below, under the Privacy Act heading.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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), which may also be found at *http://www.regulations.gov.*

You may request confidential treatment of comments or portions of comments under the procedures set forth in 49 CFR part 105. While all comments should be sent to the FDMS, OST will consider separately and not place in the public docket those comments or portions of comments OST determines to include trade secrets, other confidential commercial information, or sensitive security information (SSI). In accordance with 49 CFR 105.30, you may ask OST to keep information confidential using the following procedures: (1) Mark ''confidential'' on each page of the original document you would like to keep confidential; (2) send FDMS both the original document and a second copy of the original document with the confidential information redacted; and (3) explain why the information is confidential (as a trade secret, other confidential commercial information, or SSI). In your explanation, you should provide enough information to enable OST to determine whether the information provided is protected by law and must be handled separately.

FOR FURTHER INFORMATION CONTACT: For program issues, Jim Swart, Director, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–3784 (voice), (202) 366–3897 (fax), or *jim.swart@dot.gov* (e-mail). For legal issues, Robert C. Ashby, Deputy Assistant General Counsel for Regulations and Enforcement, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–9310 (voice); (202) 366–9313 (fax); or *bob.ashby@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: This document responds to petitions and letters from several parties seeking to postpone the effective date of portions of the Department's June 25, 2008, final rule amending 49 CFR part 40 (73 FR 35961) and/or reconsider these provisions. The petitions concern the new section 40.67(b) and (i), described in more detail below. Petitioners include the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association; the Transportation Trades Department (TTD) of the AFCL–CIO; the International Brotherhood of Teamsters; and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA).

Background

On October 31, 2005, the Department of Transportation issued a notice of proposed rulemaking (NPRM) to amend 49 CFR part 40, the Department's drug and alcohol testing procedures rule (70 FR 62276). The primary purpose of the NPRM was to propose making specimen validity testing (SVT) mandatory. Mandatory SVT is an important step in combating the safety problem of cheating on drug tests. The two provisions that are the subject of the petitions concern direct observation (DO), another significant tool the Department uses to combat cheating.

The history of DO testing under part 40 goes back to the beginnings of the Department's drug testing program. The principle that animates this history is that DO, because it is intrusive, is appropriate to use, not in the great mass of testing situations (e.g., all pre-employment and random tests), but only in those situations in which there is a heightened incentive to cheat or circumstances demonstrating the likelihood of cheating. In this way, the Department has maintained the proper balance between the legitimate privacy expectations of employees and the safety and program integrity interests of the Department. As a result, DO tests constitute only a tiny percentage of the drug tests conducted each year under DOT drug testing rules.

In the December 1, 1989, preamble to part 40 (54 FR 49854), we said that the limitations on using observed collections in only four circumstances would be maintained despite the fact that some comments requested that the Department allow greater discretion for observed collections. The Department decided that ''existing safeguards in part 40 are adequate to prevent tampering and that direct observation, because of its increased intrusiveness, should be strictly limited.'' The Department considered that limiting the circumstances that would result in a DO is ''one factor in the balance between privacy and safety necessity considered by the courts.''

The preamble went on to say that some comments specifically opposed direct observation ''as part of follow-up (i.e., post-positive) testing, while other commenters favored this practice.'' We said that the Department ''believes that direct observation may be a useful tool in follow-up testing.'' There was concern expressed about drug use relapses, especially for cocaine. We went on to say, ''An individual who has returned to work after rehabilitation but has suffered such a relapse may have a greater incentive to attempt to beat a

follow-up test, because the employer may not provide a second opportunity for rehabilitation.'' Regarding directly observed follow-up testing, the preamble concludes, ''If the employer or EAP counselor believes that this may be the case, the opportunity for direct observation should exist.''

Currently, section 40.67(a) requires that employers direct an immediate collection under direct observations in three circumstances: (1) When the laboratory reported an invalid specimen and the MRO reported that there was not an adequate medical explanation for the result; (2) when the MRO reports to the employer that the original non-negative result had to be cancelled because there was not a split specimen available for testing; and (3) when the MRO reports a negative-dilute specimen with a creatinine concentration greater than or equal to 2 mg/L or less than or equal to 5 mg/L. We added the third provision in 2003 in an interim final rule (68 FR 31624, May 28, 2003) and revised it in an interim final rule (69 FR 64865). Direct observation is also mandated at collection sites if the collector finds materials brought to the collection site to tamper with a specimen (section 40.61(f)(5)(i)), determines that a specimen is out of temperature range (section 40.65(b)(5)) or detects other evidence indicating an attempt to tamper with a specimen (section 40.65 (c)(1)). In addition, employers are currently allowed, but not required, to order a directly observed test under section 40.67(b) for return-to-duty and follow-up tests.

We acknowledge that DO collections are, and always have been, controversial. In the December 19, 2000 preamble to a major update to part 40 (65 FR 79462), about observed collections we said, ''Directly observed specimens are controversial because of their greater impact on employee privacy. They can be useful because they reduce the opportunity for tampering. On privacy grounds, some commenters, including unions and some service agents, would prefer not to conduct directly observed collections at all.'' (65 FR at 79489) These commenters opposed adding any situations in which direct observation was authorized or required.

The 2000 preamble went on to say, ''Other commenters said that the benefit of greater protection against specimen tampering warranted direct observation in situations that suggested a heightened risk of tampering.'' (65 FR at 79489) The Department agreed with these commenters and increased the number of circumstances for which an observed collection was required or authorized. In circumstances that pose a higher risk or greater risk for tampering, ''the interests of the integrity of the testing process, with its safety implications, outweigh the additional privacy impact of the direct observation process.'' (65 FR at 79489–79490)

More recently, there has been a sharply increased emphasis, at the level of national policy, on the problem of cheating and how to deal with it. The Department has been aware for several years of the increasing proliferation of products designed and sold to help workers who use drugs defeat drug tests. Not only was the Department working on the specimen validity testing rulemaking between 2005 and 2008, but the United States Congress was conducting its own inquiries on the issues.

During a May 17, 2005 hearing before the Investigations Committee on Energy and Commerce, the Department of Health and Human Services provided the following testimony regarding prosthetic devices delivering synthetic or drug-free human urine:

The most cumbersome, yet highly effective, way to beat a urine drug test is to use a physical belt-like device hidden under the clothing which contains a reservoir to unobtrusively hold real human urine from another person that is free from drugs, and deliver that bogus specimen into the collection container through a straw-like tube, or through a prosthetic device that looks like real human anatomy, color-matched. This last described device is heavily marketed for workplace drug testing and criminal justice urine collection situations that require directly observed urine specimens to be provided. Synthetic urine can be used in place of real human drug free urine. [Testimony before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce United States House of Representatives Products Used to Thwart Detection in Drug Testing Programs, Statement of Robert L. Stephenson II, M.P.H. Director, Division of Workplace Programs Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services at pages 4–5].

Also at the 2005 hearing, the GAO testified that

In summary, we found that products to defraud drug tests are easily obtained. They are brazenly marketed on Web sites by vendors who boast of periodically reformulating their products so that they will not be detected in the drug test process. In addition to an array of products designed to dilute, cleanse, or substitute urine specimens submitted to testers by drug users, approximately 400 different products are available to adulterate urine samples. The sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process. [Testimony Statement of Robert J. Cramer, Managing Director, Office of Special Investigations, the United States Government Accountability Office (GAO), before the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, GAO–05–653T, May 1, 2005].

On November 1, 2007, following media coverage regarding compromised collection integrity and security issues, the Congressional Subcommittee on Transportation and Infrastructure held a hearing on the problem of cheating on DOT-required tests. At the hearing, the GAO testified at the hearing about the threat to the integrity of the testing program posed by the devices being used to substitute urine in DO collections. In the final report the GAO issued in May of 2008, the GAO noted that the ease of subverting the testing process was a factor contributing to failures to detect drug use. Specifically, GAO noted that transportation employees ''are successfully adulterating or substituting their urine specimens with products that are widely available and marketed as * * * [ways to beat a test.]'' [GAO Report No. GAO–08–600, Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep them off the Road, May 2008 at pages 2–3.] The GAO further found that ''Several hundred products designed to dilute, cleanse, or substitute urine specimens can be easily obtained.'' [GAO Report No. GAO–08–600 at page 20.]

In light of the by-now well-recognized availability of substances and devices for substituting or adulterating specimens, the Department's premise for the changes it made to section 40.67 was that taking additional steps to combat cheating on drug tests was appropriate. Such steps are needed to avoid damage to the safety purposes of the program. Given the greater availability of means to cheat on tests, compared to the late 1980s, the Department took the position in the June 25 final rule that it is appropriate to strike the balance between the Department's interests in safety and program integrity and employees' interest in privacy at a different point than it did two decades ago.

In the Omnibus Transportation Employee Testing Act of 1991, Congress recognized that, while privacy is a very important value in the drug testing process, it is not an absolute value. The Act directs the Department to ''promote, *to the maximum extent practicable,* individual privacy in the collection of specimens'' (49 U.S.C. 20140(c)(1), emphasis added). In issuing the June 25

final rule, the Department, in effect, took the position that it is no longer ''practicable'' to operate a drug testing program without adding countermeasures to well-publicized cheating techniques and devices.

New Procedure To Check for Prosthetic Cheating Devices

Based on what the Department viewed as the need for additional safeguards against prosthetic devices used to cheat on DO tests, the Department explicitly sought comment in its October 2005 NPRM (70 FR 62281), on whether collectors should check to make sure that employees providing a specimen under DO are not using a prosthetic device to cheat on the test (e.g., by having an employee lower his pants and underwear so that the collector or observer could determine whether the employee was using such a device).

In the preamble to the Department's final rule based on this NPRM (73 FR 35968), the Department responded to comments on this proposal. This response set forth the Department's rationale for adopting a new provision, found in section 40.67(i), requiring employees to raise and lower their clothing to show the collector or observer that the employee is not using a prosthetic device. The Department reaffirms this rationale, and the Department does not believe that any delay in the effective date of this provision is appropriate. The Department believes that there would be nothing to be gained by delaying this significant anti-cheating, pro-safety initiative.

Consequently, this provision will go into effect, as scheduled, on August 25, 2008. The Department is not soliciting further comment on section 40.67(i). The effect of this decision is that, beginning August 25, 2008, observers in all DO collections will be required to carry out the anti-prosthetic device procedure of section 40.67(i) in all directly observed collections, including FU and RTD tests where employers choose to use DO. There is no requirement to use the section 40.67(i) procedure except in circumstances where DO tests otherwise are taking place.

We do not believe that petitioners have made a persuasive case that a delay is necessary to train collectors in this new procedure, which is simple to carry out and easy to understand. Moreover, it is *observers*—who need not be trained collectors—who are to carry out the task of having employees raise and lower clothing to determine whether prosthetic cheating devices are present. Any individual of the appropriate gender should be able to perform this function with minimal instruction. In addition, having waited until mid-August to file their petitions saying they had insufficient time to train personnel, railroad and aviation employers appear to have missed the opportunity to begin training personnel during the several weeks since the June publication of the final rule, if they believed additional time to be necessary.

It is important for employers to keep in mind, in view of the Department's decision to postpone the effective date of section 40.67(b), that for the period between August 25 and October 31, 2008, there will be no need to recruit or train additional observers, because there will be no additional direct observation tests required beyond those the Department's rules required before August 25. All that will be required during this period is that employers and collection contractors instruct observers to follow the additional procedure to guard against the use of prosthetic devices.

We also note that it is common for DOT operating administrations' enforcement personnel, in the initial months of a new requirement, to focus on information and education rather than the imposition of penalties. Employers who are making good faith efforts to comply with the provision should benefit from this typical enforcement practice.

Mandatory Use of Direct Observation in Return-to-Duty and Follow-up Testing

At the end of the discussion of this provision on page 35968 of the final rule preamble, the Department said, in the context of taking additional steps to address the problem of cheating on drug tests, that DO would be required for all FU and RTD tests. The new requirement was included as section 40.67(b). Under part 40 as it existed before this amendment, employers had the discretion to require direct observation in FU and RTD tests, but were not mandated to do so.

In the Department's view, this new requirement was a logical outgrowth of the development of the Department's increasing efforts to deal with the problem of cheating in drug tests. Even though we did not foresee [and few did] in 1989 the degree to which products designed to beat the drug test would be available, the Department was concerned about specimen tampering and about the heightened motivation of those employees returning to safety sensitive positions after positive tests to tamper with their specimens. That concern has increased in recent years as information about the widespread availability of cheating products has become available.

As a consequence, the Department believed, in adding this provision, that it was important for us to be consistent with the other DO provisions, which make DO testing mandatory in circumstances involving heightened motivation for or evidence suggesting attempts to cheat (see sections 40.61(f)(5)(i); 40.65 (b)(5) and (c)(1); 40.67(a)). In all these cases, use of DO is mandatory. If safety necessitates a DO in one of these circumstances, then, the Department believed, safety likewise necessitates DO as part of FU and RTD tests. The Department was mindful that everyone who has to take an RTD or FU test had already violated the rule (e.g., by testing positive or refusing to test), showing that he or she has behaved in a way that presents an increased risk to transportation safety. Such employees will be acutely aware that that they must test negative on all RTD and FU tests in order to regain or retain their ability to perform safety-sensitive functions. These circumstances, the Department believed, present just the sort of heightened incentive for cheating on a test that DO testing is intended to combat.

It was but a modest, incremental step from the current regulation's *authorization* of DO in FU and RTD situations to the June 25 final rule's *requirement* for DO in these situations. Consequently, the Department believed that taking this step was timely and appropriate.

Postponement of Effective Date of Section 40.67(b) and Request for Comment

Petitioners pointed out that the Department's 2005 NPRM did not specifically raise for comment a proposal to make DO testing mandatory, rather than discretionary, in FU and RTD testing. While the Department believes, as discussed above, that section 40.67(b) is justified as a logical outgrowth of Part 40 rulemaking, even in the absence of a specific request for comment, the Department will seek comment on section 40.67(b) for 30 days.

In order to accommodate this comment period, as well as to allow time for the Department to review and respond to any comments we receive, the Department will change the effective date of section 40.67(b) to November 1, 2008, the date suggested by petitioners. We want all interested parties to realize that this change in the effective date affects ONLY section 40.67(b). The rest

of the June 25, 2008, final rule goes into effect on August 25, 2008, as scheduled.

We will place the petitions we have received into the docket, and we will consider the arguments made in these petitions about the content of section 40.67(b) along with other comments that we receive. On the basis of the comments we receive and any other information available to the Department, the Department will reconsider section 40.67(b) and may retain, eliminate, or modify it.

Because this action and the decision not to take similar action with respect to section 40.67(i) also completely respond to the parallel petitions to the Federal Railroad Administration (FRA) by some of the same parties, which raise the same issues about the same provisions of part 40, FRA is not taking any separate action on the petitions concerning the implementation of the amendments to 40.67 in the railroad industry.

Issued this 21st day of August, 2008, at Washington, DC.

Jim Swart,

Director, Office of Drug and Alcohol Policy and Compliance.

[FR Doc. E8–19816 Filed 8–22–08; 11:15 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R5–ES–2008–0005; 92220–1113–0000–C6]

RIN 1018–AT37

Endangered and Threatened Wildlife and Plants; Final Rule Removing the Virginia Northern Flying Squirrel (Glaucomys sabrinus fuscus) From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), hereby remove the Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*), now more commonly known as the West Virginia northern flying squirrel (WVNFS), from the List of Threatened and Endangered Wildlife due to recovery. This action is based on a review of the best available scientific and commercial data, which indicate that the subspecies is no longer endangered or threatened with extinction, or likely to become so within the foreseeable future. Habitat regeneration and recovery actions have resulted in a reduction in the threats, which has led to: (1) A significant increase in the number of known WVNFS captures and distinct capture locations; (2) verification of multiple-generation reproduction and persistence throughout the range; (3) proven WVNFS resiliency; and (4) substantial improvement and continued expansion of suitable habitat rangewide.

DATES: This rule becomes effective September 25, 2008.

ADDRESSES: Comments and materials we received, as well as supporting documentation used in preparation of this final rule, are available for inspection, by appointment, during normal business hours, at our West Virginia Field Office, 694 Beverly Pike, Elkins, West Virginia 26241. Call (304) 636–6586 to make arrangements.

FOR FURTHER INFORMATION CONTACT: Diane Lynch, Regional Listing Coordinator, Northeast Regional Office, 300 Westgate Center, Hadley, MA 01035 (telephone: 413–253–8628); or Tom Chapman, Field Office Supervisor, or Laura Hill, Assistant Field Supervisor, West Virginia Field Office (see **ADDRESSES**).

SUPPLEMENTARY INFORMATION:

Background

The northern flying squirrel, *Glaucomys sabrinus,* consists of 25 subspecies, including the Virginia northern flying squirrel, *G. s. fuscus.* Miller (1936, p. 143) first described *G. s. fuscus,* based on specimens collected in the Appalachian Mountains of eastern West Virginia. The Virginia northern flying squirrel was listed as endangered under the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*) effective on July 31, 1985 (Service 1985 (50 FR 26999)). However, it was subsequently determined that a more suitable common name for *G. s. fuscus* is the West Virginia northern flying squirrel, due to the majority of the subspecies' range occurring in West Virginia; thus, we refer to *G. s. fuscus* as West Virginia northern flying squirrel (WVNFS) throughout the rest of this document. Information about the WVNFS' life history can be found in our final listing rule (50 FR 26999), the Appalachian Northern Flying Squirrels Recovery Plan (Service 1990, pp. 1–11), and the WVNFS 5-year review (Service 2006a, pp. 6–10).

Previous Federal Actions

On December 19, 2006, we published a proposed rule to delist the WVNFS (71 FR 75924). Additional information regarding previous Federal actions for the WVNFS can be obtained by consulting the subspecies' regulatory profile found at: *http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A09R.*

Recovery

In 1990, the original recovery plan was approved, and at the time, the recovery criteria as they apply to the WVNFS were deemed objective, measurable, and adequate (Service 1990, p. 19). The original recovery criteria were not specifically reviewed or updated in the 2001 recovery plan amendment (Service 2001, pp. 1–6). Instead, the focus of the 2001 amendment was an update to Appendix A, Guidelines for Habitat Identification and Management for the WVNFS. Implementation of the amended Appendix A guidelines by the Monongahela National Forest (MNF) effectively abated the main threat to the squirrel (i.e., habitat loss from timber management) throughout the majority of its range, by eliminating adverse impacts on all suitable habitat on the MNF without having to prove WVNFS presence (Service 2001, pp. 1–6; Service 2006a, pp. 3–4).

Recovery plans are not regulatory documents and are instead intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may have been exceeded while other criteria may not have been accomplished. In that instance, the Service may judge that, overall, the threats have been minimized sufficiently and the species is robust enough to reclassify the species from endangered to threatened or to delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan. Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. This new information may change the extent to which criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, and judging the degree of recovery of a species is also an adaptive management process that may, or may

not, fully follow the guidance provided in a recovery plan.

In the case of the WVNFS, new information on the subspecies has been learned that was not known at the time the recovery plan and the amendment were finalized. This new information includes habitat modeling efforts completed in 2006, completion of a forest plan amendment in 2006 with substantial provisions for protection of WVNFS and its habitat, our compilation in 2005 of the 20+ years of survey data, and our re-analysis of WVNFS persistence and geographic distribution based upon them. This new information changes the extent to which two of the four Recovery Plan criteria need to be met for recognizing recovery of the subspecies. Further details related to each recovery criterion are available in the Service-prepared document *Analysis of Recovery Criteria for the West Virginia Northern Flying Squirrel* (Service 2007a, pp. 1–16). An attachment to this document, ''Table 3, Land use designations, restrictions, and primary management emphases in WVNFS habitat on the MNF,'' provides supplementary information for downlisting criterion number 3. Based on our analysis of the best available data, we believe that the intents of the original recovery criteria have been met.

In conjunction with the analysis of the recovery criteria, we analyzed the threats to the WVNFS under the framework of the five factors established in the Act. This analysis of the threats was based in part on the most recent 5-year review of the subspecies completed in 2006 (Service 2006a, pp. 1–20). This is available at *http://www.fws.gov/northeast/pdf/flysqrev.pdf.* A further detailed discussion of the five factors is contained in the Summary of Factors Affecting the Species section of this rule below.

Summary of Public Comments

In our proposed rule (71 FR 75924), we requested that all interested parties submit information, data, and comments concerning: (1) Biological, commercial, trade, or other relevant data concerning any threat (or lack thereof) to the WVNFS; (2) additional information on the range, distribution, and population size of the WVNFS and its habitat; (3) the location of any additional populations of the WVNFS; and (4) data on population trends. The comment period was from December 19, 2006, through April 23, 2007 (71 FR 75924; 72 FR 7852; 72 FR 9913).

During the 120-day comment period, we received a total of 4,808 comments. Of these comments, we consider 18 (6 from peer reviewers and 12 from other sources) to be substantive. The majority of comments received were form letters objecting to the proposed delisting rule but providing no new or supporting information.

A. Distribution Concerns

Issue 1—Some commenters asked us to quantify what portion of the historical range is currently occupied by WVNFS.

Response—The historical range of WVNFS essentially corresponds to the distribution of old growth red spruce-northern hardwood forest (500,000 to 600,000 acres (ac)) prior to logging and fires at the turn of the 20th century. Much of the historical red spruce has been replaced by northern hardwoods. Current estimates of the amount of WVNFS habitat vary widely from 242,000 ac (U.S. Department of Agriculture (USDA), Northern Research Station 2006, unpublished map) to 600,000+ ac (Menzel *et al.* 2006b, p. 4), across which the WVNFS is widely dispersed.

Historically, the red spruce-northern hardwood forest encompassed portions of eight counties, extending from the vicinity of Mount Storm (Grant County) in the north, to Cold Knob (Greenbrier County) in the south, east to the Allegheny Front (Pendleton and Highland Counties), and west to Webster County. Based upon monitoring from 1985 to the present, the WVNFS still occupies portions of these same eight counties, roughly corresponding to 85 percent of the extent (breadth and width) of the historical range. With exception of the extreme northern portions of Grant County (roughly 5 percent of the historical range), and the area from Briery Knob south to Cold Knob in Greenbrier County (collectively less than 10 percent of the historical range), the outer boundaries of the current distribution of the WVNFS closely match the extent of its historical range (Service 2007a, Figure 1). Additional information can be found on page 75926 of the proposed delisting rule (71 FR 75924).

B. Population Concerns

Issue 1—Some commenters expressed concern about an absence of population information and trend data. These commenters stated the Service had failed to consider population growth, population size, and linkages to other populations. Some commenters expressed concern about the use of persistence as an indicator of population health or stability and noted that the Service had not clearly defined the term ''persistence.'' The commenters stated that this approach is flawed because it is not tied to knowledge of the population, but merely to subspecies presence, which can be explained by immigration from other populations.

Response—The Service has considered population dynamics when assessing the status of the WVNFS using the best available scientific data. The Service considers persistence to be the best indicator of successfully reproducing populations for this subspecies, given its poor detectability, its life history characteristics, and the 20+ years of data from presence/absence surveys.

We define persistence as continuing captures of WVNFS over multiple generations at previously documented sites throughout the historical range. Because WVNFS first reproduces at 1–2 years, and has a relatively short life span, averaging approximately 3 years, persistence at a single monitoring site over 5 years indicates successful reproduction across multiple (three to five) generations (Service 2007c, p. 10). The Service has analyzed presence/absence data to determine persistence of WVNFS across its range, taking into consideration detectability rates, life span, reproductive capacity, dispersal capability, linkages to other populations, and the naturally patchy habitat distribution of the subspecies (Service 2007c, pp. 5–6, 9–11). These data consistently indicate a relatively high degree of persistence (roughly 80 percent) across the landscape, and are not indicative of a declining population of WVNFS. The data available for the remaining landscape (roughly 20 percent) does not represent an absence or lack of persistence of the WVNFS, but rather is indicative of the WVNFS' life history traits (i.e., elusive and hard to capture). Therefore, the data is simply less conclusive. This remaining landscape (roughly 20 percent) is still habitat for the WVNFS but success rates for capturing the WVNFS are lower. The persistence of WVNFS is likely facilitated by immigration. See *Issues 2, 3,* and *4* and their responses under this section for additional information.

Issue 2—Some commenters believe the Service must conduct a Population Viability Analysis (PVA) to identify a minimum viable population before a decision on delisting the WVNFS is made. These commenters noted that genetics-based computer models of minimum viable population sizes generally indicate that population sizes on the order of thousands of individuals (low thousands or higher) may be needed. In contrast, another commenter submitted a copy of a manuscript by Smith and Person (2007, pp. 626–636) that evaluated the estimated persistence

of a northern flying squirrel subspecies in fragmented habitats in southeast Alaska. This commenter concluded that dispersal likely will be the key to northern flying squirrel population viability, not total population size of individual patches.

Response—A genetics-based computer model to identify minimum population sizes for WVNFS does not currently exist. In our view, there is insufficient information available to support an accurate or credible genetics-based PVA model for WVNFS, and such an analysis would rely upon too many variables whose values would be speculative. Given the nature of the WVNFS life history and habitat information currently available, we believe that estimates of persistence, and an analysis of functional habitat connectivity, are the most credible form of PVA analysis. We therefore have done these analyses using the best available scientific data (for more detail, see Service 2007c, pp. 5–6, 9–11) resulting in evidence of persistence and a high degree of habitat connectivity.

We also have considered the recent work by Smith and Person (2007, pp. 626–636), who developed a birth-death process model to examine persistence of populations of a different northern flying squirrel subspecies in hypothetical, old-growth reserves isolated in managed landscapes in Alaska. We agree with these authors that functional habitat connectivity is more important to WVNFS population viability than total population size rangewide, or population sizes of individual habitat patches (See *Issues 3* and *4* and their responses below).

Issue 3—Some commenters expressed concerns that habitat reserves may be too few, small, degraded, and isolated to support viable populations of WVNFS. These commenters emphasized the importance of functional habitat connectivity.

Response—Within the range of the WVNFS in the central Appalachians, there are numerous patches of high-quality, second-growth red spruce forest, with individual trees that are near maximum size and age, within an almost continuous matrix of more highly variable, second-growth red spruce and northern hardwood forest conditions. The habitat is still relatively well connected from the standpoint of WVNFS movement and does not significantly limit dispersal and movements (Service 2007c, Figure 1). Within the range of the WVNFS, above 3,200 feet (ft), approximately 96 percent of the land is forested (627,237 ac) (USDA Forest Service 2007, unpubl. map). Patch sizes on the MNF also are fairly large and connected by numerous forested linkages, facilitating the likelihood of WVNFS dispersal (Service 2007c, p. 6, Figure 1). For example, radio-tagged male WVNFS and other subspecies of northern flying squirrels have demonstrated an ability to make sudden, long-distance movements, presumably to find females. Some individuals have traveled up to 2 kilometers (1.2 miles) in a night during the mating season, which is from late winter to early spring (Smith 2007a, p. 871; Menzel 2003, p. 77, 117; Terry 2004, p. 18; Weigl *et al.* 1999, pp. 59–62; Weigl *et al.* 2002, p. 37, 145).

Smith and Person (2007) modeled habitat reserve size for northern flying squirrels in Alaska. Habitat reserves must sustain individual insular populations, or the matrix of managed lands between reserves must allow dispersal among reserves to maintain wildlife populations within a metapopulation structure (Smith and Person 2007, p. 633). Out of an abundance of caution, Smith and Person (2007, p. 628) modeled the first scenario to estimate the persistence of northern flying squirrel populations occupying isolated fragments of habitat in a matrix of unsuitable habitat within a large 2-million-ac landscape in Alaska (p. 628).

Lacking conclusive evidence of dispersal, the authors assumed their populations were closed (i.e., no immigration or emigration). They also assumed the habitat was static (i.e., patch size and patch quality are constant over as long as a 100-year period). Neither of these assumptions fits the situation in the central Appalachians where many, if not most, of the habitat patches containing WVNFS are connected by habitat, and through passive and active management, conditions are expected to continue improving. In addition, the authors relied heavily on 3 years of local demographic data and data from a longer-term study in Canada. These demographic data may be dissimilar to those of WVNFS in West Virginia and Virginia. For example, the authors used an estimated average litter size of 2, which is low compared to the WVNFS average litter size of 2.5–3.0 (Reynolds *et al.* 1999, p. 346; Stihler *et al.* 1998, p. 178). Estimated survival rates also may have been low because the value was based on recaptures of tagged individuals, and the lack of a recapture does not mean a squirrel has died.

That said Smith and Person do provide a framework for judging the relative magnitude of patch sizes that may be needed for northern flying squirrel persistence in large forested landscapes. Smith and Person (2007, p. 631, Table 5) estimated that the minimum area of an isolated patch of contiguous habitat to confidently sustain populations for at least 100 years without immigration/emigration was 11,414 ac (4,621 hectares (ha)) (P=0.90). Furthermore, there was a high probability that *G. sabrinus* could persist in smaller (≥245-ac [99-ha]) isolated habitat patches for 25 years without migration (p. 631). Smith and Person (2007, p. 633) concluded that large reserves may not need to be contiguous, because interspersed lower-quality habitats can support northern flying squirrels for a short time and likely facilitate dispersal between patches of higher-quality habitat (Smith and Person 2007, p. 633).

Because of the many assumptions, described above, of this model, which do not transfer well to the central Appalachians, we decided to do a coarse comparison of minimum patch sizes. Because the landscape for WVNFS appears to have a higher degree of functional connectivity than the study area in Alaska, we looked at the total acreages of contiguous and connected suitable habitat within each of seven core areas. [Five ''core areas'' were identified at the time the 1990 recovery plan was written (Service 1990. p. 16) as clusters of capture sites, and are referred to in the plan as Geographical Recovery Areas. Two more clusters were later identified when surveys found additional WVNFSs. Collectively these seven areas (hereafter called ''core areas'') encompass the entire extant distribution of WVNFS.] Out of an abundance of caution, we assumed these seven core areas were geographically separated (no immigration/emigration among them), although this likely is not the case. Using these conservative assumptions, the ''minimum patch size of contiguous habitat'' within each core area ranges from 9,353 ac (3,787 ha) for the smallest core area (Stuart Knob) to 120,484 ac (48,779 ha) for the largest core area (Cheat). Six of the seven core areas exceed the minimum patch size identified by Smith and Person (2007, p. 631) as necessary to confidently sustain populations for at least 100 years without immigration/emigration (11,414 ac or 4,621 ha). Thus we infer that there is adequate habitat for persistence of WVNFS populations within most, if not all, of the core areas.

Whereas habitat conditions in Alaska (small, isolated, old-growth forest fragments in a matrix of unsuitable habitat) are quite dissimilar to those in the central Appalachians (large, well-connected patches of predominantly second-growth forest in a matrix of

suitable habitat), it appears that habitat reserves of sufficient quantity, quality, and connectivity exist to sustain populations of WVNFS with influences of immigration and emigration. This habitat matrix provides a high degree of functional connectivity, as evidenced by persistence over multiple generations at monitoring sites across a range of forest conditions (Service 2007c, pp. 9–11).

Issue 4—Some commenters asked the Service to analyze the viability of WVNFS metapopulations (multiple, relatively isolated breeding units). These commenters cited Weigl (2007, p. 903), who claimed that ''some second growth stands may well appear to support healthy densities of squirrels, but, in reality, are population sinks for migrants from neighboring old growth habitats and thus may not permanently maintain viable populations.'' These commenters suggested the WVNFS may be undergoing a population decline that is influenced by source-sink dynamics of meta-population theory.

Response—In response to this comment, the Service has conducted additional analyses to look for evidence of population sinks and sources in the central Appalachians. We found no evidence that the few remaining old growth patches of habitat in the central Appalachians, or other optimal habitat, are operating as potential sources of WVNFS recruits that disperse into suboptimal habitat (potential sinks) where populations are not sustained. Rather, our analysis of 21 years of monitoring shows no evidence of localized extirpation since the subspecies was listed. The WVNFS persists in or near all of the historical areas where it was originally known at the time of listing. Persistence of WVNFS across the range over multiple generations is consistently high, consistently distributed across habitat types (varying from 70 to 86 percent persistence) and geographic zones (varying from 80 to 85 percent persistence), and not significantly different from expected values (Smith 2007a, p. 871; Service 2007c, p. 11, Table 1). Nestlings and juveniles are routinely documented at monitoring sites (76 percent of sites) (Service 2007c, p. 9). Because WVNFS has a relatively short life span (averaging approximately 3 years), and first reproduces at age 1 or 2, persistence at a single monitoring site over 5 years indicates successful reproduction across multiple (3+) generations. In addition, the observed roughly 1:1 sex ratio (492 males, 539 females) is within the range needed for normal reproductive performance (Service 2007c, p. 11). Males are most likely to disperse, presumably to seek females (Ford 2007a). There is no indication of a predominance of dispersing males or juvenile males, which could be indicative of a meta-population sink dynamic (such as an emigration front of individuals leaving former territory), or of a meta-population source-dynamic (such as a colonizing front of individuals moving into former territory) (Ford 2007a). Collectively, these data show a relatively high degree of population stability and consistent habitat occupancy across multiple generations.

Issue 5—Some commenters noted that the chance of capturing a WVNFS in a nest box is confounded by a very low rate of occupancy, plasticity in nest site selection, availability of nest sites, and relative abundance of WVNFS. These commenters state that it is as important to understand why an individual is present as to understand why it is not present. They state that a major caveat of relying on the nest box data as a measure of persistence is that it does not tell us anything about the habitat, and that it is impossible to infer what is optimal habitat and if it is available and can support the WVNFS.

Response—The Service agrees that all of the factors mentioned above affect the chance of capturing a WVNFS; however, we disagree about inferences that can be drawn from persistence data. Continued persistence of WVNFS over the past century and occupation throughout most of its historical range tell us much about habitat and indicate that sufficient quality and quantity of habitat exists regardless of what may be perceived as ''optimal'' habitat. Therefore, a strong inference can be made regarding habitat suitability based on the persistence, successful reproduction, and sex ratios that lack any indication of population sink dynamics (Service 2007c, pp 11, Table 1).

Issue 6—Some commenters cited a paper by Weigl (2007, p. 900) as evidence that the WVNFS may have a longer life span than previously assumed. These commenters suggested that if this is true, then the Service may need to reanalyze reproductive data and conclusions about persistence.

Response—Weigl (2007, p. 900) referred to a study of a different *G. sabrinus* subspecies in the Pacific Northwest as evidence that WVNFS may be relatively long lived. In this study, three squirrels were known to be at least 7 years old at recapture; however, the majority of squirrels captured were not known to survive beyond 2–3 years (Villa *et al.* 1999, p.39). In the central Appalachians, recapture data for four WVNFS suggest the average lifespan is probably about 2 to 3 years (West Virginia Division of Natural Resources (WVDNR) and Service 2006, unpubl. data). Wells-Gosling and Heaney (1984, p. 4) also noted the average longevity of *G. sabrinus* was probably less than 4 years. Our previous conclusions about persistence remain valid based upon an average lifespan of 2–3 years.

C. Using the Best Available Science

Issue 1—Some commenters were concerned about a lack of knowledge of the WVNFS life cycle and the consideration of science regarding the subspecies' ecology.

Response—The WVNFS life cycle and ecology is fairly well known from numerous studies in peer-reviewed journals, books, and technical publications. The Service has considered the best available scientific and commercial data regarding WVNFS life history and ecology. For a full list of the literature cited in this final rule, please contact the West Virginia Field Office (see **ADDRESSES**).

Issue 2—Whereas four peer reviewers and some commenters were satisfied the best available science and data had been used in the development of the proposed rule, two peer reviewers and some commenters questioned the quality or interpretation of data used to support the proposed rule. These commenters offered manuscripts in press, or alternative literature citations or explanations of the data.

Response—The Service has reviewed the manuscripts in press (now subsequently published) and literature citations provided by commenters. We have considered and incorporated the information provided in these documents where appropriate in this final rule. We have incorporated these documents into our administrative record and cited them in this rule where appropriate (including, but not limited to, sections of the rule dealing with WVNFS population dynamics; habitat use, quantity, quality, and connectivity; and climate change). The peer-reviewed scientific journal articles, peer-reviewed agency reports, and other literature cited in the final rule represent the best available science relevant to the decision. None of the alternative explanations of the data were as persuasive as the sources we have cited in the final rule.

Issue 3—Some commenters disagreed with a choice of words in the summary sections of the proposed rule which referred to ''an increase in the number of individual WVNFSs.'' These commenters claimed that there is no evidence of an increase, noting that 1,141 captures do not represent unique squirrels, because unknown portions

were recaptures. These commenters conducted an independent analysis of a WVNFS electronic database and field data reporting forms. They reported inconsistencies in the data base, and concluded there may have been as few as 654 unique captures. These commenters believe that such a low number of captures of unique individuals diminishes the credibility of conclusions reached by the Service about persistence.

Some commenters also questioned whether an increase in WVNFS occupancy was simply a consequence of increased surveys or efficacy of survey efforts since listing. One commenter questioned our ability to detect a change in habitat occupancy.

Response—Whereas the proposed rule did identify the total number of recaptures (71 FR 75926), the Service agrees that use of the phrase ''increase in the number if individual WVNFSs'' was not accurate, as we have not estimated the size of the WVNFS population. We have corrected this wording in the final rule. Based upon data collected through 2005, there has been an increase in the total number of known captures, from 10 at the time of listing, to 1,141 captures at the time of the proposed rule, of which there were 78 total recaptures (6.8 percent). Due to multiple recaptures of some individuals, these 78 total recaptures represent 62 individuals.

Contrary to the commenters' estimate of 654 unique captures, we calculate that there were a total of 908 unique captures (760 unique captures of adults and 148 unique captures of juveniles). These estimates take into account unique recaptures and unmarked individuals. About 8 percent of the adults escaped before they could be marked. Also, contrary to the commenters' determination that ''several'' nestlings were not tagged, nearly all of the 133 nestlings and about 2 percent of the 154 juveniles captured were not marked as a precautionary measure. Researchers believe that marking small individuals with ear tags and/or pit tags is an unnecessary procedure that could increase mortality (Stihler 2007). The fact that these individuals were not marked is inconsequential when considering that there is less than a 5 percent probability of subsequent recapture. Rather, the capture of nestlings or juveniles is a good sign of reproduction (25 percent of all captures).

The increase in the number of capture locations is useful in evaluating the distribution of WVNFS within its range, but cannot be used to estimate population sizes. The number of captures has increased with increased survey effort. While the area covered by surveys has increased over time, the efficacy of capturing WVNFS remains low. Based on original methodologies used at the time of listing, and still predominantly in use today, roughly 2 percent of nest box or live trap checks result in detection of WVNFS (Terry 2004, p. 46; Service 2006b, p. 13). This estimate of detectability is a simple calculation of the proportion of nest box or live trap checks that resulted in WVNFS capture. We have not used this simple estimate of detectability to calculate changes in habitat occupancy over time as suggested by one commenter. We evaluated whether the existing data set could be analyzed using more rigorous models for estimating detectability and changes in habitat occupancy (MacKenzie *et al.* 2002, pp. 2248–2255; MacKenzie *et al.* 2003, pp. 2200–2207; MacKenzie 2005, pp. 849–860; MacKenzie 2006, 1568–1584); however, we felt it inappropriate given that model assumptions would have been violated and could not be validated. While there has been an increase overall in survey area, the techniques used were the same and the intensity of work at sites has not varied significantly in the past 20 years.

As a result of these comments, the WVDNR has checked the data base against field forms and has made a few minor corrections. These changes do not substantially alter previous statistics reported by the Service or conclusions reached about persistence.

Issue 4—Some commenters noted that monitoring sites were not randomly selected, which builds in bias. These commenters recommended that such data not be used for estimating population.

Response—The Service acknowledges that monitoring sites were not selected randomly. The goal of the presence/absence surveys was to find as many WVNFS as possible and to document their range and distribution. Consequently, few sites were placed in low-quality habitat, and many sites were placed in moderate or high-quality habitat. Because of this bias, the Service has not used these data to estimate population sizes, but rather to monitor presence/absence and persistence.

D. Genetic Concerns

Issue 1—Some public commenters were concerned about a lack of genetic research that might indicate risks due to isolation (e.g., genetic drift, inbreeding) or existence of discrete populations meriting ESA protection.

Response—We considered information from several studies using a variety of genetic markers. Allozymic analyses by Browne *et al.* (1999, pp. 205–214) found lower measures of polymorphism and heterozygosity in North Carolina, West Virginia, and Virginia populations of *G. sabrinus* compared with other northern flying squirrels, noting that population structure in the southeastern States is similar to that of other species that occupy habitat islands (Browne *et al.* 1999, p. 212). Similarly, allozyme and mitochondrial DNA data examined by Arbogast *et al.* (2005, pp. 123–133) showed lower diversity of *G. s. fuscus* and *G. s. coloratus* compared with conspecifics (other flying squirrel species), but not relative to populations of the widespread southern flying squirrel. Sparks' data from a small number of microsatellite loci showed moderate to high gene flow across populations of northern flying squirrels in West Virginia, Virginia, and North Carolina (Sparks 2005, pp. 16 and 23). In addition, the coefficient of inbreeding failed to differ between populations at Cheat Mountain, West Virginia, and at an unfragmented forested landscape in Washington State (Sparks 2005, p. 18). Also, no difference in levels of a parasitic helminth (a species of parasitic worm commonly found in the intestines of flying squirrels, the presence of which is often used as possible indicator of reduced fitness) was detected among *G. sabrinus* and two sympatric tree squirrels (Sparks 2005, pp. 19, 62).

Arbogast *et al.* (2005, p. 130) and Weigl (2007, p. 902) speculate about potential future decreases in genetic diversity due to hypothetical habitat reductions. As discussed under *Issue 3, Response to Comments, Section B—Population Concerns*, however, we believe that habitat is still relatively well connected from the standpoint of WVNFS movements. Interspersed lower-quality habitats that can support northern flying squirrels for a short time will also facilitate the low levels of dispersal necessary to maintain allelic diversity and heterozygosity while conserving local adaptations. Furthermore, Sparks (2005, p. 29) suggests that *G. sabrinus* may have a population structure adapted to some degree of inbreeding tolerance.

In summary, after review of the genetic studies referenced above, we have not detected any genetic risk to the WVNFS due to isolation. Additionally, we are aware of no genetic, behavioral, ecological, morphological, physiological, physical, or other information supporting the existence of distinct population segments within the WVNFS.

E. Habitat Modeling Concerns

Issue 1—One peer reviewer and some commenters thought the Service had applied the Menzel *et al.* (2006b, pp. 1–10) model outside of its intended scope and for purposes not supported by the study the model is based upon. Some conclude that the Service is using the model to make a case that the agency can accurately predict habitat and WVNFS viability, by assuming that the model definitively predicts presence and absence.

Response—Using logistic regression, Menzel *et al.* (2006b, pp. 1–10) developed a Geographic Information System (GIS)-based habitat model for WVNFS in West Virginia by synthesizing micro- and macro-habitat relationship data. The Service has applied this model appropriately to gauge the relative abundance and quality of habitat rangewide and to broadly estimate the predicted distribution of WVNFS on the landscape. We have not assumed that the model definitively predicts presence/absence of WVNFS. Nor have we argued that predicted habitat ensures WVNFS' viability; predicted habitat is only one component. The model can give insights, albeit coarse, on habitat quality and its distribution across the landscape. As noted in the final listing rule (50 FR 26999) and recovery plans (Service 1990, pp. 12–16) for this subspecies, the abundance and quality of habitat are keys to the recovery of WVNFS because habitat loss and degradation were the main factors that led to the subspecies being listed as endangered. We have used the model at a landscape level to predict habitat quality and look for evidence of sink-source metapopulation dynamics. We have also used the model to highlight where managers should conduct follow-up site visits to determine actual squirrel habitat or where managers could reasonably assume no occupation without a site visit. A manager could use Ford *et al.* (2004, pp. 430–438) at the individual forest stand level to verify the quality of the habitat or what the probability level of occupation would be for that specific location.

Issue 2—Some commenters criticized the Menzel *et al.* (2006b, pp. 1–10) habitat model for being unverified and untested.

Response—The model has been verified and tested and proved to be quite accurate (81 percent) when the data were subjected to ground-truthing procedures to determine correct classification rates of occupiable and non-occupiable habitat (Menzel *et al.* 2006b, p. 3–4). Staff from the WVDNR and MNF have used the model successfully to identify WVNFS habitat, corroborated by additional captures where the model had shown a high probability of occurrence.

Issue 3—Some commenters stated that the Menzel model's prediction of habitat from tracking data should have been verified in following years (different temporal frame) and on different areas of the range (different spatial frame).

Response—The actual telemetry data used by the Menzel model did span several years and different areas. The model is based on actual data, which have been verified.

Issue 4—Some commenters criticized the Menzel model for containing several untested assumptions: (a) There is a direct relationship between nest box use and preferred habitat; (b) quality of habitat is predicted by elevation and vegetative community; and (c) data from spring and summer tracking reveals information on habitat use the remainder of the year.

Response—Addressing assumptions (a) and (b), Menzel *et al.* (2004, pp. 355–368; 2006b, pp. 1–10; 2006a, pp. 204–210) does not assert that probability of occurrence equates directly to preferred habitat; however, there is a clear correlation between high probability habitat (>75 percent probability of WVNFS occupancy) and habitat components such as red spruce and high elevation that were preferred by radio-collared individuals (Menzel *et al.* 2006a, pp. 206–207). Addressing assumption (c), data from winter telemetry studies at Snowshoe Mountain Resort and Canaan Valley National Wildlife Refuge (Ford *et al.* 2007 in press, pp. 6, 8) are similar to results from spring, summer and fall reported by Menzel *et al.* (2006a, pp. 206–207). Winter data confirm that male home ranges are larger than female home ranges and both sexes key in on red spruce-dominated habitats for foraging (Ford *et al.* 2007, pp. 4, 6, 7).

Issue 5—Some commenters stated that the Menzel model was based on limited spatial and temporal data from 4 sites and 13 animals; therefore, results can be generalized only with great caution.

Response—The Menzel *et al.* (2006b, p. 3) model is not based on a limited subset of the data, but rather is based on most of the capture data through 1999 and most of the telemetry data from WVNFS tracked in a variety of stand age-classes and compositions. All squirrels tracked for which home range sizes were calculated, had reached home range size asymptotes (the point on a graph indicating the minimum number of samples needed to calculate maximum home range size), indicating that sufficient location data exists to estimate home range size. Moreover, WVNFSs were tracked in a variety of poor to excellent habitat conditions. This methodology is consistent with similar examples of wildlife habitat data being collected from tagged individuals and then used in a modeling effort to extrapolate across a larger, but similar landscape (for example, Gibson *et al.* 2004, pp. 75–89; Posillico *et al.* 2004, pp. 141–150). The Service believes it has interpreted these data appropriately.

Issue 6—Some commenters stated that the Menzel model is a simplification of existing knowledge and does not account for important variables in WVNFS biology, such as forest age, structure, tree composition, and fungi. These commenters believe the model potentially overestimates optimal habitat by treating young forest the same as old forest, and by lumping other factors together (moist conditions, high rainfall, northern aspects, forest structure, suitable nest sites, food sources, etc.) based on elevation and spruce occurrence.

Response—The Service concurs that Menzel *et al.* (2006b, pp. 1–10) is a simple habitat model that was meant to capture broad aspects of WVNFS distribution. The model tends to underestimate higher-quality habitat and to overestimate lesser-quality habitat, especially near the 50 percent predicted probability of occurrence threshold (Ford 2007b). However, we still think the model is useful and reasonably accurate for gauging the relative abundance and quality of habitat rangewide and for predicting the distribution of WVNFS on the landscape, and represents the best available scientific and commercial data.

F. Ecosystem and Habitat Concerns

Issue 1—Some commenters were concerned that delisting the WVNFS would jeopardize an entire ecosystem, especially when considering the critical role that WVNFS plays in dispersal and persistence of numerous fungi which have symbiotic relationships with trees.

Response—The Service agrees that the WVNFS plays an important role in the red spruce-northern hardwood ecosystem (Smith 2007a, p. 862–863; Weigl 2007, pp.10–12). Habitat models for this subspecies implicitly recognize the symbiosis between WVNFS and tree fungus (Odom *et al.* 2001, pp. 245–252; Menzel *et al.* 2006b, pp. 1–10). The Service does not expect that delisting the WVNFS will have negative consequences for the ecosystem. The red spruce-northern hardwood ecosystem upon which the WVNFS

depends has substantially recovered and continues to improve (also see *Issue 4* in this same subsection below). The delisting process signifies elimination of endangerment of the WVNFS and elimination of the need for the Act's protections. Delisting is a procedural acknowledgement of the recovered ecological status of this subspecies and the ecosystem upon which it depends.

Issue 2—One commenter stated that protection of habitat is serving as a proxy for the status of the subspecies. Protection of habitat is critical to protection of the subspecies but does not ensure recovery.

Response—While protection of habitat is important to the status of the subspecies, it is not serving as a substitute for other factors. In analyzing whether the WVNFS has recovered, the Service has considered the reduction of all threats to the subspecies, including the destruction, modification, or curtailment of its habitat or range; overutilization; disease or predation; inadequacy of existing regulatory mechanisms; and other factors. See the Summary of Factors Affecting the Species section below for additional information.

Issue 3—Some commenters stated that there is a lack of a clear definition of habitat for WVNFS due to insufficient information on habitat needs. Factors comprising optimal habitat are complex and poorly understood.

Response—The work of Menzel *et al.* (2004, pp. 355–368; 2006b, pp. 1–10), Ford *et al.* (2004, pp. 430–438; 2007 in press, pp. 4–7), and Mitchell (2001, pp. 441–442) clearly define WVNFS habitat and its characteristics.

Issue 4—Some commenters, including two peer reviewers, thought the Service had overemphasized spruce as a habitat component for WVNFS. These commenters note that the WVNFS inhabits deciduous forest at lower elevations without a spruce component, and therefore should not be considered an obligate to red spruce forest. These commenters state that additional hardwood forest needs to be protected. Some commenters also disputed that red spruce is preferred habitat of WVNFS, identifying biases in the work by Menzel. These commenters state that the Menzel habitat model is based on a small sample of nest boxes located in red spruce habitat, skewing this monitoring program toward a finding of red spruce as preferred squirrel habitat; however, actual squirrel capture data seem to refute the exclusive focus on red spruce (Menzel 2003, p. 93).

Response—The Service never meant to imply that the squirrel is an obligate of the red spruce forest. However, the ecosystem in which WVNFS evolved consisted of a significant red spruce component, and it would be inappropriate to de-emphasize this important habitat feature. The WVNFS can be quite cosmopolitan, living within majority red spruce to nearly complete red spruce cover types, to majority hardwood to nearly complete hardwood cover types where the red spruce-fir component is minimal (Stihler *et al.* 1995, p. 18; Menzel 2003, p. 68; Menzel *et al.* 2006a, pp. 207–208; Ford *et al.* 2004, pp. 433–434; Reynolds *et al.* 1999, pp. 347–348). However, the preponderance of the data suggest a strong link to red spruce; there is a higher probability of WVNFS presence in areas with the most red spruce (as a percentage of the cover type) (Menzel 2003, p. 68; Ford *et al.* 2004, pp. 433–434, 2007 in press, pp. 12, 15–16; Menzel *et al.* 2006a, pp. 207–208). It is well documented that the entire range of the WVNFS was a red spruce dominated forest until heavily logged during the late 1800s and early 1900s (Mielke 1987, p. 219; Schuler *et al.* 2002, p. 89; Menzel *et al.* 2006b, p. 1; Rentch *et al.* 2007, pp. 440–442). Home range sizes also are smaller in areas with more red spruce, suggesting that habitat quality is better in these areas because WVNFS do not have to travel as far to meet their ecological needs (Menzel 2003, pp. 77; Ford *et al.* 2007, p. 6).

Additionally, no data in the central Appalachians show that WVNFS are heavily dependent upon pure hardwoods. Even so, protection of northern hardwood forest of considerable size is not a concern in the central Appalachians, since, within the range of WVNFS above 3,200 ft in elevation, approximately 96 percent (627,237 ac) of the land is forested (USDA Forest Service 2007, unpubl. map). At a coarser scale, within the more than 2 million ac of northern hardwoods in the high Allegheny landscape of West Virginia, Forest Inventory Analysis shows an approximately 15 percent increase in northern hardwoods from 1989 (2,061,000 ac, SE = 4,400 ac) to 2000 (2,393,600 ac, SE = 4,200 ac) (Griffith and Widmann 2003, pp. 30, 32).

Finally, Menzel (2003, p. 93) does not support the commenters' claims about bias. Sample bias was recognized and dealt with appropriately. The Menzel *et al.* (2006b, pp. 1–10) study used a sufficiently large sample of nest box and trap sites that produced WVNFS previous to 1999 in a statistical analysis. These occupied sites were then compared to 700+ locations that failed to produce WVNFS in a logistic regression analysis. Despite the fact that nest box and trap locations were skewed towards forest stands containing red spruce, captures occurred more frequently (in a greater proportion than habitat availability would suggest) in red spruce than in pure hardwood stands.

Issue 5—Some commenters, including two of the six peer reviewers, expressed concern about the threat of extensive logging on Federal, State, and private lands within the range of the WVNFS. Some commenters claim the MNF proposes to log up to 40 percent of the area comprising Management Prescription (MP) 4.1, which focuses on red spruce and red spruce-northern hardwood restoration.

Response—A substantial amount of WVNFS habitat is protected and managed consistently with the habitat needs of the WVNFS. Approximately 79 percent of WVNFS habitat (189,785 ac) is protected from the threat of exploitive logging for the foreseeable future (Service 2007a, pp. 5–8). Privately owned lands potentially subject to continued timbering (50,997 ac or 21 percent of WVNFS habitat) occur primarily at the edge of the subspecies' range (Service 2007a, p. 8). These lands are not critical to the subspecies' conservation, given the large amount of WVNFS potential habitat protected and managed on public lands in the core of the subspecies' range. [For more details on the degree of land protection, see criterion # 3 in Service (2007a)].

The current MNF Forest Plan (USDA Forest Service 2006a, chapters II and III), protects WVNFS habitat primarily through land use designations, a predominantly passive management strategy, and binding standards that effectively remove the threat of habitat loss (via logging and other disturbances) on all WVNFS habitat on the forest (164,560 ac or 68 percent of the habitat rangewide). Standards TE 63–66 (USDA Forest Service 2006a, p, II–26–27) adopt and implement the provisions of appendix A of the recovery plan for the WVNFS, which severely limit vegetation management in all WVNFS habitat, including breeding, feeding, resting, and dispersal corridors (Service 2001, appendix A). Only specific actions that have no adverse effect to WVNFS habitat, a discountable or very minor effect, or that demonstrate a beneficial effect (such as habitat restoration) are allowed in WVNFS habitat forest-wide. Based upon the Forest Service's long-term (50+ years) desired conditions for the ecosystem (USDA Forest Service 2006a, p. III–12), the Forest Service's intent shown in a Memorandum of Understanding signed by the MNF (Service *et al.* 2007, pp. 3

and 8), conversations with MNF staff, and the absence of any information to the contrary, we reasonably expect these standards to continue to apply regardless of the Act's listing status of the WVNFS. This management strategy is also likely to continue post delisting, as the WVNFS would be managed by the Forest Service as a ''sensitive species'' (USDA Forest Service 2006c, p. 18).

The commenters' reference to potential logging of 40 percent of the area of Management Prescription 4.1 appears to stem from a misunderstanding of forest-wide standards TE63–66 and how they interplay with the other standards on specific prescription areas. Prescription area 4.1 encompasses 153,600 ac, of which 59 percent (roughly 91,332 ac) has been mapped as WVNFS habitat and is protected from commercial logging by standards TE63–66. The remaining 41 percent of the area (62,268 ac) has not been mapped as WVNFS habitat. Within this 62,268-ac area, approximately 27,300 ac (or 18 percent of the total acreage in prescription area 4.1) have been tentatively identified as suitable for timber production (USDA Forest Service 2006b, p. 3–354). These 27,300 ac may be logged contingent on site-specific project review and field checks to verify that these lands are not WVNFS habitat. Thus, at most, 18 percent of the land in MP 4.1 could be logged over the life of the Forest Plan and all of this land would need to be demonstrated to not be suitable habitat for WVNFS, prior to logging.

Logging of areas that are not WVNFS habitat will also need to comply with an array of other applicable standards in the management direction for prescription area 4.1 (USDA Forest Service 2006a, pp. III–14 to III–16), such as standards 4118 and 4119, which place limits on the amount and timing of disturbances within harvest units (USDA Forest Service 2006a, p. III–15). Standard 4118 states that no more than 40 percent of forested National Forest System lands within each 4.1 prescription area unit shall be harvested over a 10-year period. Standard 4119 requires that unforeseen activities, such as timber salvage or pipeline installation, shall be counted toward the 40 percent disturbance standard in 4118. Thus there are additional limits on timbering, even in areas that are not WVNFS habitat, that further reduce forest disturbances.

Limited logging in WVNFS habitat for purposes of restoration is also allowed in prescription area 4.1, consistent with standards TE 63–66, as long as it can be demonstrated to result in a minor/discountable adverse effect or a beneficial effect to WVNFS. The Forest Service has an objective to restore approximately 1,000 to 5,000 ac of habitat over the next 10 years (USDA Forest Service 2006a, p. III–14, objective 4107). Standard 4118 also applies to these restoration activities. Hence it places limits on the frequency of disturbances within stands.

The Service is confident that these restoration efforts would benefit WVNFS in several ways, by: (1) Increasing amounts of coarse woody debris necessary for many fungal species; (2) increasing the size and importance of red spruce (an important fungal substrate); (3) increasing habitat patch size and connectivity; (4) increasing snags available as day dens for WVNFS; and (5) decreasing hard-mast production, thereby lessening stand value to the southern flying squirrel competitor (Menzel *et al.* 2006a, p. 208).

Issue 6—Some commenters expressed a view that all old growth forest across the range of WVNFS needs to be protected. These commenters cited Smith (2007a, pp. 864–865, 877) and Weigl (2007, p. 899, 902) as evidence of concerns about ongoing harvest of old growth forest, its replacement with plantations or regenerating stands, and the increasing fragmentation of much of the remaining habitat.

Response—There is little to no harvesting occurring in old growth forests on public or private lands within the range of the WVNFS. There is very little old-growth remaining from the exploitive logging period in the late 1800s/early 1900s. On the MNF, old growth currently comprises less than 1 percent of the entire forest (USDA Forest Service 2006a, p. B–1). In addition, areas identified as old growth on the MNF are not suitable or allowed to be cut. The remaining known old-growth areas on the forest are protected by Botanical Area, National Natural Landmark, or Scenic Area designations, and are managed through specific Forest Plan direction and standards that prohibit timber removal and restrict other types of vegetation management in these areas (USDA Forest Service 2006a, p. B–4). Furthermore, ''[t]imber harvest goals and objectives are based on achieving desired conditions for vegetation and habitat, not on regional economics'' (USDA Forest Service 2006b, Final Environmental Impact Statement (FEIS), Appendix I, p. I–152), so there is little risk of the MNF having adverse impacts on the WVNFS. Concerns about a significant increase in forest fragmentation throughout much of the remaining WVNFS habitat are unsubstantiated. There are no existing or predicted activities that are anticipated to significantly adversely affect forests within WVNFS range on a landscape level.

Issue 7—Some public commenters cited a newspaper article as specific evidence that the impact of second home development in West Virginia is a significant threat to WVNFS. They requested that the Service reanalyze these impacts.

Response—The Service has reanalyzed these impacts and come to the same conclusion as in its earlier analysis, that second home development is not currently a significant threat. The greatest development pressures in West Virginia are occurring, and are projected to continue to occur, outside of the range of the WVNFS, in the far eastern panhandle, and in and around the cities of Morgantown and Charleston (Stein *et al.* 2005, Figure 2). Second home development currently is occurring at the edge of the range of the WVNFS (primarily at Canaan Valley and Snowshoe Mountain). By 2030, housing density increases are projected to occur on private forests across 0 to 5 percent of the area corresponding to the core of the range of WVNFS (Stein *et al.* 2005, Figure 2). Such losses, if they occur, would be at the periphery of the range and minor in relation to the 242,000 ac of WVNFS habitat that exist within a larger landscape encompassing the range of WVNFS that is 96 percent forested (USDA Forest Service 2007, unpub. map).

Issue 8—Some commenters thought that the impacts of roads had not been adequately considered. These commenters stated that roads create absolute barriers to flying squirrel movement. These commenters were concerned that construction of Appalachian Corridor H (a four lane divided highway running from Weston, WV, to the Virginia line), in particular, will open the region to further development and will isolate populations of WVNFS in Blackwater Canyon from populations and suitable habitat south of the highway. Commenters were concerned that populations of WVNFS in Blackwater Canyon north of the highway may not be able to survive on the remaining small island of habitat. They criticized the Service for not discussing these impacts in more detail in the proposed rule or 5-year review.

Response—Construction of Corridor H through the extreme northern part of the WVNFS range is not expected to result in significant impacts to WVNFS or its habitat. As explained in the Land Use Planning section of the Factor A

analysis below, sufficient habitat will remain on both sides of the highway to support WVNFS (Service 2006b, pp. 4–5, 16–29; 2007c, pp. 3–4, 14–26). Additionally, a cumulative effects assessment, conducted by the West Virginia Department of Transportation (2006, pp. 17–19) suggests there is an adequate amount of non-environmentally sensitive, low-elevation land, which is not WVNFS habitat, and is available to support all development reasonably expected to occur as a result of the highway construction.

Issue 9—Some commenters were concerned that mining, drilling for gas, and construction of wind turbines in the habitat of WVNFS are increasing and therefore pose a threat to WVNFS.

Response—There is no evidence that these activities have in the past, or will in the future, significantly threaten the WVNFS. This conclusion is based upon Service review of impacts to WVNFS from permit applications for coal mining, gas, and wind power projects.

Surface mine projects in West Virginia average 302 ac in size, and underground mines average 34 ac of surface disturbance (Office of Surface Mining (OSM) 2005, p. 2). Most coal mining activity is concentrated in six counties (Boone, Kanawha, Mingo, Logan, Marshall, and Monongalia) outside the range of the WVNFS (OSM 2005, p. 2). Within the range of WVNFS, small portions of Greenbrier, Randolph, Tucker, and Grant Counties have coal seams (OSM 2005, cover map); however, these areas were mined in the past and are not currently active. Given the cost of reopening a mine, it is unlikely that there would be a resurgence of active mining in these areas, considering that these sites require expensive acid-mine waste remediation (Fala 2007). In the 21 years since the WVNFS's listing, there have been only 2 or 3 projects out of thousands reviewed each year where the Service identified potential adverse effects from coal mining to WVNFS habitat, and each of these projects was in marginal habitat on the edge of the subspecies' range. The Service has no information suggesting that coal mining activities will expand into WVNFS habitat. Given this lack of evidence of a threat and the above prior history and acreages involved, the potential for future impacts to WVNFS from this activity appears remote and insignificant.

The Service has noticed a recent increase in gas drilling applications in West Virginia; however, the footprint of these projects typically is small, averaging approximately 1.5 ac per gas well. These projects also tend to use existing, short (<1 mile long) gravel access roads which do not pose a barrier to WVNFS dispersal. In the 21 years since the WVNFS's listing, few if any gas projects have resulted in adverse impacts to WVNFS habitat, and none of these projects have resulted in take of WVNFS. The Service expects these trends to continue after the WVNFS is delisted. The minor impacts of these projects do not pose a substantial threat to WVNFS.

There currently is one operating wind power project in West Virginia, two under construction, and one approved which will not be constructed. There also is one project in Virginia in the permitting application phase. These projects have ranged in size from 24 to 372 ac of disturbance. Neither the presently operative project nor the two under construction have had impacts to WVNFS or its habitat. Although the Service has noticed an increase in prospecting for wind power projects in West Virginia, only a minority of these potential projects might adversely impact WVNFS or its habitat. Three of the 13 projects the Service has reviewed initially identified potential adverse impacts to WVNFS habitat (two projects in West Virginia and one project in Virginia). Two of these projects ultimately avoided WVNFS habitat because of the Act, and one of these projects was withdrawn due to difficulties seeking access from the Forest Service. Although prospecting is currently occurring, nearly half of all prospective wind energy applications filed for grid interconnection study within the mid-Atlantic region are withdrawn (Boone 2006, pp. 1–2).

On national forest lands, project proponents currently must seek separate authorization for prospecting (surveys and setting up meteorological stations), as well as the construction and operation of wind towers. Even after the WVNFS is delisted, proposed wind farms in national forests within the range of WVNFS range would still need to be consistent with standards and guidelines in the forest plans. Therefore, we conclude that while prospecting in wind farms is increasing, only a minority may materialize, and fewer still might adversely affect the WVNFS. Based on these projections and the small acreage potentially involved, we conclude that wind power will not pose a significant threat to WVNFS or its habitat.

G. Forest Pest Concerns

Issue 1—Some commenters were concerned about the effects of beech bark disease and the hemlock woolly adelgid on the habitat of the WVNFS. Two peer reviewers noted that while these forest pests may have local impacts to WVNFS, they are not significant at the landscape level. Two peer reviewers discussed forest pests as potential threats but did not comment on their significance to WVNFS.

Response—Any impacts to WVNFS habitat from beech bark disease or hemlock woolly adelgid are considered minor in the context of the subspecies' range. A decline in American beech, as a result of beech bark disease, should provide additional snags and coarse woody debris for WVNFS. Additionally, a decline in beech nuts would also reduce the food supply of southern flying squirrels, a potential competitor of the WVNFS.

Eastern hemlock currently comprises 1 to 9 percent of forested land in counties within the range of WVNFS in West Virginia (Kish 2007, Figure 1). A predominantly eastern hemlock overstory is known to occur at 7 percent of WVNFS nest site locations (such as Blackwater Falls State Park), and its loss could affect the quality of riparian zone habitat useful for WVNFS dispersal between more isolated patches of red spruce–northern hardwood forest. Whether or not eastern hemlock is replaced by red spruce or northern hardwoods, thereby ameliorating losses, is unknown. However, research indicates that hardwood forests with little or no conifer component are not barriers to WVNFS movement (Menzel *et al.* 2006a, p. 207). Please refer to the 5-year review (Service 2006a, pp. 17–18) and Factor A of the Summary of Factors Affecting the Species below for further information on both beach bark disease and the hemlock woolly adelgid.

H. Acid Deposition Concerns

Issue 1—Two commenters expressed concern about the effects of atmospheric acid deposition (also known as ''acid rain'') on WVNFS habitat, whereas one peer reviewer believed that such effects were largely speculative.

Response—The Service agrees with the peer reviewer that such effects are largely speculative. Acid deposition is not a significant threat to the subspecies' habitat. See Factor E under the Summary of Factors Affecting the Species section below for further details.

I. Climate Change Concerns

Issue 1—All peer reviewers agreed that the impacts of climate change on WVNFS are unclear. Whereas four peer reviewers concluded that measurable effects to WVNFS were not foreseeable, two concluded that the risk to WVNFS could not be discounted and requested

further analysis. Likewise, a coalition of commenters requested a more thorough analysis of the effects of global warming on WVNFS. They provided the Service a list of references to consider and submitted several unpublished maps of bioclimatic models for northern flying squirrels provided by Lawler (2007a, unpub. maps). This coalition of commenters believes that global warming is probably the greatest threat to WVNFS existence within the next 100 years and likely will result in extinction of the WVNFS.

Response—The Service has reviewed all evidence on climate change provided by the peer reviewers and members of the public, including references cited by the commenters, as well as others. While the Service acknowledges the general scientific consensus that global scale increases in temperature have occurred and are expected to continue into the future, we disagree with the commenters' speculation that these changes will drive the WVNFS to extinction. Our ability to foresee 100 or more years into the future is limited by the current lack of reasonably accurate (Botkin *et al.* 2007, pp. 227–234; Meyers 2008) climate change projection models localized for the range of the WVNFS, and simple stochastic events over such a long timeframe.

Issue 2—Some commenters were concerned about the effect of climate change on interactions of WVNFS with the southern flying squirrel. They point to regional climate change studies projecting an increase in potential mast (nut producing) trees as evidence that the southern flying squirrel will outcompete WVNFS. In contrast, one peer reviewer noted that future climate conditions are unknown. He noted that hotter, drier summers but wetter, snowier winters might have little effect, or even a positive effect, on WVNFS if vegetation conditions remain unchanged, but wetter, snowier winters were less favorable for southern flying squirrels.

Response—Bowman *et al.* (2005, pp. 1486, 1490) speculated that southern flying squirrels in Canada had expanded their northern geographic range in response to climate warming between 1994 and 2002, followed by a population crash in 2003 that resulted from an energetic bottleneck created by the combination of a cold winter that was preceded by a failed mast crop. They hypothesize that southern flying squirrels have the opportunity to expand their range northward during these warm periods, but acknowledge that there also is the possibility of large range contractions during cold spells (Bowman *et al.* 2005, p. 1491). They conclude that continued range expansions of southern flying squirrels are likely under continued global warming, although they expect that these expansions will be limited by the distribution of mast trees (Bowman *et al.* 2005, p. 1492).

It is important to realize that projections about potential northward advance of oak forests in response to climate change relate to the potential distribution of suitable habitat wherein oaks could grow, not the actual distribution of the tree species. It is speculation that tree species will continue to move north because there are no barriers or constraints to migration (Hansen *et al.* 2001, p. 771).

Iverson *et al.* (2004a, p. 787–799; 2004b, pp. 209–219) investigated potential colonization of new suitable tree-species habitat under climate change for five eastern U.S species, including red oak. The results show the generally limited nature of likely migration over the first 100-year period following climatic change (Iverson *et al.* 2004b, p. 216). They estimate that the proportion of new habitat that might be colonized within a century is low (15 percent) for all five tree species, suggesting that there is a substantial lag between the potential movement of suitable habitat and the potential for tree species to migrate into the new habitat (Iverson *et al.* 2004a, p. 795). There is a relatively high probability of colonization within a zone of 10–20 km (depending on habitat quality and species abundance) of the current boundary, but a small probability of colonization as the distance from the current boundary exceeds about 20 km (Iverson *et al.* 2004b, p. 216).

Looking at historical patterns, Schwartz *et al.* (2001, pp. 570, 574) and Iverson *et al.* (1999, Figure 7 on p. 89) predicted that migration rates of 1 to 10 km/century might be the maximum future rates of tree colonization in fragmented habitats. Considering that the distribution of the WVNFS spans >170 km, it would take centuries for such potential shifts in oak species composition to materialize over a substantial portion of the range of WVNFS. Such slow colonization rates increase the likelihood that should red spruce decline significantly as a result of climate change, WVNFS would be able to survive in refugia of red spruce-northern hardwood habitats (as projected by Delcourt and Delcourt 1998, p. 927) and shift its range in response to similar slow, potential changes in southern flying squirrel distribution.

Issue 3—Some commenters were concerned that the risk of wildfires would increase as a result of more frequent droughts, and thus would pose a threat to WVNFS.

Response—Historically, natural fires in the Central Appalachians are believed to have been ''relatively unimportant in the past, and to remain unimportant today, because of the wet weather that usually accompanies lightning'' (Lafon *et al.* 2005, p. 129). Anthropogenic fires have played some role in the Central Appalachians for centuries as Native Americans used fire to drive game, improve wildlife habitat, maintain open meadows, and clear underbrush (Van Lear and Waldrop 1989, pp. 1–2; Delcourt and Delcourt 1997, p. 1013). European settlers also practiced widespread burning (Van Lear and Waldrop 1989, p. 3). As discussed by Weigl (2007, p. 898), wildfires ravaged the landscape during the period of industrial logging. Loggers set fires after clearcutting, and additional fires were ignited from sparks from the logging trains (Schuler *et al.* 2002, p. 89). The fires associated with the logging practices of the early 1900s are not expected to reoccur, because the clearcutting is no longer taking place. While other parts of the Central Appalachians are currently considered to be especially fire-prone, the Allegheny Plateau, which contains most of the WVNFS habitat, is considered as ''having limited fire activity'' (Lafon *et al.* 2005, p. 141). It is clear that fire has played some role in development of the current ecosystem for many centuries.

Since climate appears to have a strong influence on fire regimes, potential climate changes will influence the number of fires, the area burned, and fire intensity (Lafon *et al.* 2005, p. 140). While there is the potential for occurrence of more frequent and intense fires during drought, there is also potential during wetter climatic periods for decreased fire activity. There are no scientific means, however, of accurately, or reasonably determining the net effect on WVNFS and its habitat of any potential change in the fire regime that may occur over the next century. While a long-term regime of intense, landscape level fires could significantly impact WVNFS habitat, those potential conditions are mere speculation given our present state of knowledge.

Issue 4—Some commenters requested that the Service specifically review the potential contribution of global warming to the ''recent'' condition of red spruce, as described in several papers from the late 1980s [McLaughlin *et al.* 1987; Johnson *et al.* 1988; and Hamburg and Cogbill 1988 (miscited as Cogbill 1988 by the commenters)]. They stated that the Service should fully examine all

studies of red spruce condition and factors contributing to that condition.

Response—The Service has reviewed the three papers from the 1980s cited by the commenters, as well as other studies of red spruce condition. The three cited papers primarily focus on the northern and southern Appalachians, areas that are outside the range of the WVNFS. Although not directly applicable to WVNFS, papers covering areas outside the range of the WVNFS do provide a context for observed differences in regional trends of red spruce condition. The Service further examined potential impacts on the current and future condition of the red spruce-northern hardwood ecosystem in Factors A and E under the Summary of Factors Affecting the Species section of this final rule, as well as the responses to comments on these issues.

Issue 5—Some commenters cited a paper by Delcourt and Delcourt (1998) as specific evidence that we can foresee: (1) The extirpation of red spruce-balsam fir and spruce-Fraser fir forests south of 44 degrees north latitude (the White Mountains, New Hampshire); and (2) the movement of the southern range of these forests to northern New England in the next 100 years.

Response—We have reviewed the paper by Delcourt and Delcourt (1998) cited by the commenters. We believe the projections made by these authors are likely overestimates of risk. First, the authors did not model the full range of possible climate extremes and did not use a full array of different climate models. They modeled possible future shifts in the spruce-fir ecotone from two climate models, assuming projected summer warming of 3.0 degrees or 6.4 degrees Celsius (Delcourt and Delcourt 1998, p. 926). The Intergovernmental Panel on Climate Change (IPCC) (2007c, Table 3.1) currently recognizes a 2 to 4 degree Celsius increase by 2099 as the best estimate of warming under six climate models (with a likely range of 1 to 6 degrees). Values substantially higher than 4 degrees cannot be excluded, but agreement of models with observations is not as good for those values (IPCC 2007c, part 2.3). Thus the 3-degree warming scenario, identified by the Delcourts as their ''most conservative'' projection, falls within the middle range of the best estimate of temperature changes currently recognized by the IPCC. The Delcourts did not model the lower range (1–2 degrees) of warming currently recognized by the IPCC.

Second, the Delcourts provided little information about model assumptions and limitations, and did not attempt to validate their model, all of which greatly diminishes the usefulness of this paper. They did not quantify tree species extinction probabilities, or otherwise explain the basis for qualitative statements about their confidence in their predictions. Botkin *et al.* (2007, p. 231) notes that the type of niche-theory model used by the Delcourts is likely to overestimate the risk of tree species extinction. These types of models assume that observed distributions of trees are in equilibrium with their current environment, and that the tree species will become extinct outside of the regional values (Botkin *et al.* 2007, p. 231). However, local variation in climate due to topography or other factors could result in tree species being able to persist in suitable microhabitats even though the model projects no suitable habitat in these general regions (Hansen *et al.* 2001, p. 765). The Delcourts focused on elevation and summer temperature as the primary factors controlling where spruce-fir could grow, but other factors would likely add considerable uncertainty, such as: the seasonality of precipitation, duration of cloud cover in the growing season, winter temperatures and frost-free chronologies, and site-specific disturbances (White and Cogbill 1992, pp. 4–16).

The Delcourts suggested possible northern and upslope migration of red spruce under both a 3- and 6-degree warming scenario, with greater impacts occurring under the warmer scenario. For the moderate 3-degree warming scenario, the authors also suggested the possibility of spruce survival in refugia (Delcourt and Delcourt 1998, p. 928, Figure 4), similar to what happened during warmer and drier extremes of the post-glacial period 4000–5000 years before present (Delcourt and Delcourt 1998, p. 927, Ware 1999, pp. 45–55) under similar temperature regimes.

Although Delcourt and Delcourt (1989) modeled summer temperature changes through 2100, they provided no time frame for when vegetative responses would likely occur. They also did not provide any prediction of what the tree species composition would be in the forest that would succeed the spruce-fir forest in each of these scenarios. As discussed in climate change *Response to Comments Issues 1–3*, future vegetative changes in response to such temperature changes could possibly occur over several hundred years. However, their possible impacts on WVNFS distribution and persistence are not reasonably foreseeable given the long time frames and high degree of uncertainty. Therefore, we do not find that the projections of Delcourt and Delcourt (1989) present a climate change threat to the WVNFS' habitat that is likely to endanger the subspecies in the foreseeable future.

J. Spruce Restoration Concerns

Issue 1—Whereas one peer reviewer commented that restoration techniques have the ability to hasten improved overstory conditions and compositions favorable to WVNFS, some members of the public were concerned that spruce restoration efforts are misdirected and would not be successful. These commenters state there is only one master's level study suggesting that such recovery may be feasible.

Response—Forest management and silvicultural techniques, such as those being proposed, have long histories of implementation (Frank and Bjorkbom 1973, pp. 1–29; Frank and Blum 1978, pp. 1–15; Carey *et al.* 1999, pp. 64–66). Several studies and modeling simulations indicate that restoration silviculture could be an effective tool for increasing the amount and quality of red spruce-northern hardwood forests in the central Appalachians (Rentch *et al.* 2007, pp. 440–452; Schuler *et al.* 2002, pp. 88–98; Hornbeck and Kochenderfer 1998, pp. 197–202).

Efforts to restore or enhance red spruce-northern hardwood forests should in many cases enhance WVNFS habitat in the short-term, as well as the long term. For example, noncommercial efforts that involve red spruce release by girdling or stem-injection of herbicide will create snags suitable for day dens. In addition, removal of hard mast species such as northern red oak or American beech will lessen habitat suitability for the southern flying squirrel and therefore minimize any potential competition for dens and food, as well as lessen interspecific contact to spread the *Stronglyoides* parasite. See Factor C under the Summary of Factors Affecting the Species section below for additional information.

And lastly, red spruce-northern hardwood restoration on the MNF is targeted at maximizing patch size and habitat connectivity for WVNFS (USDA Forest Service 2006a, p. III–14). These efforts are proceeding cautiously in unoccupied habitat, with monitoring to gauge success. These efforts are not clear cuts, but rather are light thinnings of northern hardwoods that open the canopy to provide additional light for growth of spruce. Spruce is naturally adapted to regeneration in small openings such as these.

K. Overutilization Concerns

Issue 1—One public commenter was concerned that once the WVNFS was delisted, its collection would no longer

be regulated and the subspecies would be threatened by overcollection. In contrast, two peer reviewers offered evidence that overutilization of WVNFS never has been a threat and would not become a threat should WVNFS be delisted.

Response—Even for trained wildlife professionals, the WVNFS is an exceptionally difficult animal to catch. Thus the probability that a layman or commercial collector could capture or overcollect WVNFS is very remote given the subspecies' low detectability, nocturnal and secretive habits, and remote localities where it occurs. Once delisted, WVNFS collection by hunting or trapping will still be illegal under West Virginia and Virginia state laws (West Virginia Code 20–2–5(26); Code of Virginia 29.1–521.A.10, 29.1–566 and 29.1–530.A.), and its capture for scientific and educational purposes will still be regulated through collection permitting systems of the WVDNR (West Virginia Code 20–2–50) and the Virginia Department of Game and Inland Fisheries (Code of Virginia 29.1–568). For more information, see Factor B in the Summary of Factors Affecting the Species below.

L. Adequacy of Regulatory Mechanisms

Issue 1—Some commenters stated that much of the habitat believed to be important to the WVNFS is not fully protected in the long term.

Response—There are no known rangewide threats to the subspecies' forested habitat, thus full protection of this habitat is not required to maintain the WVNFS's status as recovered. (See Factor A under the Summary of Factors Affecting the Species section for further details.) Seventy-nine percent of the modeled habitat of the WVNFS is being managed for the long term by provisions of forest plans, state management plans, wilderness and backcountry recreation designations, and conservation easements. For example, in the forest plan for the MNF (USDA Forest Service 2006a, p. III–9, D–1), Management Prescription 4.1 focuses on protection, restoration and management of red spruce and red spruce-northern hardwood communities. This management prescription, as well as other management plans and agreements on state, Federal, and private lands, wilderness and backcountry recreation designations, and perpetual conservation easements will continue to apply following delisting of the WVNFS (Service 2007a, pp. 5–10). Collectively, all of these mechanisms provide reasonable certainty of protection and management of much of the habitat for WVNFS.

Issue 2—Some commenters requested clarification on the status of forest plans for the Monongahela and the George Washington National Forests. These commenters were concerned that the Forest Service would not be able to implement these plans because of a lawsuit on the land management planning rule published in 2005.

Response—In March 2007, a U.S. District court order enjoined the Forest Service from implementation and use of the land management planning rule published in 2005 until the Forest Service complied with the Court's order for two combined cases (*Citizens for Better Forestry et al.* v. *USDA* and *Defenders of Wildlife* v. *Johanns, C.A.* C05–1144 (N.D. Cal.)). The Forest Service complied in 2008 by re-issuing its forest planning regulations. Forest plans currently in effect for the MNF and the George Washington National Forest (GWNF) were based on planning rules published prior to 2005; hence, their continued implementation and use in present form is not affected by the lawsuit or the new regulations. These existing plans provide guidance for management and monitoring of the WVNFS and its habitat, including prescriptions, goals, objectives, standards, and guidelines. Any subsequent revisions or amendments to these existing plans will require compliance with any planning regulations in effect at the time. Should the MNF choose to revise or amend their existing forest plan, we believe it is highly unlikely that the current WVNFS habitat would be affected (See the Factor A—Land Use Planning section under the Summary of Factors Affecting the Species below for further information).

Issue 3—Some commenters noted the Service had entered into a Memorandum of Understanding (MOU) with the Forest Service, WVDNR, and others for continued management and protection of WVNFS. These commenters question whether the Forest Service would continue to protect a species without the force of law.

Response—By signing the MOU, signatories demonstrate that they are committed to implementing the features within their discretion and authority (Service *et al.* 2007, pp. 1–8). The MOU affirms commitments made by the U.S. Forest Service MNF to implement standards and guidelines for the WVNFS and its habitat contained in the 2006 Land and Resource Management Plan. This plan would not be invalidated by delisting the WVNFS. Also see response to *section F,. Ecosystem and Habitat Concerns—Issue 5* and *section L,. Adequacy of Regulatory Mechanisms—Issue 2,* above.

Issue 4—Some commenters questioned the ability of the Forest Service, WVDNR, and others to fulfill their obligations in the MOU, given projected staff and budget cuts.

Response—The Service is not relying upon the MOU as an enforceable regulatory mechanism under the Act. See *Response to Issue 3* in this same subsection above.

Issue 5—Some commenters were concerned that the MOU termination clause allows parties to opt out for any reason with 30 days' notice.

Response—MOUs commonly have early termination clauses. While some changes to the composition of the signatory parties to the MOU may occur over time, we expect that other parties will sign on and the MOU will continue to be implemented for the long-term by those participating at the time. See *Response to Issues 3 and 4* in this same subsection above.

M. Predator Concerns

Issue 1—One commenter noted the Service had not discussed the impact on WVNFS of the reintroduction of the fisher, a potential predator on WVNFS.

Response—Fishers (*Martes pennanti*) were reintroduced to West Virginia in the late 1960s or early 1970s, prior to the listing of WVNFS as endangered. Both animals have shown overlapping range expansions in the intervening decades, providing indirect evidence that fishers are not significant mortality agents for WVNFS. Most data from the eastern United States suggest that snowshoe hare, cottontails, voles, mice, and bird eggs comprise the majority of the fisher's diet (Powell *et al.* 2003, p. 643). Weigl (2007, p. 901) concluded that fishers probably can coexist with northern flying squirrels, with the exception of in small habitat islands, where there are fewer WVNFS and other prey is more limited.

N. Other Natural Factors

Issue 1—One peer reviewer and one public commenter thought the Service needed to give more consideration to the impact of parasites on WVNFS spread by southern flying squirrels (*Glaucomys volans*), given projections about climate change, acid deposition, oak decline in northern hardwood communities, and expansion of other seed- and nut-bearing hardwoods.

Response—Recognizing that there are ''varying intensities'' of parasitic infection of northern flying squirrels (*G. sabrinus*) in the wild, Weigl (2007, p. 901) remains concerned about infection of *G. sabrinus* by the intestinal parasite

Stonglyoides robustus, based in part on his belief that there has never been stable sympatry of *G. sabrinus* and *Stonglyoides robustus.* While that may be true for the Carolina northern flying squirrel (*G. s. coloratus*) at the sites he studied in North Carolina and Tennessee, stable sympatric occurrences of WVNFS and the southern flying squirrel (*G. volans*) have been documented for decades at the Spruce Knob geographic recovery area in West Virginia (Wallace 2007, p. 2). The southern flying squirrel has been detected within all 7 of the generalized WVNFS core areas (or population centers), and at 20 percent of the 109 WVNFS capture sites. Despite the presence of this competing species, there is no evidence of illness or mortality of WVNFS, and no evidence of local extirpation of WVNFS from any of these sites during 21 years of monitoring. Based on their documented co-occurrence in West Virginia and Virginia, and no documented lethal effects in the wild, we believe that speculation that impacts of climate change, acid deposition, or shifts in forest composition would decrease the fitness or survival of the WVNFS is unwarranted. The WVNFS has prevailed in repopulating its range in a habitat where the red spruce-northern hardwood compositions arguably favor the southern flying squirrel over the past 100 years. The Service does not believe that the WVNFS would have made this recovery if it suffered debilitating or lethal effects from sympatric relationships with parasite-bearing species (See Factor E—Competition with Southern Flying Squirrel under the Summary of Factors Affecting the Species section for further information).

O. Miscellaneous

Issue 1—Some commenters were concerned that we have ignored the WVNFS recovery plan criteria in determining that the subspecies has recovered.

Response—As summarized above in the Recovery section of this final rule, our analysis shows that the intent of each criterion for downlisting and delisting has been satisfied and that most of the criteria have been achieved or substantially achieved. Although the recovery plan criteria are out-of-date, we conducted an analysis of how well these criteria have been met and summarized that analysis in the beginning of this final rule. New information has changed the extent to which these criteria need to be met for recognizing recovery of the subspecies. Species are listed or delisted under the Act based on whether they are threatened or endangered by one or more Factors (see Summary of Factors Affecting the Species section below). Up-to-date, threats-based recovery criteria can assist the Service in analyzing whether a species meets the definition of threatened or endangered. Recovery criteria are only one tool, however, the Service uses in making a classification determination.

Issue 2—Some commenters expressed concern about not providing a post-delisting monitoring plan for public review, concurrently with the proposed rule.

Response—The proposed and final delisting decisions are based firmly on an analysis of identified threats and changes in the subspecies' status. They are not legally contingent upon future approval or implementation of the post-delisting monitoring plan. The Act contains no explicit requirements for either notifications or public comment opportunities relative to planning or implementation of post-delisting monitoring plans. Nevertheless, the Service sought input into these processes, as indicated by our request for public comment on the draft post-delisting monitoring plan (72 FR 57346), published in the **Federal Register** on October 9, 2007, prior to publication of this final rule, and by our finalization of the plan concurrent with this final decision on the delisting proposal.

Issue 3—Some commenters expressed mistrust about the motivations behind delisting and accused the Service of catering to developers, the timber industry, and other extractive resource users. Some commenters also expressed value-based reasons as to why they opposed delisting, such as spiritual importance, animal rights, and need for humans to behave as caretakers and stewards of the WVNFS, not as pillagers of its habitat. The majority of comments received were one of three various form letters stating that the proposed rule was premature and based on inadequate scientific information, but provided no substantive information to support these statements.

Response—Our decision to delist WVNFS is based solely on the best scientific and commercial data available and our five-factor analysis. This analysis indicates that the subspecies is neither threatened nor endangered. While we appreciate the values expressed by these commenters, such comments are either not relevant to the decision, or are outside the scope and authority of the final rule.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified was in error.

A recovered species is one that no longer meets the Act's definition of threatened or endangered. The analysis for a delisting due to recovery must be based on the five factors outlined in section 4(a)(1) of the Act. This analysis must include an evaluation of threats that existed at the time of listing, those that currently exist, and those that could potentially affect the species once the protections of the Act are removed.

The Act defines ''species'' to also include any subspecies or, for vertebrates, any distinct population segment. The Act defines ''endangered species'' as any species which is in danger of extinction throughout all or a significant portion of its range, and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

For the purposes of this finding, the ''foreseeable future'' is the period of time over which events or effects reasonably can or should be anticipated, or trends reasonably extrapolated, such that reliable predictions can be made concerning the status of the species. As discussed in the Summary of Factors section, we determined that any future threat from development will be localized and minimal, based on trends over the past 10 years. In addition, the Service has no indications that management of the forest for timber will have more than a minor impact on the

WVNFS based on the discussion in Factor A. WVNFS habitat has been improving steadily for the past 50–80 years throughout its range and we expect this improvement to continue into the future.

Climate change projection models are not reasonably accurate for the localized range of WVNFS, and therefore we cannot reliably predict that climate change will pose a threat in the future. All indications suggest that the squirrel is resilient enough to adapt to and survive gradual changes in the habitat, if there are any due to climate change. Therefore, we do not foresee any threats affecting the WVNFS into the future that would lead the species to become an endangered species.

Section 4(a)(1) of the Act requires that we determine whether a species is endangered or threatened based on one or more of the five following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Our evaluation of these factors is presented below. Following this threats analysis, we evaluate whether the WVNFS is threatened or endangered within any significant portion of its range.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

WVNFS Distribution

At the time of listing (1985), 10 WVNFS individuals were known from Randolph and Pocahontas Counties, WV, and Highland County, VA (Service 2006a, p. 8). It was thought that vast stretches of unsuitable habitat separated the four known population centers and that the WVNFS still existed but that it was very rare, and perhaps no longer present in much of its former range (50 FR 26999). The final listing rule qualitatively described historic habitat losses and suggested that ''in these last occupied zones, the squirrels [*G. s. fuscus* and *G. s. coloratus*] and their habitat may be coming under increasing pressure from human disturbances such as logging and development'' (50 FR 26999).

The current known range of WVNFS follows the spine of the high Allegheny Plateau in a northeast to southwest alignment. Helmick Run (Grant County, WV) marks the northeast periphery and Briery Knob (Greenbrier County, WV) the southwest periphery, covering seven counties in West Virginia and Highland County, Virginia (Service 2006a, p. 25). As of 2006, there is a total of 109 WVNFS capture sites, of which 107 are in West Virginia and 2 are in Highland County, Virginia (Service 2006a, pp. 8 and Figure 2; WVDNR 2006a, pp. 1–109). These capture sites are dispersed across seven general areas of habitat in the Allegheny Highlands region (Service 2006a, pp. 9 and Figure 3). Distributed throughout the 109 capture sites, there have been 1,198 captures (including 85 recaptures) as of 2006 (WVDNR 2006a, pp. 1–109). Collectively, the proportion of sites demonstrating persistence across multiple generations (83 percent), distributed among habitat quality types and within geographic zones; the routine documentation of nestlings and juveniles (76 percent of sites); and balanced to slightly skewed sex ratios demonstrate a relatively high degree of population stability and constant habitat occupancy (Service 2007c, pp. 9–11). Locally reproducing populations are the most likely factors for continuing to find WVNFS in numerous locations within their historical range over the last couple of decades, given their low detectability, relatively short life span, and relatively low reproductive capacity, and a naturally patchy nature of suitable forest habitat distribution (Service 2007c, p. 11).

We now know that the WVNFS continues to occupy the areas identified in the 1985 final listing rule (50 FR 26999) as well as numerous additional sites dispersed throughout its historical range, suggesting that its current range roughly approximates the extent of its historical range. Studies have confirmed the ability of the WVNFS to adjust its foraging and denning behavior (i.e., the ability to nest in a wide variety of trees) to persist in and around red spruce-northern hardwood forest patches (Menzel *et al.* 2004, pp. 360, 363–364; Menzel *et al.* 2006a, pp. 1–3, 6, 7; Menzel *et al.* 2006b, p. 208; Ford *et al.* 2004, p. 430).

Habitat Quantity and Quality

Prior to European settlement, there were in excess of 500,000 ac (some sources suggest 600,000+ ac) of old-growth red spruce–northern hardwood forests, the preferred habitat of the WVNFS, in the Allegheny Highlands. These forests (occupying ridges, slopes, and drainages) in West Virginia extended from the vicinity of Mount Storm (Grant County) in the north to Cold Knob (Greenbrier County) in the south, east to the Allegheny Front (Pendleton County), and west to Webster and Nicholas Counties. These red spruce–northern hardwood forests were more contiguous across the Allegheny Highlands than are the well-known ''sky-islands'' of the Southern Appalachians, which support Carolina northern flying squirrels (*G. s. coloratus*) (Service 1990, pp. 16–17; USDA Forest Service–Northern Research Station 2006, unpublished data, pp. 2–3).

Logging activity and associated widespread fires at the turn of the 20th century decimated the red spruce–northern hardwood forests, resulting in younger forests with less red spruce and, in many areas, a mixed mesophytic (moderately moist environment), oak-dominated forest (Menzel *et al.* 2006b, p. 6; Rollins 2005, pp. 12–13; Schuler *et al.* 2002, pp. 88–89). Loggers set fires after clearcutting, and additional fires were ignited from sparks from the logging trains (Schuler *et al.*, 2002, p. 89). The fires associated with the logging practices of the early 1900s are not expected to reoccur, because the clearcutting is no longer taking place. These fires did, however, consequently, result in less, and poorer quality, WVNFS habitat because younger forests with fewer red spruce provided reduced foraging and sheltering opportunities (Service 2006a, p. 6). Also, the presence of oak and its associated mast (i.e., acorns), provided a competitive advantage of food resources for the more aggressive southern flying squirrel. The WVNFS' rarity was understood to be a consequence of its specialized use of a precipitously declining habitat type (Service 2006a, p. 11).

Currently, it is estimated that there are approximately 242,000 ac of WVNFS habitat (USDA Forest Service–Northern Research Station 2006, unpublished data, p. 4). This estimate is based in part on the results of several habitat models, and includes all ''optimal'' habitat as well as ''likely'' habitat located in close proximity to red spruce–northern hardwood forests. ''Likely'' and ''optimal'' are terms and definitions imparted by the Menzel model, with ''likely'' areas having a greater than 50 percent chance of being occupied by the WVNFS, and ''optimal'' areas having a greater than 75 percent probability of being occupied (Menzel 2003, pp. 84–85, 87–89; Menzel *et al.* 2006b, pp. 4–5). The models allow us to estimate the amount of potential and high-quality habitat in the Allegheny Highlands, prioritize areas for restoration and recovery (Menzel *et al.* 2006a, p. 7), assess anthropogenic (manmade) and geologic fragmentation of the red spruce forest, and analyze stewardship of the suitable habitat (Menzel *et al.* 2006b, p. 7).

The forested areas used by the WVNFS across most of its range have continued to mature in the 20 years since listing. For example, about half of the rangewide areas modeled as optimal habitat are red spruce-northern hardwood forest stands on the MNF that are over 75 years old (Menzel *et al.* 2006b, p. 4; Service 2006a, pp. 10–11; USDA Forest Service-Northern Research Station 2006, unpublished data, p. 2). Even though current habitat conditions are not as favorable for the WVNFS as historical conditions preceding the late 1800s/early 1900s, current conditions are much improved compared to those at the time of listing. With the exception of localized habitat impacts, forest succession has resulted in older forest stands with improved forest structure, reflecting a continuing positive rangewide trend (Service 2006a, pp. 11–14, 19–20). With regard to forest composition, the amount and extent of red spruce in the Central Appalachians also appears to be gradually increasing (Adams *et al.* 1995, p. 101; Schuler *et al.* 2002, p. 92–93; Rollins 2005, pp. 39–51). Recent evidence also suggests improving trends in health and regeneration of red spruce-northern hardwood forests within the range of WVNFS (Adams *et al.* 1995, p. 101; Audley *et al.* 1999, pp. 179–199; Hornbeck and Kochenderfer 1998, pp. 198–200; Schuler *et al.* 2002, p. 92–94; Rollins 2005, pp. 74–78). The forested landscape within the range of WVNFS provides a high degree of functional connectivity, as evidenced by large patch sizes, numerous linkages, and persistence over multiple generations at monitoring sites across a range of forest conditions (Service 2007c, pp. 5–6, 9–11).

We analyzed impacts that the balsam and hemlock woolly adelgids, insect parasites accidentally introduced from Europe (Service 1990, p. 13), may be having on the WVNFS' habitat (Service 2006a, p. 17). The balsam woolly adelgid infects balsam fir (*Abies balsamea*) trees, causing damage or mortality to the host trees (Service 1990, p. 13). However, we believe the effect of the balsam woolly adelgid on WVNFS habitat is discountable because balsam fir is limited to a minor component of the WVNFS habitat (Peart *et al.* 1992, p. 149, 165). Red spruce occurs in or near stands of balsam fir, providing the WVNFS with alternative and higher value habitat where damage from the balsam woolly adelgid may have occurred. In addition, the impact of the balsam woolly adelgid on the small component of balsam fir within WVNFS habitat has already occurred (Service 2006a, p. 17).

The hemlock woolly adeglid has been in the United States since 1924. The insect damages eastern hemlock (*Tsuga canadensis*) trees by damaging new growth, which can cause defoliation and mortality (Service 2006a, p. 17). Only 7 percent of the WVNFS capture sites are dominated by Eastern hemlock instead of red spruce (Service 2006a, p. 17). However, work conducted on the WVNFS indicates that hardwood forests with little or no conifer component are not barriers to movement (Menzel *et al.* 2006a, p. 207). While hemlock woolly adelgid may remove the montane conifer component at less than 10 percent of the known capture sites, most, if not all, of these areas are in close proximity to red spruce-northern hardwood forests, significantly reducing the occasions where loss of Eastern hemlock could be detrimental to the WVNFS (Service 2006a, p. 17). Additionally, the West Virginia Department of Agriculture has an active detection program for hemlock woolly adelgid and a treatment program that will remain in place regardless of the listing status of the WVNFS. Therefore, even though the hemlock woolly adelgid may impact a minor component of the squirrel's habitat, we consider it to pose a negligible degree of risk to the WVNFS, because of the limited role of hemlock in the subspecies' survival, and presence of red spruce in the majority of the areas (Service 2006a, p. 17).

The potential impact of beech bark disease was also analyzed. Beech bark disease is caused by the beech scale insect (*Cryptococcus fagisuga*), followed by one of two fungi (*Nectria coccinea* var. *faginata* or *N. galligena*). The scale stresses and weakens the American beech tree (*Fagus grandifolia*) and the fungi then cause either localized lesions or decay and death of the entire tree (Service 2006a, pp. 17–18). Although American beech trees are common to the red spruce-northern hardwood forests of the Allegheny Highlands, in WVNFS habitat they usually occur in combination with red spruce and other hardwoods, particularly birch and maple. Therefore, despite having a devastating impact on the American beech component of the red spruce-northern hardwood forest, beech bark disease is not thought to render WVNFS habitat unsuitable (Service 2006a, p. 18). There is actually a potential short-term benefit to the WVNFS due to the creation of new nest cavities in the holes of dead and decaying beeches. Foraging habitat for the WVNFS may also improve with increases in large woody debris on the forest floor from the dead beech trees, which could promote the growth of underground fungi, one of the WVNFS' primary food sources (Carey *et al.* 1999, p. 54; Pyare and Longland 2001, p. 1008; Rosenberg and Anthony 1992, p.161; Waters *et al.* 2000, p. 85). Additionally, the removal of beech nuts is thought to be more detrimental to the southern flying squirrel because it is a high-energy food source for that species, and, therefore, would counter any small amount of direct competition between the WVNFS and the southern flying squirrel. Therefore, while beech bark disease affects a minor component of WVNFS habitat rangewide, we consider it to pose an overall low-to-moderate degree of risk for WVNFS, and this risk may be offset by the potential benefits of creation of new nest cavities, increase in a primary food source, and potential harm to the food supply of the southern flying squirrel (Service 2006a, p. 18).

We also analyzed the potential future impacts of climate change on the WVNFS's habitat. While there is much speculation on potential future impacts of climate change on the WVNFS, it is important to recognize that there is no evidence that climate changes observed to date have had any adverse impact on WVNFS or its habitat. For example, within the range of the WVNFS, inexplicable crown dieback (Mielke 1987, pp. 221–222) and declines in red spruce radial growth were reported in the 1980s (Adams *et al.* 1985, p. 315). Since the 1980s, there has been no evidence of widespread crown decline of red spruce throughout the range of WVNFS. By the late 1990s, Audley *et al.* (1998, pp. 177, 180, 190) noted that while a small percentage of individual trees sampled exhibited symptoms of reduced health and vigor, the majority of red spruce sampled in West Virginia appeared healthy. More recent dendrochronological surveys of red spruce stands in West Virginia detected this growth decline phenomenon occurring from about 1930 to 1990 (Schuler *et al.* 2002, p. 93; Hornbeck and Kochenderfer 1998, pp. 199–200). Since this time period, the decline appears to have ended in the central Appalachians—growth rates have leveled or shown slight increases (Schuler *et al.* 2002, p. 93, figure 3; Hornbeck and Kochenderfer 1998, p. 199–200) and regeneration remains unaffected (Schuler *et al.* 2002, pp. 92–93).

Red spruce is now recolonizing areas of hardwood forest near existing red spruce stands, areas that historically were red spruce until the logging and fires at the turn of the 20th century (Schuler *et al.* p. 2002, p. 89). There is

evidence that the red spruce-northern hardwood ecotone is either stabilizing or decreasing in elevation (expanding) to approximate its former extent (Adams *et al.* 1999, p. 235, Rollins 2005, p. 76). Rollins (2005, p. ii, 74–75) found that the amount and quality of red spruce at three study sites in the central Appalachians appeared to be gradually improving through natural regeneration.

Since then, Rollins has studied 9 additional sites, for a total of 12 representative sites distributed in the northern, central, and southern portions of the range of WVNFS. Stand data on trees, saplings and seedlings, soil chemistry, red spruce foliar chemistry, and the percent of red spruce roots covered by symbiotic fungal mycorrhizae are currently being analyzed between two sampling periods (1985 vs. 2005). Although a final report is not yet available, preliminary results indicate a reversal of the crown dieback conditions observed in 1985 (Connolly 2007).

This pattern is contrary to general projections that climate changes in the next 100 years may shift the geographic ranges of flora and fauna upwards in elevation and northward (IPCC 2002, p. 1). Considering the ecotone range expansion trends documented by Rollins (2005) and Adams *et al.* (1999), we expect that the extent and quality of the habitat for WVNFS is likely to continue to increase.

We looked at the possible range of effects of climate change on the WVNFS. Under warmer scenarios, several regional models project that mixed (hardwood and conifer) forests in the northeastern United States (including West Virginia and Virginia) may decrease in potential area, as they gradually shift into Canada over the next 100 years or more. By some projections, this possible decrease in potential habitat could be as small as −11 percent to −22 percent (Iverson *et al.* 2005, p. 34) or as large as −97 percent over 100 years (Hansen *et al.* 2001, p. 769). These models also project that northeast mixed hardwood and conifer forests may gradually be squeezed from the south by the advance of southeastern mixed forests to varying degrees (Inkley *et al.* 2004, p. 6). However, some models project that the biome remains intact under cooler scenarios (Hansen *et al.* 2001, p. 769; Inkley *et al.* 2004, p. 6, figure 3). As explained by Botkin *et al.* (2007, p. 230), ''the larger the scale of the primary units of the model, the simpler it is to estimate effects over large areas and times, but also the cruder the approximation is and the more likely that undesirable assumptions will prevail.'' Given this caveat, as well as the huge variation in possible views of the future noted above, all with unknown likelihoods of occurrence, we conclude that it is not possible to translate these potential scenarios into potential effects on WVNFS or its habitat over any meaningful timeframe.

We considered the map products provided by some of the public commenters (Lawler 2007a, unpub. maps). We spoke to Dr. Joshua Lawler (2007b), University of Washington, to gain a better understanding of the continentwide bioclimatic models he ran for all subspecies of northern flying squirrels. These models do not map vegetation directly, but attempt to do so indirectly by correlating the distribution of the various subspecies of northern flying squirrels to alternative scenarios of climate change. For the WVNFS, the models project that the future climate (2071–2100) within the range of the subspecies will be different from the baseline climate conditions of 1961–1990. Contrary to the commenters' speculation that these products project the extinction of WVNFS, the unpublished map products (Lawler 2007a, unpub. maps) provided by the commenters indicate only an unquantified potential range contraction of WVNFS. Botkin *et al.* (2007, p. 231) notes that bioclimatic models vary greatly in their projections of extinction, and that Lawler *et al.* (2006) have not attempted to validate any of the models they are using. Lawler *et al.* (2006, p. 1579) recognized that it would be difficult to translate these types of predictions into threats of extinction because actual range shifts would depend on dispersal, evolutionary flexibility, and species interactions. Dr. Lawler (2007b) stated that the model had a good degree of fit at the continentwide level, but the fit would be reduced, and the degree of uncertainty would be expected to be higher, at the State level. He indicated it is not possible to determine model error for the relatively small scale of the WVNFS' range in West Virginia and Virginia.

The WVNFS and other subspecies of *G. sabrinus* have demonstrated significant adaptability, resilience, mobility, and plasticity in habitat use by surviving landscape-level habitat changes during times of glacial retreat and advance during the Pleistocene, and by surviving intense landscape-level loss of forest during the late 1800s and early 1900s (Weigl 2007, p. 898). Over the past 100+ years, the WVNFS survived a change from a red spruce-dominated forest to a loss of much of the forest habitat, to a transitional regeneration of a hardwood-dominated forest, and a more recent increase in the red spruce component. As several commenters point out, hardwood trees have always been an important component of WVNFS habitat and there is no evidence that a gradual increase in hardwoods would cause dramatic population declines for the WVNFS. In fact, Weigl (2007, p. 899), citing two other studies in the northeast, noted that ''the species is known to occupy hardwood habitat without spruce or fir.'' The Service concludes that the WVNFS is expected to survive slow, gradual changes from long-term climate change.

Based upon a review of the current scientific studies, peer-review comments, the unpublished maps provided by the commenters, and discussions with modelers, the Service concludes that there is no evidence that current changes in climate have had an adverse impact on WVNFS. Long-term projections about climate change and its possible effects on WVNFS are complex and best viewed as possible alternative views of the future that have unknown likelihoods of occurrence. Therefore, based on the above information, we have determined that we are unable to establish climate change as a threat to the WVNFS within the foreseeable future.

Land Use Planning

Available information indicates that the threat posed by past habitat loss has been largely abated across most of the WVNFS' range. Implementation of the 2001 recovery plan amendment (Service 2001, p. 4) and the 2004 amendment to the MNF Land and Resource Management Plan (USDA Forest Service 2004, pp. 84a–84c, 87, 234–234b) significantly removed the threat of habitat loss (via logging) across much of the WVNFS' range. The recovery plan amendment recommended that suitable WVNFS habitat be considered during consultation with Federal agencies. The Forest Service reinforced this recommendation through an amendment to the MNF Land and Resource Management Plan, which limited vegetation management in all ''suitable habitat'' (as determined collaboratively by the Forest Service, Service, and WVDNR) to: (1) Research activities covered under an Act section 10 permit; (2) actions to improve or maintain WVNFS populations after research has demonstrated the beneficial effects of the proposed management; or (3) when project-level assessment results in no adverse effects. This conservation strategy has been carried forward into the MNF's recent

Forest Plan Revision (USDA Forest Service 2006a, Management Prescriptions 4.1 and parts of 5.0, 5.1, 6.2, and 8.0; USDA Forest Service 2006c, pp. 12, 19–20, 27).

It is important to note that section 7 of the Act provides regulatory flexibility to Federal agencies to complete their missions. This process allows Federal agencies to incidentally ''take'' individuals of a listed species as long as they insure their actions are not likely to jeopardize the entire species or adversely modify critical habitat. This regulatory option provided the MNF the ability to harvest and manage timber even in occupied WVNFS habitat. However, the MNF has avoided impacts to the WVNFS altogether while still maintaining a viable timber harvest program, which continues under the revised plan (USDA Forest Service 2006a).

After the WVNFS is delisted, the MNF is likely to amend the Forest Plan to incorporate its latest forest planning regulations, and to formally recognize that the WVNFS is no longer an endangered or threatened species. But given the MNF's desired future condition for Management Prescription 4.1 (summarized below), and history of proactive recovery efforts directed toward WVNFS conservation, the Service believes that the MNF will continue management and monitoring the red spruce-northern hardwood ecosystem that supports the WVNFS. Furthermore, the MNF's current timber management and harvest goals are based on achieving desired forest and habitat conditions and not on a regional economic or a supply/demand basis (USDA Forest Service 2006b, FEIS, Appendix I). The desired future condition for Management Prescription 4.1 focuses on developing a late successional stage (>120 years) forest over time (50+ years) with the multi-age stand structure that likely existed prior to exploitive logging (USDA 2006a, pp. III–12). At the stand level, desired vegetation conditions include a mix of trees of different ages, complex vertical habitat structure, scattered small openings (<2 ac) dominated by shrubs and saplings, scattered over-mature trees, and an abundance of snags, den trees, and downed woody debris.

Even if the MNF revises the current or subsequent Forest Plans to increase timber harvest, it is highly unlikely that the current WVNFS habitat would be impacted. About two-thirds of the MNF is fully stocked or overstocked timber. The MNF is growing nearly four times as much timber as is being harvested or dying from natural causes (USDA Forest Service 2006b, FEIS, Appendix I, p. I–155). Therefore, with the current surplus of available timber and the relatively small portion of the available timber currently being harvested, the MNF could substantially increase its annual harvest rate within the 330,000 available ac and still have no need to harvest in WVNFS habitat. The MNF's FEIS for the Forest Plan Revision describes three forest management alternatives that would result in a greater acreage available for timber harvest than the selected alternative (from 900 to 17,300 ac more) (USDA Forest Service 2006b, FEIS, Summary). The alternative with the greatest acreage available for timber harvest also includes a greater total acreage withheld from timber harvest to protect WVNFS habitat, Indiana bat (federally listed as endangered) habitat, river corridors, scenic areas, and streams buffers (367,396 ac or 68,703 ac more) than the selected alternative (298,693 ac), providing supporting evidence that the MNF has sufficient timber reserves if it wanted to increase timber harvest and still can protect WVNFS habitat.

The MNF is harvesting its timber outside of WVNFS habitat, at a sustainable rate. Alternatives have been identified that would provide additional acreage for timber harvesting without compromising WVNFS habitat. Therefore, the Service believes it is reasonable to expect the MNF will continue not to harvest timber in WVNFS habitat; a choice that would continue the agency's previous contributions to improve the WVNFS's status. We also believe that the MNF has the current and future capability to manage timber harvest in a way that does not harm the WVNFS after delisting and will do so.

Looking beyond the MNF, there is no evidence of any new sources of habitat loss throughout the current range of the WVNFS. According to analyses using the Menzel model, approximately 68 percent of areas modeled as habitat are now considered secured by public ownership and/or managed for the protection of the WVNFS (Menzel *et al.* 2006b, p.4). These areas include Canaan Valley National Wildlife Refuge (NWR) (created in 1994), Blackwater Falls and Canaan Valley State parks, Handley Wildlife Management Area, Kumbrabow State Forest, and the MNF (Service 2006a, pp. 12–14). An additional 5 percent of habitat is considered secure in Virginia on the GWNF.

Activities that have contributed to habitat loss and degradation since the time of listing occur only locally or occur on the periphery of the WVNFS's range (Service 2006a, pp. 11, 14, 20). These activities include limited highway development, recreational development, mining and gas exploration, timber management, and wind farm development (see ''Summary of Public Comments'', part F, issue 9). With regard to activities that are reasonably foreseeable to occur, some low level of local impacts are likely to continue into the future; however, there is no indication that the activities would ever be likely to occur over a landscape level, or at such a magnitude as to pose a threat to the continued existence of WVNFS throughout its range or in any significant portion of its range (Service 2006a, pp. 11, 14, 19–20).

For example, construction of Corridor H through the extreme northern part of the range of WVNFS is not expected to result in significant impacts to WVNFS or its habitat. Roads can adversely affect WVNFS movement by fragmenting habitat, although not all roads create absolute barriers. WVNFS are capable of gliding up to 200 ft, with the majority of the glides ranging from 16 to 82 ft (Scheibe *et al.* 2007, p. 857; Vernes 2001, pp. 1028–1029). WVNFS are known to have crossed logging roads, gravel roads, and ski slopes (Ford *et al.* 2007, p. 8; Menzel *et al.* 2006a, p. 207; Terry 2004, pp. 18–19). Menzel *et al.* (2004, p. 358) noted that many WVNFS day dens were located along or near abandoned skidder trails. Weigl *et al.* (1999, p. 61) found that *G. s. coloratus* frequently crossed patches of non-forested habitat, and one crossed a paved road several times. However, telemetry studies conducted on G. s. coloratus near the 2-lane paved Cherohala Skyway in North Carolina failed to document any evidence of squirrels attempting to cross this highway, even though in many cases the home ranges of the tracked squirrels were located in close proximity to the highway right-of-way (Weigl *et al.* 1999, pp. 69–73). Mean distances between forest edges across both sides of the right-of-way for that study ranged from 125 to 175 ft, and hence may have exceeded the normal gliding capability of a majority of *G. s coloratus.*

Range-wide habitat modeling has estimated that more than 235,000 ac of suitable WVNFS habitat exists south of the proposed Corridor H alignment and an additional 4,400 ac of suitable WVNFS habitat exists in the Blackwater Canyon area to the north of the alignment (Service 2006b, p. 19). Construction of the proposed project could decrease habitat connectivity within the northern habitats, or even create a permanent barrier to dispersal of the WVNFS between northern and southern areas. However, the amount of suitable habitat north and northeast of

the Blackwater canyon (approximately 4,400 ac) is considerable and we conclude that it is large enough that the current WVNFS population is likely to persist (Service 2006b, p. 23; Smith and Person 2007, p. 631). About 24,000 acres of suitable habitat exists in the Blackwater Canyon area south of the highway and this will remain connected by dispersal corridors to the remaining 211,000 acres of suitable habitat. Although the 235,000 acres (this figure is comprised of 211,000 acres plus the 24,000 acres in Blackwater Canyon) south of the proposed Corridor H alignment is not contiguous habitat, there are no sizeable gaps preventing squirrel dispersal, so we conclude that no portion of the population south of the alignment will be meaningfully affected by the road. This leaves only the question of the impact of the road footprint itself. A total of 745 ac of habitat for the WVNFS will be lost during construction of the proposed project (Service 2006b, p. 23; Service 2008, p. 20). This equates to a total loss of only 0.1 percent of the available highly suitable and suitable habitat for the subspecies, and therefore does not represent a significant threat.

The Service analyzed possible secondary impacts to WVNFS from the proposed Corridor H project from Parsons, WV to Davis, WV (Service 2006b, pp. 1–39) and Davis, WV to Bismarck, WV (Service 2008, pp. 1–32). Construction of this four-lane divided highway is expected to increase human accessibility to surrounding lands and could spur increased development in the lands adjacent to the project. However, a cumulative effects assessment, conducted by the West Virginia Department of Transportation (WVDOT) (2006, pp. 17–19) suggests there is an adequate amount of non-environmentally sensitive, low-elevation land that is not WVNFS habitat and that is available to support all development reasonably expected to occur as a result of the highway construction. WVDOT (2006, p. 20) modeled the worst-case scenario for development that was reasonably certain to occur after the highway was built, taking into consideration development and traffic patterns, and trends in employment and population growth. They mapped the raw private land (currently undeveloped) that was available to accommodate projected development. This was defined as land that was located outside of the 100-year floodplain that did not have slopes greater than 25 percent, that did not have wetlands, and that did not have existing development or was not currently under public ownership. Thus is appears that the land identified as being available to accommodate development corresponds to those lands that have the greatest likelihood of being developed due to lack of constraints.

As a general matter, because the majority of WVNFS habitat is publicly owned and managed, future development throughout the range of the WVNFS is expected to be minimal. The entire range of the WVNFS is within the Allegheny Mountains Valley Physiographic Region, an area of steep terrain and low human population density and growth. In 2005, the proportion of land use classified as low density and high density development within this physiographic region in West Virginia was 0.4 percent and 0.1 percent, respectively (WVDNR 2006b, p. 10). During 2000, population densities in the counties in West Virginia in which the WVNFS occurs were among the lowest in the State, ranging from 9.7 to 40.4 persons per square mile (WVDNR 2006b, p. 17); and with the exception of Randolph County (0.3 percent increase), the 10-year population trend (1990–2000) in all of these counties decreased (WVDNR 2006b, p. 18).

Summary of Factor A: Although the quantity and quality of WVNFS habitat is reduced from historical levels (preceding the logging and burning era of the late 1800s and early 1900s), we now know that the WVNFS is more resilient in its habitat use than formerly thought, probably because of its mobility and plasticity in nest tree selection. Additionally, the habitat is more connected than previously thought, and habitat trends are moving in a positive direction in terms of forest regeneration and conservation. Also, the subspecies continues to persist for multiple generations at many locations across its historical range. Impacts from proposed transportation projects and potential future housing development are localized and minimal. For the foreseeable future, any localized loss of habitat due to timber harvest or development on private lands will not reduce the overall quality of habitat for the WVNFS, rather it will just slightly reduce the amount of improvement in habitat conditions. For these reasons, and the lack of any rangewide threats to WVNFS habitat, the present or threatened destruction, modification, or curtailment of its habitat or range is no longer currently a threat to the WVNFS or likely to become so in the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The final listing rule concluded that the WVNFS was not known to be threatened by human utilization but noted that flying squirrels are highly desirable as pets to some persons, and collecting for such purposes is at least a potential threat to the already rare WVNFS (50 FR 26999). The WVNFS has been captured only for scientific or educational purposes through nest box and live trap methods, and not for market collecting or commercial use. Capture for scientific or educational purposes has been very limited, is regulated by state permitting systems, and has not proven to be detrimental to the continued existence of the WVNFS.

In the 21 years since listing, the Service has not received any evidence that commercial use in the pet trade or recreational use of the WVNFS is a threat. There are no law enforcement records of illegal harvesting or commercialization of the subspecies. Several factors indicate that delisting will not significantly change that. The WVNFS is a thinly dispersed, nocturnal mammal that is very difficult to catch. For example, Menzel captured the WVNFS at a rate of 0.227 captures per 100 trap nights (Menzel 2003, p. 65), and the WVDNR's nest box monitoring program has had only a 2 percent average success rate of squirrel occupancy per box checked (Service 2006a, p. 7). Additionally, once the WVNFS is delisted, its collection by hunting or trapping will still be illegal under West Virginia and Virginia state laws (West Virginia Code 20–2-5(26); Code of Virginia 29.1–521.A.10; 29.1–566 and 29.1–530A.). See further discussion in Factor D under the Summary of Factors Affecting the Species below. WVNFS is not currently defined as a game or furbearing animal that can be legally hunted or trapped in either state, and as such, there currently are no bag limits allowed for WVNFS (West Virginia Code 20–1-2; Code of Virginia 29.1–100, 29.1–530.A). Moreover, once the WVNFS is delisted, its capture for scientific and educational purposes will still be regulated through collection permitting systems of the WVDNR (West Virginia Code 20–2-50) and the Virginia Department of Game and Inland Fisheries (VDGIF) (Code of Virginia 29.1–568).

Summary of Factor B: Overutilization for any purpose is not currently considered a threat and is not anticipated to emerge as a threat in the foreseeable future.

C. Disease or Predation

The final listing rule (50 FR 26999) made no mention of disease as a threat to the WVNFS, and we are not aware of any evidence since the time of listing that suggests the health of WVNFS individuals is threatened by disease. Of the more than 1,000 squirrel captures since 1985, none have shown signs of disease (Service 2006a, p.15).

The final listing rule predicted that increasing human recreational use of northern flying squirrel habitat might result in predation on the WVNFS by pets, especially cats (50 FR 26999). While natural predators of the WVNFS may include weasel, fox, mink, owls, hawks, bobcat, skunk, raccoon, snakes, and fisher, we are not aware of any scientific or commercial evidence since the time of listing to support pets preying upon WVNFS (Service 2006c, p. 15), or to suggest that natural predation limits populations of WVNFS. As analyzed in our biological opinion for the Camp Wilderness Habitat Conservation Plan (HCP) (Service 2003, pp.12, 23), there are no documented deaths of northern flying squirrels, particularly the WVNFS, as a result of impacts of human recreational use or occupancy in, or near, its habitat, and pets are not predicted to be a substantial threat in the future (Service 2003, pp. 12, 23–25). Since the majority of WVNFS habitat is found on the MNF, human encroachment into WVNFS habitat is uncommon and localized (e.g., Canaan Valley and Snowshoe Mountain) (Service 2003, pp. 12, 23–25; Service 2006c, p. 15; Service 2006a, pp. 15, 20), and is therefore unlikely to become a threat to the WVNFS in the foreseeable future.

Summary of Factor C: Disease and predation are not currently threats to the WVNFS and are not likely to become threats in the foreseeable future.

D. Inadequacy of Existing Regulatory Mechanisms

The final listing rule stated that this factor was not known to be applicable (50 FR 26999). Currently, all threats under Factors A-C, and E have been eliminated or abated, and no regulatory mechanisms are needed to delist the WVNFS. Therefore, the inadequacy of regulatory mechanisms is not considered a threat to the subspecies. Nevertheless, even though not considered necessary for delisting, the laws discussed below will continue to provide some level of benefits to the WVNFS.

State Laws

The State of West Virginia does not currently have any State laws protecting endangered species. However, for the reasons stated in the discussions of Factors A, B, C and E, there are no current threats to the subspecies as a whole that require additional regulation. Therefore, the lack of an endangered species State law in West Virginia is not expected to negatively impact the WVNFS. See Factor B above for additional information.

In the Commonwealth of Virginia, the WVNFS has been listed as endangered under the Commonwealth's endangered species act since its Federal listing in 1985. This Commonwealth law, which is administered by the VDGIF, prohibits take of Commonwealth-listed species and is currently applicable to the WVNFS. The State has the authority to continue protection of the WVNFS under the State law once it is removed from the Federal List of Threatened and Endangered Wildlife (Virginia Code 29.1–566) and intends to do so (Reynolds 2008). Lack of current threats, along with the Commonwealth's endangered species act, ensures the WVNFS' persistence in Virginia. See Factor B above for additional information.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Competition With Southern Flying Squirrel

The final listing rule (50 FR 26999) concluded that the WVNFS was threatened by competition with the southern flying squirrel for habitat and by the spread of a parasite from the southern flying squirrel to the WVNFS. However, evidence collected since the time of listing indicates that the occurrence and potential severity of the southern flying squirrel's impacts are limited. The occurrence of the two subspecies has been documented at 20 percent of the known occupied WVNFS sites with no evidence of local extirpation of WVNFS. Over-competition by the southern flying squirrel for den sites does not appear to be affecting population persistence of the WVNFS. In addition, any competition between the two subspecies may be somewhat ameliorated by the spread of beech bark disease (see Factor A above for further information), which results in the reduced availability of beech nuts, an important food source for the southern flying squirrel (Service 2006a, p. 18).

The final listing rule cited evidence from a captive study in the 1960s that a nematode parasite, possibly carried by the southern flying squirrel, might be lethal to the WVNFS (50 FR 26999). The rule stated that while the southern flying squirrels appeared healthy, all the northern flying squirrels weakened and died within 3 months, and this mortality was associated with heavy infestations of the nematode parasite. All the southern flying squirrels also carried the parasite, but they remained in apparent good health and continued to breed (50 FR 26999). Based on review of the original dissertation, the cause of the northern flying squirrel mortality was never completely understood (Weigl 1968, pp. 129–150). Weigl *et al.* (1999, pp. 74–75, 2007 p. 902) hypothesized that survival and maturation rates of the parasite are limited by below-freezing temperatures that occur within the range of the WVNFS, but were not replicated in the 1960s captive study. The conditions created in the captive study apparently do not closely relate to naturally occurring conditions, and observations of WVNFS individuals captured in the last 20 years (including areas also occupied by the southern flying squirrel) have revealed no signs of sickness, debilitation, or death due to parasitic infestation.

Other Natural or Manmade Threats

The 1985 final listing rule did not address additional threats under Factor E. However, the delisting criterion within the 1990 recovery plan addressed potential threats, such as forest pests (see Factor A) and acid rain, to the existence of the high elevation forests on which the squirrels (*G. s. fuscus* and *G. s. coloratus*) depend (Service 1990, p. 19). These potential threats were included in the overall analysis of the status of the WVNFS in the 5-year review (Service 2006a, pp. 4–6) and are analyzed in more detail below.

Acid rain (more appropriately referred to as acid deposition) has been cited as potentially damaging forest ecosystems, especially the spruce-fir forests in portions of the Appalachian Mountains (NAPAP 2005, p. 41). Although empirical data are lacking regarding specific effects on the WVNFS, the long-term potential exists for anthropogenic acid deposition to diminish the extent and quality of the boreal-like spruce forests that have survived on the high ridges and plateaus, by pushing them farther up the slopes, and, if warming continues, reducing and eventually eliminating habitat at higher elevations. However, there has been no evidence of acid deposition reducing the extent of red spruce-northern hardwood forests in the Central Appalachians since the WVNFS' listing in 1985 (Service 2006a, p. 18, Adams 1999, p. 24) (See above

Response to Comments, I—Climate Change Concerns, Issues 4 and 5).

Given the naturally acidic nature of soils in spruce forests, it is unlikely that acid deposition has contributed significantly to their further acidification (Johnson and Fernandez 1992, p. 262; Johnson et al, 1992, pp. 391, 396). These forests do not reach the very low winter temperatures observed farther north and have not exhibited the red spruce winter kill due to decreased cold tolerance that has been observed in the northern Appalachians and Adirondacks (Peart *et al.* 1992, p. 180; DeHayes 1992, p. 296; NAPAP 2005, p. 41). Sulphate deposition in the Central Appalachians has dropped by at least 25 percent in the last 10 years and pH of deposition has increased, making this runoff less acidic (Johnson *et al.* 1992, pp. 388, 391; Adams and Kochenderfer 2007, p. 99–100, Adams *et al.* 2006, pp. 4–6, 216–217). Deposition of nitrogen has either leveled off or may be slightly increasing, but the overall acid load is decreasing in high elevation red spruce forests of the Central Appalachians (Adams and Kochenderfer 2007, p. 100–101; Johnson *et al.* 1992, p. 391; Adams *et al.* 2006, pp. 4–6, 266). Also, compared to many deciduous trees, red spruce also is more resistant to ozone, which is often found in combination with high levels of acid deposition (McLaughlin and Kohut 1992, pp. 360–366; Adams 2007). Given the factors of naturally acidic soils, increasing pH of deposition, lack of extreme cold temperatures, resistance to ozone impacts, and lack of adverse impacts from nitrogen, there is no current information demonstrating a negative impact on these high elevation forests. Furthermore, the current trends of the decreasing overall acid load indicate that acid deposition is not a significant threat to the subspecies' habitat in the foreseeable future.

Thus, to the extent that the effect of acid deposition on *G. s. fuscus* and its habitat are reasonably predictable, we concluded that they are not a significant threat to the subspecies' habitat in the foreseeable future.

Summary of Factor E: Overall, our analysis of the other natural and manmade factors, either alone or in combination, indicates that the WVNFS is not in danger of extinction throughout all or a significant portion of its range, or likely to become endangered within the foreseeable future.

Conclusion of the 5-Factor Analysis

As demonstrated in our 5-factor analysis, threats to the WVNFS have been abated or sufficiently minimized over the entire range of the subspecies. Relative to the information available at the time of listing, recovery actions, forest regeneration, and a reduction or abatement of threats have led to: (1) A significant increase in the number of known WVNFS captures and distinct capture locations; (2) verification of multiple-generation reproduction and persistence throughout the range; (3) proof of resiliency of the squirrels; and (4) the substantial improvement and continued expansion of suitable habitat rangewide.

The biological principles under which we evaluate the rangewide population status of the WVNFS relative to its long-term conservation are representation, redundancy, and resiliency (Groves 2003, pp. 30–32). At the time of listing, the WVNFS was thought to be an extremely rare and declining taxon that had disappeared from most of its historical range. We now know that occupancy of available habitat has increased and is much more widespread and well connected than formerly thought, and that the geographic extent of the WVNFS' range approximates historical range boundaries. The red spruce-northern hardwood forests have substantially recovered from the vast clear-cutting at the turn of the 20th century, and continue to improve. Additionally, we have learned that the WVNFS has adapted to changes in the spruce ecosystem over the past hundred years, and can successfully exploit the existing habitat conditions throughout the landscape. Habitat patch sizes within the core of the range of WVNFS are sufficiently large and well connected by numerous linkages to facilitate adequate WVNFS dispersal among population centers (Service 2007c, pp. 9–12). Although there remains geographic separation (and likely has been since the end of the Pleistocene) between a few of the habitat areas supporting population centers at the edge of the range, this habit matrix overall provides a relatively high degree of functional connectivity, as evidenced by constant occupancy of habitat across a range of forest conditions over multiple generations. The WVNFS has demonstrated more flexibility in its habitat use than previously thought, including a capacity to move freely and become widely dispersed. Thus, there is adequate representation (i.e., occupancy of representative habitats formerly occupied by the WVNFS across its range) and redundancy (i.e., distribution of populations in a pattern that offsets unforeseen losses across a portion of the WVNFS' range) (Service 2007c, pp. 6–12).

Compared to most other North American tree squirrels, *G. sabrinus* demonstrates resilience and behavioral plasticity (Weigl 2007, p. 898). The species survived glacial advances in the Pleistocene, as well as widespread loss of forest cover from logging and burning in the late 1800s/early 1900s (Weigl 2007, p. 898; Rentch *et al.* 2007, p. 441). Studies have confirmed the ability of *G. sabrinus* to adjust its biology to survive a wide range of environmental conditions, such as: The ability to occupy forests of varying spruce and hardwood compositions (Weigl 2007, p. 898–899); the ability to survive short cold snaps by dropping its body temperature without becoming torpid (Weigl 2007, p. 898); the ability to generally subsist on fungi and lichens, buds, berries, and staminant cones, but to occasionally use mast (Weigl 2007, p. 898); the ability to delay reproduction in response to environmental variables (Weigl *et al.* 1999, p. 32, 79); the ability to nest in a wide variety of trees (Menzel *et al.* 2004, pp. 360, 363–364; Menzel *et al.* 2006b, pp. 1–3, 6, 7; Menzel *et al.* 2006b, p. 208; Ford *et al.* 2004, p. 430); and the ability to recolonize new habitat areas over time by adjusting its activity patterns to meet ecological requirements in and around patches of forest (Menzel *et al.* 2006b, p. 208).

Survey and monitoring efforts at 109 sites over the past 21 years have shown a relatively high degree of population stability, as evidenced by a high degree of persistence and successful reproduction over multiple generations throughout the historical range (Service 2007c, pp. 9–11). There is no evidence of extirpation of a local population or of a deleterious source-sink metapopulation dynamic (Service 2007c, p. 11). As previously described, the current and future trend for habitat quantity, quality, and connectivity is expected to be favorable because of the continuing recovery of the red spruce-northern hardwood ecosystem and the lack of rangewide threats to WVNFS habitat (see Factor A under the Summary of Factors Affecting the Species above, and Service (2007b, pp. 3–8)). As habitat availability increases into the future, the carrying capacity of protected habitat should continue to ensure persistence of populations of the WVNFS.

Recovery efforts have provided increased attention and focus on the WVNFS and the habitat upon which it depends. Numerous conservation actions have been implemented since 1985 by land stewards, biologists, government agencies, and conservation groups. These include: Research and recovery actions specified in the 1990 recovery plan and 2001 recovery plan update for the WVNFS; conservation

provisions incorporated into future expansion of the Corridor H highway at the edge of subspecies' range (Service 2008, pp. 3–4, 22–26; 2006b, pp. 4–8, 28–32); minimization and mitigation measures specified in two HCPs at Snowshoe Mountain, specifically the protection of approximately 200 ac of WVNFS habitat in perpetuity [BHE Environmental, Inc. (BHE) 2003, pp. 34–42, Appendix F; BHE 2005, pp. 49–55]; red spruce plantings on public and private lands; and conservation provisions in the 1986 MNF Land and Resource Management Plan (USDA Forest Service 1986, pp. X–1–X–3), 2004 Forest Plan Amendment (USDA Forest Service 2004, p. 84, 84a, 84c, 87, pp. 234–234b), and 2006 Forest Plan Revision (USDA Forest Service 2006a, Management Prescription 4.1 and portions of 5.0, 5.1, 6.2, and 8.0). Of particular note are the habitat protection initiatives that have occurred on both public and private lands, the development of habitat models and research on red spruce-northern hardwood forest restoration, and the establishment of Canaan Valley NWR.

In summary, all of the past, existing, or potential future threats to WVNFS, either alone or in combination, have either been eliminated or largely abated throughout all of its range. The major factor in listing the WVNFS was the loss of habitat due to the logging era at the turn of the 20th century. This threat has largely been abated as evidenced by the substantial recovery and continued improvement of the preferred habitat of the WVNFS, red spruce-northern hardwood forests. Therefore, we have determined that the WVNFS is not in danger of extinction or likely to become so throughout its range in the foreseeable future.

Significant Portion of the Range Analysis

Having determined the WVNFS is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we must next consider whether the subspecies is in danger of extinction or is likely to become so in the foreseeable future in any significant portions of its range.

A portion of a species' range is significant if it is part of the current range of the species and if it is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

Applying the definition described above for determining whether a species is endangered or threatened in a significant portion of its range, we first addressed whether any portions of the range of WVNFS warranted further consideration. As discussed in Factor A—Land Use Planning, there is one small geographic area where localized habitat threats still exist due to a future road expansion. However, we concluded that this area did not warrant further consideration because this area is very small (in the context of the range of the WVNFS) and has no substantive effect on the viability of the subspecies, and thus there was no substantial information that this area is a significant portion of the range (see Service prepared document ''*Analysis of significant portion of the range for the West Virginia northern flying squirrel*'' (Service 2007b, pp. 1–6). Therefore, based on discussion of the threats above, we do not foresee the loss or destruction of any portions of the subspecies' range such that our ability to conserve the subspecies would be decreased. Therefore, we find that the WVNFS is not in danger of extinction and is not likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

Effects of the Rule

Promulgation of this final rule will affect the protections afforded the WVNFS under the Act. Taking, interstate commerce, import, and export of WVNFS are no longer prohibited under the Act. Removal of the WVNFS from the List of Endangered and Threatened Wildlife does not supersede any State regulations. Federal agencies are no longer required to consult with us under section 7 of the Act to ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the subspecies' continued existence. However, for the approximately 68 percent of the WVNFS habitat on the MNF, and the small area (5 percent) of habitat located within the GWNF, the activities impacting the WNVFS and its habitat must comply with appropriate Forest Service management plans. There is no critical habitat designated for the WVNFS.

Post-Delisting Monitoring Plan

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been recovered and delisted. The purpose of this requirement is to develop a program that detects the failure of any delisted species to sustain itself without the protective measures provided by the Act. If, at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

To further ensure the long-term conservation of the WVNFS, a post-delisting monitoring (PDM) plan has been developed that lays out a 10-year framework to monitor the status of the subspecies (Service 2007c, pp. 1–27). The Plan focuses primarily on monitoring of (1) Habitat status and trends and (2) implementation of habitat management plans and agreements. Habitat changes will be tracked rangewide by interpretation of remote-sensed imagery obtained at or near the time of delisting (baseline), compared to the end of the PDM period. These data will be verified by a subsample of stand data and on the ground field checks. In addition, land managers will self-report annually on accomplishment of key components of land management plans or agreements for WVNFS, including the acreage of habitat modified (positively or negatively), as well as land management problems and solutions.

The PDM plan also includes actions for monitoring of WVNFS distribution and persistence. The nest box and live trapping survey component will be largely a continuation of ongoing annual presence/absence surveys by the WVDNR, MNF, and other participants, but with an increased emphasis on covering as much of the extant distribution within core habitat areas as possible. This will help determine if WVNFS continue to be present in these areas over multiple generations.

The PDM plan identifies measurable management thresholds and responses for detecting and reacting to significant changes in WVNFS habitat, distribution, and persistence. If declines are detected equaling or exceeding these thresholds, the Service, in combination with other PDM participants, will investigate causes of these declines, including consideration of habitat changes, low natality, deaths or emigration, weather, trap shyness, competition for nest sites, or any other significant evidence. The result of the investigation will be to determine if the WVNFS warrants expanded monitoring, additional research, additional habitat protection, and/or resumption of Federal protection under the Act. At the end of the 10-year monitoring program, the Service will conduct a final review. It is the intent of the Service to work with all of our partners towards maintaining the recovered status of the WVNFS.

The final PDM plan is available on the Service's northeast region Web site, *http://www.fws.gov/northeast/endangered.*

Paperwork Reduction Act

This rule does not contain any new collections of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT** above).

Author

The primary author of this final rule is Laura Hill, Endangered Species Biologist and species lead for the WVNFS in our West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and 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. Amend § 17.11(h) is amended by removing the entry for ''Squirrel, Virginia northern flying'' under ''MAMMALS'' from the List of Endangered and Threatened Wildlife.

Dated: August 15, 2008.

Bryan Arroyo,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–19607 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 73, No. 166
Tuesday, August 26, 2008

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0909; Directorate Identifier 2007–NM–363–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ airplanes. The existing AD currently requires revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate life limits for certain items and inspections to detect fatigue cracking in certain structures. This proposed AD would require revising the ALS of the Instructions for Continued Airworthiness to incorporate new and more restrictive life limits for certain items and new and more restrictive inspections to detect fatigue cracking in certain structures. This proposed AD results from issuance of a later revision to the airworthiness limitations of the BAe/Avro 146 Aircraft Maintenance Manual, which specifies new inspections and compliance times for inspection and replacement actions. We are proposing this AD to ensure that fatigue cracking of certain structural elements is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

DATES: We must receive comments on this proposed AD by September 25, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact British Aerospace Regional Aircraft American Support 13850 Mclearen Road, Herndon, Virginia 20171.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0909; Directorate Identifier 2007–NM–363–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On November 14, 2005, we issued AD 2005–23–12, amendment 39–14370 (70 FR 70483, November 22, 2005), for all BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ airplanes. That AD requires revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate life limits for certain items and inspections to detect fatigue cracking in certain structures. That AD resulted from issuance of a revision to the airworthiness limitations of the BAe/Avro 146 Aircraft Maintenance Manual, which specifies new inspections and compliance times for inspection and replacement actions. We issued that AD to ensure that fatigue cracking of certain structural elements is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

Actions Since Existing AD Was Issued

Since we issued AD 2005–23–12, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, notified us that later revisions to Sections 05–10 and 05–20 have been issued for Chapter 5 of the BAe/Avro 146 Aircraft Maintenance Manual (AMM). Those sections also reference additional sections of the AMM. (The AD refers to the information included in the revised section of the AMM as the ''Airworthiness Limitations Section (ALS).'') The revised sections affect all BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ airplanes. In addition, those sections provide mandatory replacement times and structural inspection intervals approved under section 25.571 of the Joint Aviation Requirements and the Federal Aviation Regulations (14 CFR 25.571). As airplanes gain service experience, or as

results of post-certification testing and evaluation are obtained, it may become necessary to add additional life limits or structural inspections to ensure the continued structural integrity of the airplane.

The EASA advises that analysis of fatigue test data has revealed that certain inspections must be performed at specific intervals to preclude fatigue cracking in certain areas of the airplane. In addition, the EASA advises that certain life limits must be imposed for various components on these airplanes to preclude the onset of fatigue cracking in those components. Such fatigue cracking, if not corrected, could adversely affect the structural integrity of these airplanes.

The EASA mandated the service information and issued airworthiness directive 2007–0271, dated October 16, 2007, to ensure the continued airworthiness of these airplanes in the European Union.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

This proposed AD would supersede AD 2005–23–12 and would retain certain requirements of the existing AD. This proposed AD would also require revising the ALS of the Instructions for Continued Airworthiness to incorporate new and more restrictive life limits for certain items and new and more restrictive inspections to detect fatigue cracking in certain structures.

Change to Existing AD

This proposed AD would retain certain requirements of AD 2005–23–12. Since AD 2005–23–12 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2005–23–12	Corresponding requirement in this proposed AD
paragraph (h)	paragraph (f).
paragraph (i)	paragraph (h).

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
ALS Revision (required by AD 2005–23–12)	1	$80	None	$80	1	$80
ALS Revision (new proposed action)	1	80	None	80	1	80

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 39–14370 (70 FR 70483, November 22, 2005) and adding the following new airworthiness directive (AD):

BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Docket No. FAA–2008–0909; Directorate Identifier 2007–NM–363–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 25, 2008.

Affected ADs

(b) This AD supersedes AD 2005–23–12.

Applicability

(c) This AD applies to all BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A series airplanes, and

Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from issuance of a later revision to the airworthiness limitations of the BAe/Avro 146 Aircraft Maintenance Manual (AMM), which specifies new inspections and compliance times for inspection and replacement actions. We are issuing this AD to ensure that fatigue cracking of certain structural elements is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

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.

Certain Requirements of AD 2005–23–12

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (i) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Airworthiness Limitations Revision

(f) Within 30 days after December 27, 2005 (the effective date of AD 2005–23–12), revise the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate new and more restrictive life limits for certain items and new and more restrictive inspections to detect fatigue cracking in certain structures, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (or its delegated agent). Section 05–10–01, dated July 15, 2005, of Chapter 5 of the BAe/Avro 146 Aircraft Maintenance Manual is one approved method. This section references other sections of the AMM. The applicable revision level of the referenced sections is the revision level that is in effect on December 27, 2005.

New Requirements of This AD

Later Revision for Airworthiness Limitations

(g) Within 30 days after the effective date of this AD, revise the ALS of the Instructions for Continued Airworthiness to incorporate new and more restrictive life limits for certain items and new and more restrictive inspections to detect fatigue cracking in certain structures, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (or its delegated agent). Sections 05–10 and 05–20, both dated August 15, 2007, of Chapter 5 of the BAe/Avro 146 Aircraft Maintenance Manual is one approved method. Those sections reference other sections of the AMM. The applicable revision level of the referenced sections is the revision level that is in effect on the effective date of this AD. Incorporating the new and more restrictive life limits and inspections into the ALS terminates the requirements of paragraphs (f) and (g) of this AD, and after incorporation has been done, the limitations required by paragraph (f) of this AD may be removed from the ALS.

(h) Except as specified in paragraph (i) of this AD: After the actions specified in paragraph (f) or (g) of this AD have been accomplished, no alternative inspections or inspection intervals may be approved for the structural elements specified in the documents listed in paragraph (f) or (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(i) The Manager, International Branch, ANM=116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *ATTN:* Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–4056; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(j) The European Aviation Safety Agency airworthiness directive 2007–0271, dated October 16, 2007, also addresses the subject of this AD.

Issued in Renton, Washington, on August 18, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–19714 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0908; Directorate Identifier 2007–NM–190–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all Airbus Model A310 series airplanes. The existing AD currently requires repetitive detailed inspections to detect cracks propagating from the fastener holes that attach the left- and right-hand pick-up angles at frame 40 to the wing lower skin and fuselage panel, and corrective actions, if necessary. This proposed AD would revise the intervals for accomplishing the repetitive detailed inspections and would provide for an optional terminating modification for the repetitive inspections. This proposed AD results from mandatory continuing airworthiness information originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We are proposing this AD to prevent reduced structural integrity of the airplane due to fatigue damage and consequent cracking of the pick-up angles at frame 40.

DATES: We must receive comments on this proposed AD by September 25, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be

available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0908; Directorate Identifier 2007–NM–190–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On December 22, 2000, we issued AD 2000–26–14, amendment 39–12064 (66 FR 1031, January 5, 2001), for all Airbus Model A310 series airplanes. That AD requires repetitive detailed visual inspections to detect cracks propagating from the fastener holes that attach the left- and right-hand pick-up angles at frame 40 to the wing lower skin and fuselage panel, and corrective actions, if necessary. That AD resulted from a report indicating that structural damage was found on the pick-up angles at the junction between the wing lower surface and the fuselage skin at frame 40. We issued that AD to prevent reduced structural integrity of the airplane due to fatigue damage and consequent cracking of the pick-up angles at frame 40.

Actions Since Existing AD Was Issued

Since we issued AD 2000–26–14, European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has informed us that, as a result of A310 extended service goal activities, the thresholds and repetitive intervals for the existing repetitive detailed visual inspections required by AD 2000–26–14 must be modified to adequately address the identified unsafe condition.

Relevant Service Information

Airbus has issued Revision 03 of Service Bulletin A310–53–2111, dated May 21, 2007 (AD 2000–26–14 refers to Airbus Service Bulletin A310–53–2111, Revision 01, dated June 21, 2000, as the appropriate source of service information for accomplishing the required actions). The inspection procedures specified in Revision 03 are essentially identical to those specified in Revision 01. Revision 03 revises the thresholds and repetitive intervals for the inspections and thresholds for replacing pick-up angles. No additional work is required by Revision 03 for airplanes inspected in accordance with earlier revisions. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The EASA mandated Service Bulletin A310–53–2111, Revision 03, and issued airworthiness directive 2007–0184, dated July 3, 2007, to ensure the continued airworthiness of these airplanes in the European Union.

Airbus also issued Service Bulletin A310–53–2119, Revision 01, dated February 27, 2007. The service bulletin describes procedures for removing the existing pick-up angles and installing a reinforced doubler between frames (FR) FR40 and FR41, and doing applicable related investigative and corrective actions. The related investigative actions include inspecting the diameters of the holes, and doing a rotating probe inspection of the holes 1 through 70. The corrective actions involve contacting the airplane manufacturer for repair procedures. EASA airworthiness directive 2007–0184 refers to this service bulletin as an optional terminating action for the repetitive inspections specified in Service Bulletin A310–53–2111, Revision 03.

FAA's Determination and Requirements of the Proposed AD

These airplanes are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. As described in FAA Order 8100.14A, ''Interim Procedures for Working with the European Community on Airworthiness Certification and Continued Airworthiness,'' dated August 12, 2005, the EASA has kept the FAA informed of the situation described above. We have examined the EASA's findings, evaluated all pertinent information, and determined that AD action is necessary for airplanes of this type design that are certificated for operation in the United States.

This proposed AD would supersede AD 2000–26–14 and would continue to require repetitive detailed inspections to detect cracks propagating from the fasteners holes that attach the left- and right-hand pick-up angles at frame 40 to the wing lower skin and fuselage panel, and corrective actions, if necessary. This proposed AD would revise the intervals for accomplishing the repetitive detailed inspections and would provide for an optional terminating modification for the repetitive inspections.

Change to Existing AD

This proposed AD would retain all requirements of AD 2000–26–14. Since AD 2000–26–14 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2000–26–14	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (f).
paragraph (b)	paragraph (g).
paragraph (c)	paragraph (h).
paragraph (d)	paragraph (i).
paragraph (e)	paragraph (j).
paragraph (f)	paragraph (k).

We also have changed all references to a ''detailed visual inspection'' in the existing AD to ''detailed inspection'' in this action.

Costs of Compliance

This proposed AD would affect about 68 Model A310 series airplanes of U.S. registry.

The inspections that are required by AD 2000–26–14 and retained in this proposed AD take about 2 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions is $10,880, or $160 per airplane, per inspection cycle.

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 39–12064 (66 FR 1031, January 5, 2001) and adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2008–0908; Directorate Identifier 2007–NM–190–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 25, 2008.

Affected ADs

(b) This AD supersedes AD 2000–26–14.

Applicability

(c) This AD applies to Airbus Model A310 series airplanes, certificated in any category, except those airplanes modified in-service in accordance with Airbus Service Bulletin A310–53–2119, dated October 25, 2005; or Revision 01, dated February 27, 2007.

Unsafe Condition

(d) This AD results from mandatory continuing airworthiness information originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We are issuing this AD to prevent reduced structural integrity of the airplane due to fatigue damage and consequent cracking of the pick-up angles at frame 40.

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.

Requirements of AD 2000–26–14

Inspections and Corrective Actions

(f) Perform a detailed inspection to detect cracks propagating from the fastener holes that attach the left- and right-hand pick-up angles at frame 40 to the wing lower skin and fuselage panel, at the time specified in paragraph (g), (h), (i), (j) or (k) of this AD, as applicable. Perform the actions in accordance with Figure 2, Sheet 1, ''Synoptic Chart,'' of Airbus Service Bulletin A310–53A2111, Revision 01, dated June 21, 2000, except as provided by paragraph (l) of this AD.

(1) If no cracking is found during the inspection required by paragraph (f) of this AD, repeat the detailed inspection thereafter at the interval specified in paragraph (f)(1)(i) or (f)(1)(ii) of this AD, as applicable, except as provided by paragraph (n) of this AD.

(i) For Model A310–200 series airplanes: Except as provided by paragraph (i) of this AD, repeat the inspection thereafter at intervals not to exceed 1,000 flight cycles or 2,600 flight hours, whichever occurs first.

(ii) For Model A310–300 series airplanes: Except as provided by paragraphs (i) of this AD, repeat the inspection thereafter at intervals not to exceed 850 flight cycles or 2,800 flight hours, whichever occurs first.

(2) If any cracking is found during the inspection required by paragraph (f) of this AD, prior to further flight, perform applicable corrective actions (including repair (drilling and reaming a crack stop hole in the pick-up angle, performing a Rototest inspection and repetitive detailed inspections at the time specified in the service bulletin, and replacing the pick-up angle with a new angle at the time specified in the service bulletin, except as provided by paragraph (o) of this AD); or immediate replacement of any cracked angle with a new angle). Perform the actions and repetitive inspections in accordance with Figure 2, Sheet 1, ''Synoptic Chart,'' of Airbus Service Bulletin A310–53A2111, Revision 01, dated June 21, 2000, except as provided by paragraph (l) of this AD.

Note 1: Accomplishment of the actions required by paragraph (f) of this AD in accordance with Airbus Service Bulletin A310–53A2111, dated April 21, 2000, is considered to be acceptable for compliance with the requirements of that paragraph.

Compliance Times

(g) For Model A310–200 series airplanes: Except as provided by paragraphs (i), (j), and (k) of this AD, perform the initial inspection at the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Prior to the accumulation of 7,900 total flight cycles or 23,600 total flight hours, whichever occurs first.

(2) Within 700 flight cycles or 1,200 flight hours after February 9, 2001 (the effective date of AD 2000–26–14), whichever occurs first.

(h) For Model A310–300 series airplanes: Except as provided by paragraphs (i), (j), and (k) of this AD, perform the initial inspection required by paragraph (f) of this AD at the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Prior to the accumulation of 6,700 total flight cycles or 24,700 total flight hours, whichever occurs first.

(2) Within 700 flight cycles or 1,200 flight hours after February 9, 2001, whichever occurs first.

(i) For airplanes that have accumulated more than 18,000 total flight cycles or 53,000 total flight hours as of February 9, 2001: Perform the initial inspection required by paragraph (f) of this AD within 350 flight cycles or 600 flight hours after February 9, 2001, whichever occurs first. Repeat the inspection thereafter at intervals not to exceed 350 flight cycles or 600 flight hours, whichever occurs first.

(j) For airplanes having manufacturer's serial number 0162 through 0326 inclusive, on which Airbus Service Bulletin A310–53–2014 has been accomplished prior to February 9, 2001: The initial inspection threshold may be counted from the date of accomplishment of Airbus Service Bulletin A310–53–2014.

(k) For airplanes on which a pick-up angle has been replaced: For that pick-up angle only, the initial inspection threshold may be counted from the date of installation of the new pick-up angle.

Note 2: For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

New Requirements of This AD

New Revisions of Service Bulletin

(l) As of the effective date of this AD, use only the Accomplishment Instructions of Airbus Service Bulletin A310–53–2111, Revision 03, dated May 21, 2007, to do the inspections and corrective actions required by paragraph (f) of this AD; except where Figure 2 Sheet 2 of the service bulletin specifies actions for crack length of ''<54 mm (2.126 in.)'' and ''<69 mm (2.716 in.),'' this AD requires the corresponding actions for crack lengths less than or equal to those measurements.

(m) Inspections and applicable corrective actions done before the effective date of this AD in accordance with Airbus Service Bulletin A310–53–2111, Revision 02, dated October 25, 2005, are acceptable for compliance with the requirements of paragraph (f) of this AD.

Revised Repetitive Intervals for Detailed Inspections

(n) As of the effective date of this AD, repeat the detailed inspections for no crack findings required by paragraph (f)(1)(i), (f)(1)(ii), or (i) of this AD, as applicable, at the applicable times specified in Table 1 of this AD, until the modification specified in paragraph (p) of this AD is done.

TABLE 1—REVISED REPETITIVE INTERVALS FOR CERTAIN DETAILED INSPECTIONS

For model—	Repeat the inspection at the later of the following times—	Repeat the inspection at the later of the following times—	And thereafter at intervals not to exceed—
(1) A310–200 series airplanes.	Within 950 flight cycles or 1,900 flight hours since the last inspection required by paragraph (f)(1)(ii) or (i) of this AD, whichever occurs first.	Within 50 flight cycles or 250 flight hours after the effective date of this AD, whichever occurs first.	950 flight cycles or 1,900 flight hours, whichever occurs first.
(2) A310–300 series airplanes (short range).	Within 900 flight cycles or 2,550 flight hours since the last inspection required by paragraph (f)(1)(ii) or (i) of this AD, whichever occurs first.	Within 50 flight cycles or 250 flight hours after the effective date of this AD, whichever occurs first.	900 flight cycles or 2,550 flight hours, whichever occurs first.
(3) A310–300 series airplanes (long range).	Within 800 flight cycles or 4,000 flight hours since the last inspection required by paragraph (f)(1)(ii) or (i) of this AD, whichever occurs first.	Within 50 flight cycles or 250 flight hours after the effective date of this AD, whichever occurs first.	800 flight cycles or 4,000 flight hours, whichever occurs first.

Revised Threshold for Replacing the Pick-Up Angles

(o) As of the effective date of this AD, do the replacement of the pick-up angle required by paragraph (f)(2) of this AD, at the applicable time specified in Table 2 of this AD.

TABLE 2—REVISED THRESHOLDS FOR REPLACING PICK-UP ANGLES

For model—	Replace at the earlier of the following times—	
(1) A310–200 series airplanes.	At the time specified in paragraph (f)(2) of this AD for replacing the pick-up angle.	Within 1,500 flight cycles or 3,000 flight hours since the last detailed inspection, or within 30 days after the effective date of this AD, whichever occurs later.
(2) A310–300 series airplanes (short range).	At the time specified in paragraph (f)(2) of this AD for replacing the pick-up angle.	Within 1,600 flight cycles or 4,600 flight hours since the last detailed inspection, or within 30 days after the effective date of this AD, whichever occurs later.
(3) A310–300 series airplanes (long range).	At the time specified in paragraph (f)(2) of this AD for replacing the pick-up angle.	Within 1,400 flight cycles or 7,200 flight hours since the last detailed inspection, or within 30 days after the effective date of this AD, whichever occurs later.

Optional Terminating Modification

(p) Remove the existing pick-up angles and install a reinforced doubler between frames (FR) FR40 and FR41, and perform applicable related investigative and corrective actions by accomplishing all the applicable actions specified in the Accomplishment Instructions of Airbus Service Bulletin A310–53–2119, Revision 01, dated February 27, 2007; except as provided by paragraph (q) of this AD. Accomplishing these actions ends the repetitive inspections required by this AD.

(q) If any crack is detected and Airbus Service Bulletin A310–53–2119, Revision 01, dated February 27, 2007, specifies to contact Airbus: Before further flight, repair the crack using a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

(r) Actions done before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–53–2119, dated October 25, 2005, are acceptable for compliance with the corresponding requirements of paragraph (p) of this AD.

Alternative Methods of Compliance (AMOCs)

(s) The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(t) EASA airworthiness directive 2007–0184, dated July 3, 2007, also addresses the subject of this AD.

Issued in Renton, Washington, on August 18, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–19715 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0911; Directorate Identifier 2008–NM–115–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> There have been several incidents of shorting and sparks due to de-icing fluid ingress into the cockpit of CL–600–2C10 and CL–600–2D24 aircraft. De-icing fluid can enter between the windshields and side windows, leading to possible damage to the electrical components and wires as it comes into contact with cockpit floodlight electrical connections.

De-icing fluid in contact with cockpit floodlight electrical connections can result in possible arcing and fire. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by September 25, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Wing Chan, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7311; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0911; Directorate Identifier 2008–NM–115–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2008–19, dated May 8, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> There have been several incidents of shorting and sparks due to de-icing fluid ingress into the cockpit of CL–600–2C10 and CL–600–2D24 aircraft. De-icing fluid can enter between the windshields and side windows, leading to possible damage to the electrical components and wires as it comes into contact with cockpit floodlight electrical connections.

De-icing fluid in contact with cockpit floodlight electrical connections can result in possible arcing and fire. The actions to address the unsafe condition include performing a leak test, applying sealant between the windshields and side windows, and doing related investigative and corrective actions. The related investigative action is performing a leak test after applying sealant. The related corrective action is contacting Bombardier for repair instructions and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 254 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the

proposed AD on U.S. operators to be $81,280, or $320 per product.

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 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 this 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.

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 FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2008–0911; Directorate Identifier 2008–NM–115–AD.

Comments Due Date

(a) We must receive comments by September 25, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2C10 (Regional Jet Series 700, 701 & 702) airplanes, serial numbers 10003 through 10216 inclusive; and Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15040 inclusive; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 56: Windows.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been several incidents of shorting and sparks due to de-icing fluid ingress into the cockpit of CL–600–2C10 and CL–600–2D24 aircraft. De-icing fluid can enter between the windshields and side windows, leading to possible damage to the electrical components and wires as it comes into contact with cockpit floodlight electrical connections.

De-icing fluid in contact with cockpit floodlight electrical connections can result in possible arcing and fire. The actions to address the unsafe condition include performing a leak test, applying sealant between the windshields and side windows, and doing related investigative and corrective actions. The related investigative action is performing a leak test after applying sealant. The related corrective action is contacting Bombardier for repair instructions and doing the repair.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 450 flight hours after the effective date of this AD: Perform a leak test in accordance with Part A of the Accomplishment Instructions of Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008.

(2) If leakage is detected in the leak test performed in accordance with paragraph (f)(1) of this AD: Prior to further flight, apply sealant between the windshields and side windows and do all applicable related investigative and corrective actions in accordance with Part B of the Accomplishment Instructions of Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008. Do all applicable related investigative and corrective actions before further flight.

(3) If there is no leakage detected in the leak test performed in accordance with paragraph (f)(1) of this AD: Within 6 months or 2,000 flight hours after the effective date of this AD, whichever comes first, apply sealant between the windshields and side windows and do all applicable related investigative and corrective actions before further flight in accordance with Part B of the Accomplishment Instructions of Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008. Do all applicable related investigative and corrective actions before further flight.

(4) A leak test and application of sealant are also acceptable for compliance with the requirements of paragraphs (f)(1), (f)(2), and (f)(3) of this AD if done before the effective date of this AD in accordance with Bombardier Alert Service Bulletin A670BA–56–002, dated January 7, 2008.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *ATTN:* Wing Chan, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7311; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2008–19, dated May 8, 2008; and Bombardier Alert Service Bulletin A670BA–56–002, Revision A, dated February 26, 2008; for related information.

Issued in Renton, Washington, on August 18, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–19717 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0910; Directorate Identifier 2008–NM–033–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–200, A330–300, A340–300, A340–500, and A340–600 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An A330 operator reported a shroud box bottom panel missing during a routine inspection. The same panel detached from an A330 aircraft during take-off, causing damage to the surrounding structure and to the Trimmable Horizontal Stabilizer (THS) tip fairing.

The inspection indicated the blind rivets used to attach the panel worked loose causing fatigue damage with crack propagation through the fastener line resulting in panel detachment * * *.

* * * Three additional events of panel loss have been experienced on in service aircraft already inspected in accordance with the AD requirements * * *.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by September 25, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building, Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0910; Directorate Identifier 2008–NM–033–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On April 4, 2007, we issued AD 2007–08–05, Amendment 39–15022 (72 FR 18563, April 13, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2007–08–05, we have received additional reports of loss of the bottom panel of the shroud box on in-service airplanes on which the one-time detailed inspection required by AD 2007–08–05 has been done. Therefore, the requirements of AD 2007–08–05 do not adequately address the identified unsafe condition of that AD. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Airworthiness Directive 2008–0002, dated January 7, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

An A330 operator reported a shroud box bottom panel missing during a routine inspection. The same panel detached from an A330 aircraft during take-off, causing damage to the surrounding structure and to the Trimmable Horizontal Stabilizer (THS) tip fairing.

The inspection indicated the blind rivets used to attach the panel worked loose causing fatigue damage with crack propagation through the fastener line resulting in panel detachment.

To avoid potential injuries to persons on ground, Airworthiness Directive (AD) 2006–0107 [which corresponds with FAA AD 2007–08–05] mandated a one time detailed visual inspection of the shroud box bottom panel.

Further to issuance of AD 2006–0107, three additional events of panel loss have been experienced on in service aircraft already inspected in accordance with the AD requirements and no findings. Thus, it has been decided to delete this one time detailed visual inspection and to mandate a modification which prevents such unsafe condition. Therefore, the present AD supersedes EASA AD 2006–0107 and mandates the installation of a bolted shroud box bottom panel instead of blind riveted metallic design.

The modification includes doing all applicable related investigative and corrective actions. The related investigative action is an inspection to detect cracks of the shroud box hole. The corrective action is repairing any cracked shroud box hole. The applicability of the MCAI has been revised; certain airplanes have been removed and others added. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued the following service bulletins:

- Airbus Service Bulletin A330–57–3100, dated October 1, 2007;
- Airbus Service Bulletin A340–57–4109, dated October 1, 2007; and
- Airbus Service Bulletin A340–57–5018, dated October 1, 2007.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 34 products of U.S. registry. We also estimate that it would take about 20 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $990 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $88,060, or $2,590 per product.

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 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 this 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.

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 FAA amends § 39.13 by removing Amendment 39–15022 (72 FR 18563, April 13, 2007) and adding the following new AD:

Airbus: Docket No. FAA–2008–0910; Directorate Identifier 2008–NM–033–AD.

Comments Due Date

(a) We must receive comments by September 25, 2008.

Affected ADs

(b) The proposed AD supersedes AD 2007–08–05, Amendment 39–15022.

Applicability

(c) This AD applies to Airbus airplanes identified in Table 1 of this AD; certificated in any category.

TABLE 1—APPLICABILITY

For model—	On which—	Except for those airplanes on which—
(1) A330–200, A330–300, and A340–300 series, all certified models, all serial numbers.	Airbus modification 46077 has been embodied in production.	Airbus Modification 55568 has been done in production, or Airbus Service Bulletin A330–57–3100 or Airbus Service Bulletin A340–57–4109 has been embodied in service.
(2) Airbus A340–500 and A340–600 series, all certified models, all serial numbers.	None	Airbus modification 55568 has been embodied in production, or Airbus Service Bulletin A340–57–5018 has been embodied in service.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

An A330 operator reported a shroud box bottom panel missing during a routine inspection. The same panel detached from an A330 aircraft during take-off, causing damage to the surrounding structure and to the Trimmable Horizontal Stabilizer (THS) tip fairing.

The inspection indicated the blind rivets used to attach the panel worked loose causing fatigue damage with crack propagation through the fastener line resulting in panel detachment.

To avoid potential injuries to persons on ground, Airworthiness Directive (AD) 2006–0107 [which corresponds with FAA AD 2007–08–05] mandated a one time detailed visual inspection of the shroud box bottom panel.

Further to issuance of AD 2006–0107, three additional events of panel loss have been experienced on in service aircraft already inspected in accordance with the AD requirements and no findings. Thus, it has been decided to delete this one time detailed visual inspection and to mandate a modification which prevents such unsafe condition. Therefore, the present AD supersedes EASA AD 2006–0107 and mandates the installation of a bolted shroud box bottom panel instead of blind riveted metallic design.

The modification includes doing all applicable related investigative and corrective actions. The related investigative action is an inspection to detect cracks of the shroud box hole. The corrective action is repairing any cracked shroud box hole.

New Requirements of This AD: Actions and Compliance

(f) Unless already done: Within 69 months after the effective date of this AD, modify the shroud box bottom skin panel on both wings, and do all applicable related investigative and corrective actions, by accomplishing all the actions in the applicable service bulletins identified in Table 2 of this AD. Do all applicable related investigative and corrective actions before further flight.

TABLE 2—SERVICE BULLETINS

Service Bulletin—	Dated—
Airbus Service Bulletin A330–57–3100	October 1, 2007.
Airbus Service Bulletin A340–57–4109	October 1, 2007.
Airbus Service Bulletin A340–57–5018	October 1, 2007.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2008–0002, dated January 7, 2008; and the service bulletins identified in Table 2 of this AD for related information.

Issued in Renton, Washington, on August 18, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–19716 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Proposed Modification of the Dallas/Fort Worth, TX Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Meetings.

SUMMARY: This notice announces four fact-finding informal airspace meetings to solicit information from airspace users and others concerning a proposal to revise the Class B airspace area at Dallas/Fort Worth, TX. The purpose of these meetings is to provide interested parties an opportunity to present views, recommendations, and comments on the proposal. All comments received during these meetings will be considered prior to any revision or issuance of a notice of proposed rulemaking.

DATES: The informal airspace meetings will be held on Monday, November 3, 2008, at 5 p.m., Thursday, November 6, 2008, at 5 p.m., Thursday, November 13, 2008, at 5 p.m., and Tuesday, November 18, 2008, at 5 p.m. Comments must be received on or before November 26, 2008.

ADDRESSES: (1) The meeting on Monday, November 3, 2008, will be held at Lancaster Recreation Center, 1700 Veterans Memorial Parkway, Lancaster, TX 75134. (2) The meeting on Thursday, November 6, 2008, will be held at Cavanaugh Flight Museum, 4572 Claire Chennault Drive, Addison, TX 75001. (3) The meeting on Thursday, November 13, 2008, will be held at 5000 Airport Road, Denton, TX 76205–0207. (4) The meeting on Tuesday, November 18, 2008, will be held at Mesquite Airport Terminal Building, 1340 Airport Boulevard, Mesquite, TX 75181.

Comments: Send comments on the proposal to: Don Smith, Manager, Operations Support Group, Air Traffic Organization Central Service Area, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, TX 76137, or by fax to (817) 222–5547.

FOR FURTHER INFORMATION CONTACT: Robert Beck, DFW ATCT/TRACON, Dallas/Fort Worth International Airport, 2401 International Parkway, Dallas/Fort Worth Airport, TX 75261; Telephone (972) 615–2530.

SUPPLEMENTARY INFORMATION: (a) The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Central Service Center. A representative from the FAA will present a formal briefing on the planned modification to the Class B airspace at Dallas/Fort Worth, TX. Each participant will be given an opportunity to deliver comments or make a presentation. Only comments concerning the plan to modify the Class B airspace area at Dallas/Fort Worth, TX, will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be

asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded.

Agenda for the Meetings

—Sign-in.
—Presentation of Meeting Procedures.
—FAA explanation of the planned Class B modifications.
—Solicitation of Public Comments.
—Closing Comments.

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

Issued in Washington, DC, on August 13, 2008.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E8–19275 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 070726413–8730—01]

RIN 0648–AV89

Conducting Consultations Pursuant to Section 304(d) of the National Marine Sanctuaries Act

AGENCY: Office of National Marine Sanctuaries (ONNS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce).

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: NOAA solicits public comment on whether development of regulations implementing certain aspects of the consultation provisions of section 304(d) of the National Marine Sanctuaries Act is appropriate and, if so, what such regulations should contain to ensure the efficient application and implementation of, and compliance with, this statutory requirement.

DATES: Comments on this notice must be received by October 31, 2008.

ADDRESSES: Submit all electronic comments via the Federal eRulemaking Portal at *http://www.regulations.gov*. Comments can also be mailed to David Bizot, Attn: 304(d) ANPR, NOIA Office of National Marine Sanctuaries, 1305 East-West Hwy (N/ORM6), SSMC4 #11500, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: David Bizot, ONNS Permit and Consultations Coordinator, 301–713–7268.

SUPPLEMENTARY INFORMATION:

I. Consultation Under Section 304(d) of the National Marine Sanctuaries Act

The National Marine Sanctuaries Act (NNSA) authorizes the Secretary of Commerce (Secretary) to designate and manage areas of the marine environment with special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or esthetic qualities as national marine sanctuaries. The Secretary has delegated to NOAA and the Office of National Marine Sanctuaries (ONNS) the authority to implement the NNSA and provide comprehensive management of the National Marine Sanctuary System for its primary purpose of marine resource protection. The ONMS implements the NNSA through regulations, permitting, enforcement, research, monitoring, education and outreach.

In the 1992 amendments to the NMSA, Congress added section 304(d), 16 U.S.C. 1434(d), which requires interagency consultation between NOAA and Federal agencies taking actions, including authorization of private activities, ''likely to destroy, cause the loss of, or injure a sanctuary resource.'' In addition, Federal agencies are required to consult on proposed actions that ''may affect'' the resources of Stellwagen Bank National Marine Sanctuary (SBNNS), Public Law 102–587 § 2202(e).

Section 304(d) outlines the basic process by which Federal agencies are to consult with NOAA on activities that trigger the need to consult. If a Federal agency finds that a proposed action is likely to destroy, cause the loss of, or injure sanctuary resources (or, for SBNNS, ''may affect'' sanctuary resources), the agency is required to submit a ''written statement'' to the ONMS describing the potential effects of the activity on sanctuary resources at the earliest practicable time, but in no case later than no later than 45 days before the final approval of the action, unless another schedule is agreed to. If the ONNS finds that the proposed action is likely to destroy, cause the loss of, or injure a sanctuary resource, it must, within 45 days of receipt of complete information on the proposed action from the Federal agency, develop and recommend ''reasonable and prudent alternatives'' for the Federal agency to implement to protect sanctuary resources. If the ONNS recommends alternatives to the proposed action, the Federal agency is required to consult with the ONNS regarding plans for incorporating these recommendations into the proposed action. If the Federal agency decides not to follow the ONNS recommendations, it must provide a written explanation for that decision to the ONNS. If the Federal agency takes an action other than an alternative recommended by the ONNS and the action results in the destruction of, loss of, or injury to a sanctuary resource, the head of the agency must promptly prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the ONNS.

II. Proposed Development of Regulations

ONNS staff work diligently with Federal agencies to assist them in achieving full compliance with the NNSA, and encourage Federal agencies to work proactively with the ONNS to identify actions that may require NNSA consultation and to complete consultation at the earliest practicable time. However, more detailed regulatory provisions addressing the consultation process and requirements (e.g., how section 304(d) relates to other statutory and regulatory requirements, how a consultation might be conducted for a class of actions, and what information must be provided in a sanctuary resource statement) may be helpful to Federal agencies to more efficiently and effectively conduct the required consultation. NOAA therefore provides this notice for purposes of evaluating whether the development of such regulations to further implement the NNSA section 304(d) consultation requirement would be useful to Federal agencies and the public.

III. Action Requested From the Public

To expand upon the basic statutory requirements for NMSA consultations, NOAA is considering addressing a number of elements pertaining to these consultations through regulation and seeks comments on the following:

1. It may be appropriate to provide a process for a Federal agency to conduct a single NMSA consultation on a series or class of actions similar in type and effect. Would the public and other Federal agencies find this useful and, if so, how might the ONMS best identify the most appropriate actions that could be subject to this arrangement?

2. Beyond simply describing the action and its potential effects on sanctuary resources, what additional information, if any, should be included in the written statement provided to the ONMS by the Federal action agency to ensure that the consultation fully addresses the effects of the activity on sanctuary resources?

3. The ONNS anticipates there may be circumstances where a sanctuary resource statement might need to be supplemented, such as when the scope of the proposed action changes prior to the conclusion of the consultation process. The ONMS seeks comment on what other circumstances might require a supplemental statement and if this issue should to be addressed through regulation.

4. The ONNS desires that 304(d) consultations be integrated as efficiently as possible with the other statutory requirements that may apply to a Federal agency action. Should regulations address how 304(d) consultations can be best integrated or otherwise coordinated with, for example, actions required by the National Environmental Policy Act (NEPA), consultations conducted pursuant to section 7 of the Endangered Species Act and section 305(b)(2) of the Magnuson Stevens Fisheries Conservation and Management Act (Essential Fish Habitat provision)? If so, what considerations should be made by the ONNS and Federal agencies when integrating NNSA consultations with these other requirements?

5. When multiple Federal agencies are involved with a project, the ONNS believes it may be helpful to consider designating a lead agency to conduct 304(d) consultations on behalf of the other agencies. Do agencies and the public believe this would be useful and, if so, how should this designation be determined and what procedures should govern this arrangement?

6. The ONNS believes that the ONNS permit and NNSA consultation processes should be integrated for Federal activities that trigger both the 304(d) andNNSA permit requirements. Would additional information on how this integration could work be helpful and, if so, should it be described via regulation?

7. Section 304(d) states that if a Federal agency takes action other than what was recommended, and a sanctuary resource is destroyed, lost, or injured, the agency taking action should ''prevent and mitigate further damage and restore or replace the sanctuary resource'' in a manner approved by ONNS. Would it be helpful to Federal agencies and the public to have regulations to implement this statutory directive?

8. If the circumstances under which a consultation was completed change (i.e., if new information becomes available, there are changes to the proposed action, or the results of monitoring show injury or loss to sanctuary resources), a previously completed NNSA consultation might need to be reopened in order to protect sanctuary resources in accordance with the NNSA. Should regulatory procedures be developed to govern how and when a consultation should be re-opened?

9. Are there any other ideas that should be considered in order to best facilitate and improve the NNSA consultation requirements and process?

Comments received will help NOAA determine its next steps. If NOAA decides that regulations are appropriate for the implementation of NNSA section 304(d), they will be promulgated in compliance with the Administrative Procedure Act, NEPA and other relevant statutes and executive orders.

Classification: This Advanced Notice of Proposed Rulemaking has been determined to be significant for purposes of Executive Order 12866.

Dated: August 19, 2008.

John H. Dunnigan,

Assistant Administrator for Oceans and Coastal Zone Management.

[FR Doc. E8–19662 Filed 8–25–08; 8:45 am]

BILLING CODE 3510–NK–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2008–0030]

RIN 0960–AG82

Authorization of Representative Fees

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We propose to revise our rules regarding payment of representative fees to allow representatives to charge and receive a fee from third parties without requiring our authorization in certain instances. We also propose to eliminate the requirement that we authorize fees for legal guardians or court-appointed representatives who provide representational services in claims before us if a court has already authorized their fees. We are proposing these revisions to reflect changes in representatives' business practices, and in the ways in which claimants obtain representation, and to make more efficient the way we process representative fees.

DATES: To make sure that your comments are considered, we must receive them no later than September 25, 2008.

ADDRESSES: You may submit comments by any one of four methods—Internet, facsimile, regular mail, or hand-delivery. Commenters should not submit the same comments multiple times or by more than one method. Regardless of which of the following methods you choose, please state that your comments refer to Docket No. SSA–2008–0030 to ensure that we can associate your comments with the correct regulation:

1. Federal eRulemaking portal at *http://www.regulations.gov.* (This is the most expedient method for submitting your comments, and we strongly urge you to use it.) In the ''Comment or Submission'' section of the webpage, type ''SSA–2008–0030'', select ''Go'', and then click ''Send a Comment or Submission.'' The Federal eRulemaking portal issues you a tracking number when you submit a comment.

2. Telefax to (410) 966–2830.

3. Letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703.

4. Deliver your comments to the Office of Regulations, Social Security Administration, 922 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days.

All comments are posted on the Federal eRulemaking portal, although they may not appear for several days after receipt of the comment. You may also inspect the comments on regular business days by making arrangements with the contact person shown in this preamble.

Caution: All comments we receive from members of the public are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov.* Therefore, you should be careful to include in your comments only information that you wish to make publicly available on the Internet. We strongly urge you not to include any personal information, such as your Social Security number or medical information, in your comments.

FOR FURTHER INFORMATION CONTACT: Marg Handel, Supervisory Social Insurance Specialist, Office of Income Security Programs, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–4639. 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:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

Explanation of Changes

Authority

We may issue regulations to administer the Social Security Act (Act). 42 U.S.C. 405(a), 902(a)(5), and 1383(d)(1). Specifically, we may issue regulations allowing attorneys and non-attorneys to represent claimants before us. We also may set the maximum fees for those services. 42 U.S.C. 406(a)(1) and 1383(d)(2). Based on this authority, we are proposing new rules to revise our current regulations on fees paid to claimant representatives found in part 404 subpart R and part 416 subpart O.

Current Regulations on Fees Paid by Third Parties

We require all representatives to obtain our approval before charging or receiving a fee for representational services. 20 CFR 404.1720 and 416.1520. We also prohibit representatives from charging or receiving fees that are more than the amount we approve regardless of whether the fee is charged to, or received from, claimants or third parties. 20 CFR 404.1720(b)(3) and 416.1520(b)(3). However, under our long-standing interpretation of these regulations, if certain criteria are met, we need not approve a fee if a nonprofit organization pays the fee out of funds provided by a government entity. Social Security Ruling (SSR) 85–3.

Proposed Changes

We propose to revise our current policy and allow representatives, in certain cases, to be paid fees for providing representational services without requiring our authorization. The primary reason that we set maximum fees is to protect claimants and beneficiaries. Our current regulations carry out this purpose. Nevertheless, when a party other than a claimant or beneficiary incurs the liability for the cost of the representative's services, there is little risk that the individual may be charged an unreasonable fee. Often third parties, such as insurance companies, have provided claimants representation and have paid the representatives' fees without any liability to the claimants. We do not believe that we need to continue approving fee arrangements between representatives and third parties when the amount of claimants' benefits will not be affected.

Similarly, there is no reason to require legal guardians or court-appointed representatives to obtain our approval for fee arrangements if a court has already authorized their fees. Because courts, when authorizing guardians' fees, generally consider the wards' best interests and have reviewed and approved the legal guardian's accounting, there is little risk to the beneficiary that the fee approved is unreasonable. Thus, under our current subregulatory instructions, we do not require legal guardians or court-appointed representatives to obtain our approval for fee arrangements if a court has already authorized their fees for representation before us, regardless of who bears the liability for paying the fee.

We propose to define ''legal guardian or court-appointed representative'' as ''a court-appointed person, committee, or conservator who is lawfully invested with the power and charged with the duty of taking care of and managing the property and rights of an individual who is considered incapable of managing his or her own affairs'' in §§ 404.1703 and 416.1503.

In both of the situations addressed in these proposed rules, eliminating the requirement that we review these fee arrangements would not adversely affect the interests of our beneficiaries and would allow our resources and the resources of the representatives to be used to serve claimants and beneficiaries in other ways. However, to ensure that the interests of our beneficiaries are not adversely affected, we are including criteria in proposed §§ 404.1720(e) and 416.1520(e) that are similar to the criteria we currently have in SSR 85–3. Under these proposed regulations, our approval would not be necessary when the fees are paid by a third party, the claimant is free from any liability for a fee, and the representative waives the right to charge and collect a fee. As we previously noted, our approval of the fee request would also not be necessary where a court has already authorized the fee in cases where legal guardians or court-appointed representatives provide representational services in claims before us. Our experience has been that these criteria adequately ensure that the cases where our prior approval of a fee is not needed are limited to ones where claimants and beneficiaries are already protected from unreasonable attorney fees.

We also propose to make minor conforming changes to paragraph (b)(3) in §§ 404.1720 and 416.1520.

Please note that in another proposed rule document that we are publishing separately, Revisions to Rules on Representation of Parties, RIN 0960–AG56, we propose different revisions to §§ 404.1703, 404.1720, 416.1503, and 416.1520. When we publish any final rules following the public comment period, we will coordinate revisions to these sections.

Lastly, SSR 85–3 explains that we do not need to authorize a representative's fee if the fee is paid by a nonprofit organization or an agency out of funds provided or administered by a government entity and not paid by the claimant or beneficiary. The proposed rules would codify this policy. In accordance with our usual practice, we will rescind SSR 85–3 as obsolete if and when we adopt these rules in final.

Clarity of These Rules

Executive Order 12866, as amended, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make them easier to understand.

For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

When Will We Start To Use These Rules?

We will not use these rules until we evaluate the public comments we receive on them, determine whether they should be issued as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will

apply them, and summarize and respond to the public comments. Until the effective date of any final rules, we will continue to use our current rules.

Regulatory Procedures

Executive Order 12866, as Amended

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended. Therefore, they were reviewed by OMB.

Regulatory Flexibility Act

We certify that these proposed rules will not have a significant economic impact on a substantial number of small entities. These proposed rules do not place significant costs on small entities because they will relieve some small entities of the need to obtain SSA approval of a fee. It is anticipated that the cost to small entities will either be minimal, or it will result in cost savings as a result of increased efficiency. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

We are proposing revisions to our rules on obtaining approval for charging a fee for representing claimants. These proposed rules contain public reporting requirements that must be approved by OMB. The chart below lists these sections, describes their content, and provides their burden. We previously accounted for these public reporting burdens in the Information Collection Requests for the various forms the public uses to submit the information to SSA. Consequently, we are inserting a 1-hour placeholder burden in these sections.

Regulation sections and description	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
404.1720; 416.1520 ..... The representative submits to us a form we prescribe waiving the right to charge and collect a fee.	.....	.....	.....	1

We have submitted an Information Collection Request to OMB for clearance. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. You can call, e-mail or write to the addresses/phone numbers listed below to request a copy of the Information Collection Request package or to comment.

Office of Management and Budget, Attn: Desk Officer for SSA, *Fax Number:* 202–395–6974, *E-mail address: OIRA_Submission@omb.eop.gov.*

Social Security Administration, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, *Fax:* 410–965–6400, *E-mail address: OPLM.RCO@ssa.gov.*

You can submit comments on the paperwork burdens associated with this rule for up to 60 days after publication of this notice; however, they will be most useful if received within 30 days of publication. This does not affect the deadline for the public to comment to SSA on the proposed regulations. These information collection requirements will not become effective until approved by OMB. When OMB has approved these information collection requirements, SSA will publish a notice in the **Federal Register**.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Penalties; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 416

Administrative practice and procedure; Penalties; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Dated: May 27, 2008.

Michael J. Astrue,

Commissioner of Social Security.

Editorial Note: This document was received at the Office of the Federal Register on August 20, 2008.

For the reasons set out in the preamble, we propose to amend 20 CFR parts 404 and 416 as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart R—[Amended]

1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, 702(a)(5), and 1127 of the Social Security Act (42 U.S.C. 405(a), 406, 902(a)(5), and 1320a–6); sec. 303, Pub. L. 108–203, 118 Stat. 493.

2. Amend § 404.1703 by adding a definition for ''legal guardian or court-appointed representative'' in alphabetical order to read as follows:

§ 404.1703 Definitions.

* * * * *

Legal guardian or court-appointed representative means a court-appointed person, committee, or conservator who is lawfully invested with the power and charged with the duty of taking care of and managing the property and rights of an individual who is considered incapable of managing his or her own affairs.

* * * * *

3. Amend § 404.1720 by revising paragraph (b) heading and (b)(3) and by adding paragraph (e) to read as follows:

§ 404.1720 Fee for a representative's services.

* * * * *

(b) *Charging and receiving a fee under the fee petition process.* * * *

(3) Subject to paragraph (e) of this section, a representative must not charge or receive any fee unless we have approved it, and a representative must not charge or receive any fee that is more than the amount we approve.

* * * * *

(e) *When we need not authorize a fee.* We do not need to authorize a fee when:

(1) A non-profit organization, a Federal, State, county, or city government agency, or a third party that is a business entity independent of your representative pays from its funds the representative fees and expenses and both of the following conditions apply:

(i) You (including any auxiliary beneficiaries) are free of any liability to

pay a fee or any expenses, or any part thereof, directly or indirectly, to the representative or someone else; and

(ii) The representative submits to us a form we prescribe waiving the right to charge and collect a fee and any expenses from you and the auxiliary beneficiaries, if any, directly or indirectly, in whole or in part; or

(2) A court authorizes a fee for your representative who, in your case, is your legal guardian or a court-appointed representative.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart O—[Amended]

4. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1127 and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5), 1320a–6 and 1383(d)); sec. 303, Pub. L. 108–203, 118 Stat. 493.

5. Amend § 416.1503 by adding a definition for ''legal guardian or court-appointed representative'' in alphabetical order to read as follows:

§ 416.1503 Definitions.

* * * * *

Legal guardian or court-appointed representative means a court-appointed person, committee, or conservator who is lawfully invested with the power and charged with the duty of taking care of and managing the property and rights of an individual who is considered incapable of managing his or her own affairs.

* * * * *

6. Amend § 416.1520 by revising paragraph (b) heading and (b)(3) and by adding paragraph (e) to read as follows:

§ 416.1520 Fee for a representative's services.

* * * * *

(b) *Charging and receiving a fee under the fee petition process.* * * *

(3) Subject to paragraph (e) of this section, a representative must not charge or receive any fee unless we have approved it, and a representative must not charge or receive any fee that is more than the amount we approve.

* * * * *

(e) *When we need not authorize a fee.* We do not need to authorize a fee when:

(1) A non-profit organization, a Federal, State, county, or city government agency, or a third party that is a business entity independent of your representative pays from its funds the representative fees and expenses and both of the following conditions apply:

(i) You are free of any liability to pay a fee or any expenses, or any part thereof, directly or indirectly, to the representative or someone else; and

(ii) The representative submits to us a form we prescribe waiving the right to charge and collect a fee and any expenses from you if any, directly or indirectly, in whole or in part; or

(2) A court authorizes a fee for your representative who, in your case, is your legal guardian or a court-appointed representative.

[FR Doc. E8–19674 Filed 8–25–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 924

[SATS No. MS–018–FOR; Docket No. OSM–2008–0017]

Mississippi Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; reopening and extension of public comment period on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of revisions to a previously proposed amendment to the Mississippi regulatory program (Mississippi program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Mississippi proposes a revision to its regulations regarding valid existing rights as it pertains to designation of lands as unsuitable for surface coal mining operations. Mississippi intends to revise its program to be consistent with SMCRA.

This document gives the times and locations that the Mississippi program and proposed amendment to that program are available for your inspection and the comment period during which you may submit written comments on the revisions to the amendment.

DATES: We will accept written comments on this amendment until 4 p.m., c.t., September 10, 2008.

ADDRESSES: You may submit comments by either of the following two methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* The proposed rule is listed under the agency name **''OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT''** and has been assigned Docket ID: OSM–2008–0017. If you would like to submit comments through the Federal erulemaking Portal, go to *http://www.regulations.gov* and do the following. Click on the ''Advanced Docket Search'' button on the right side of the screen. Type in the Docket ID OSM–2008–0017 and click the submit button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on the OSM–2008–0017, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.
- *Mail/Hand Delivery/Courier:* Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209. Please include the Docket ID (OSM–2008–0017) with your comments.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the two listed above will be included in the docket for this rulemaking and considered.

For additional information on the rulemaking process and the public availability of comments, see ''III. Public Comment Procedures'' in the **SUPPLEMENTARY INFORMATION** section of this document.

You may receive one free copy of the amendment by contacting OSM's Birmingham Field Office. See below **FOR FURTHER INFORMATION CONTACT.**

You may review a copy of the amendment during regular business hours at the following locations:

Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209, Telephone: (205) 290–7282, *swilson@osmre.gov*.

Michael B. E. Bograd, Director, Mississippi Department of Environmental Quality, 2380 Highway 80 West, P.O. Box 20307, Jackson, Mississippi 39289–1307, Telephone: (601) 961–5500.

FOR FURTHER INFORMATION CONTACT: Sherry Wilson, Director, Birmingham Field Office. *Telephone:* (205) 290–7282. *E-mail: swilson@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Mississippi Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Mississippi Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and

reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior approved the Mississippi program on September 4, 1980. You can find background information on the Mississippi program, including the Secretary's findings and the disposition of comments in the September 4, 1980, **Federal Register** (45 FR 58520). You can also find later actions concerning the Mississippi program and program amendments at 30 CFR 924.10, 924.15, 924.16, and 924.17.

II. Description of the Proposed Amendment

By letter dated April 5, 2006 (Administrative Record No. MS–0402), Mississippi sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Mississippi sent the amendment at its own initiative.

We announced receipt of the proposed amendment in the May 24, 2006, **Federal Register** (71 FR 29867) and invited public comment on its adequacy. The public comment period ended June 23, 2006.

During our review of the amendment, we identified concerns relating to Mississippi's definition for ''valid rights'' in its statute and associated regulations in sections 105, 1101, and 1105 of the Mississippi Surface Coal Mining Regulations. We notified Mississippi of these concerns by letter dated August 17, 2006 (Administrative Record No. MS–0414). By letter dated May 30, 2008, Mississippi sent us additional explanatory information (Administrative Record No. MS–0416–02). By e-mail dated July 23, 2008, Mississippi also sent us revisions to its amendment (Administrative Record No. MS–0416–03). Below are the revisions Mississippi proposes.

A. Mississippi Surface Coal Mining Regulations (MSCMR) 105. Definitions

Mississippi proposes to add a definition for ''*valid rights*'' to read as follows:

Valid Rights—as used in § 53–9–71(4) of the Act means Valid Existing Rights.

B. MSCMR 1101. Authority

Mississippi proposes to revise this section to read as follows:

The Commission is authorized by § 53–9–71(4) of the Act to prohibit or limit surface coal mining operations on or near certain private, federal and other public lands, subject to valid rights.

C. MSCMR 1105. Areas Where Mining is Prohibited or Limited

Mississippi proposes to revise the introductory paragraph of this section to read as follows:

Subject to valid existing rights as defined in § 105, no surface coal mining operations shall be conducted on the following lands unless you have valid existing rights as determined under § 1106 or qualify for the exception for existing operations under paragraph (h) of this section:

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your comments to us by one of the two methods specified above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the two listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

IV. Procedural Determinations

Executive Order 12630—Takings

In this rule, the State is adopting valid existing rights standards that are similar to the standards in the Federal definition at 30 CFR 761.5. Therefore, this rule has the same takings implications as the Federal valid existing rights rule. The takings implications assessment for the Federal valid existing rights rule appears in part XXIX.E. of the preamble to that rule. See 64 FR 70766, 70822–27, December 17, 1999.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and

Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Mississippi program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Mississippi program has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior 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.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 924

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 30, 2008.

Sherry Wilson,

Acting Regional Director, Mid-Continent Region.

[FR Doc. E8–19713 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT–028–FOR; Docket ID OSM–2008–0018]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Montana regulatory program (hereinafter, the ''Montana program'') under the Surface Mining Control and Reclamation Act of 1977 (''SMCRA'' or ''the Act''). Montana proposes to clarify ambiguities.

This document gives the times and locations that the Montana program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., m.d.t. September 25, 2008. If requested, we will hold a public hearing on the amendment on September 22, 2008. We will accept requests to speak until 4 p.m., m.d.t. on September 10, 2008.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* This proposed rule has been assigned Docket ID: OSM–2008–0018. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and do the following. Click on the ''Advanced Docket Search'' button on the right side of the screen. Type in the Docket ID ''OSM–2008–0018'' and click the ''Submit'' button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM–2008–0018, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.
- *E-mail: JFleischman@osmre.gov.* Include the docket number in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Jeffrey Fleischman, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement,150 East B Street, Rm 1018, Casper, Wyoming 82601–1018.
- *Fax:* 307/261–6552.

Instructions: All submissions received must include the agency name and OSM Docket ID OSM–2008–0018.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''III. Public Comment Procedures'' in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: In addition to viewing the docket and obtaining copies of documents at *www.regulations.gov*, you may review copies of the Montana

program, this amendment, a listing of any public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may also receive one free copy of the amendment by contacting OSM's Casper Field Office or Montana's Industrial and Energy Minerals Bureau.

Jeffrey W. Fleischman, Chief, Casper Field Office, U.S. Office of Surface Mining,Federal Building, 150 East B Street, Room 1018,Casper, Wyoming, 307/261–6550, *Internet: JFleischman@osmre.gov.*

Neil Harrington, Chief, Industrial and Energy Minerals Bureau, Montana Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, 406/444–4973, *Internet: neharrington@mt.gov.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, *Telephone:* 307/261–6550, *Internet: JFleischman@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program in the April 1, 1980, **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

II. Description of the Proposed Amendment

By letter dated July 7, 2008, Montana sent us a proposed amendment to its program (Docket ID No. OSM–2008–0018) under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment to include the changes made at its own initiative. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Specifically, Montana proposes to: (1) Make minor revisions to the Administrative Rules of Montana (ARM) for style and readability; (2) change the ARM to require, rather than allow discretion to the Montana Department of Environmental Quality to release bonds when reclamation standards have been met; and (3) to clarify that written findings are required when reclamation has not been accomplished.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Montana program.

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Tribal or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available in the electronic docket for this rulemaking at *www.regulations.gov.* While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., m.d.t. on September 10, 2008. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing. If only one person expresses an interest, a public meeting rather than a hearing may be held, with the results included in the docket for this rulemaking.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations

and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior 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.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 6, 2008.

Richard Holbrook,

Acting Regional Director, Western Region.

[FR Doc. E8–19712 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2006–0379; FRL–8708–4]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Reasonably Available Control Technology Requirements for Volatile Organic Compounds and Nitrogen Oxides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to remove the limited status of its approval of the Commonwealth of Pennsylvania's State Implementation Plan (SIP) revision that requires all major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X) to implement reasonably available control technology (RACT). EPA is proposing to convert its limited approval of Pennsylvania's VOC and NO_X RACT regulations to full approval because EPA has approved all of the case-by-case RACT determinations that had been submitted by Pennsylvania such that there are no longer any such submissions pending before EPA. In prior final rules, EPA has fully approved Pennsylvania's VOC and NO_X RACT regulations for the Pennsylvania portion of the Philadelphia-Wilmington-Trenton area, and for the Pittsburgh-Beaver Valley area. EPA previously proposed to convert its limited approval of Pennsylvania's VOC and NO_X RACT regulations as they apply in the remainder of the Commonwealth to full approval. EPA is withdrawing that proposal and is now reproposing approval. This action is being taken under the Clean Air Act (CAA or the Act).

DATES: Written comments must be received on or before September 25, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–

R03–OAR–2006–0379 by one of the following methods:

A. *www.regulations.gov.* Follow the online instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2006–0379, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2006–0379. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov.* providing 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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Marcia Spink, (215) 814–2104, or by e-mail at *spink.marcia@epa.gov.*

I. Background

Pursuant to sections 182(b) and 182(f) of the CAA, the Commonwealth of Pennsylvania (Pennsylvania) is required to establish and implement RACT for all major VOC and NO_X sources. SIP revisions imposing RACT for three classes of VOC sources are required under section 182(b)(2). The categories are all sources covered by a Control Technique Guideline (CTG) document issued between November 15, 1990 and the date of 1-hour ozone attainment; all sources covered by a CTG issued prior to November 15, 1990; and all other major non-CTG sources. Section 182(f) provides that the planning requirements applicable to major stationary sources of VOCs in other provisions in part D, subpart 2 (including section 182) apply to major stationary sources of NO_X.

The Pennsylvania SIP already includes approved RACT regulations for sources and source categories of VOCs covered by the CTGs as required by section 182(b)(2)(A) and (B). Regulations requiring RACT for all major sources of VOC and NO_X were to be submitted to EPA as SIP revisions by November 1992 and compliance required by May of 1995. On February 4, 1994, the Pennsylvania Department of Environmental Protection (DEP) submitted a revision to the Pennsylvania SIP, consisting of 25 PA Code Chapters 129.91 through 129.95, to require major sources of NO_X and additional major sources of VOC emissions not covered by a CTG (non-CTG sources) to implement RACT. The February 4, 1994 submittal was amended on May 3, 1994 to correct and clarify certain presumptive NO_X RACT requirements under Chapter 129.93. As described in more detail, below, EPA granted conditional limited approval of 25 PA Code Chapters 129.91 through 129.95 on March 23, 1998 (63 FR 13789), and removed the conditional aspect of the approval on May 3, 2001 (66 FR 22123).

Under section 184 of the CAA, RACT as specified in sections 182(b)(2) and 182(f) applies throughout the Ozone Transport Region (OTR). The entire Commonwealth is located within the OTR. Therefore, RACT is applicable statewide in Pennsylvania. The major source size generally is determined by the classification of the area in which the source is located. However, for areas located in the OTR, the major source size for stationary sources of VOCs is 50 tons per year (tpy) unless the area's classification prescribes a lower major source threshold. The RACT regulations contain technology-based or operational ''presumptive RACT emission limitations'' for certain major NO_X sources. For other major NO_X sources, and all major non-CTG VOC sources (not otherwise already subject to RACT pursuant to a source category regulation under the Pennsylvania SIP), the regulations contain a ''generic'' RACT provision. A generic RACT regulation is one that does not, itself, specifically define RACT for a source or source categories, but instead allows for case-by-case RACT determinations. The generic provisions of Pennsylvania's regulations allow for DEP to make case-by-case RACT determinations that are then to be submitted to EPA as revisions to the Pennsylvania SIP.

On March 23, 1998 (63 FR 13789), EPA granted conditional limited approval of 25 PA Code Chapters 129.91 through 129.95, which require all major sources of NO_X and non-CTG sources to implement RACT, as a revision to the Pennsylvania SIP. This approval was granted on the condition that Pennsylvania must, by no later than April 22, 1999 certify that (1) it had submitted case-by-case RACT proposals for all sources subject to the RACT requirements of 25 PA Code Chapters 129.91 through 129.95 currently known to DEP, *or* (2) demonstrate that the emissions from any remaining subject sources represented a *de minimis* level of emissions as defined in the rulemaking document.

On April 22, 1999, the DEP submitted a letter certifying that it had met the terms and conditions imposed by EPA in its March 23, 1998 (63 FR 13789) conditional limited approval of its VOC and NO_X RACT regulation by submitting the case-by-case VOC/NO_X RACT determinations as SIP revisions in accordance with EPA's conditional limited approval. EPA concurred that Pennsylvania's April 22, 1999 certification satisfied the condition imposed in its conditional limited approval published on March 23, 1998

(63 FR 13789), and published a direct final rulemaking (May 3, 2001, 66 FR 22123) removing the conditional status of its approval of 25 PA Code Chapters 129.91 through 129.95 as a revision to the Commonwealth's SIP. That final rule became effective on June 18, 2001. The SIP revision consisting of 25 PA Code Chapters 129.91 through 129.95 retained a limited approval status on the basis that it strengthened the Pennsylvania SIP. Conversion from limited to full approval would occur when EPA had approved all of the case-by-case RACT determinations submitted by DEP as SIP revisions.

On October 16, 2001 (66 FR 52533), EPA published a final rulemaking for the Commonwealth removing the limited status of its approval of 25 PA Code Chapters 129.91 through 129.95 as it applied in the Pittsburgh-Beaver Valley ozone nonattainment area (Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland counties), because EPA had approved all of the case-by-case RACT determinations submitted by DEP for affected major sources of NO_X and/or VOC sources located in the area. In so doing, EPA converted its limited approval of 25 PA Code Chapters 129.91 through 129.95 to full approval as it applied to that area. That rulemaking became effective on November 15, 2001. On October 30, 2001 (66 FR 54698), EPA published a final rulemaking for the Commonwealth removing the limited status of its approval of 25 PA Code Chapters 129.91 through 129.95 as it applied in the Pennsylvania portion of the Philadelphia-Wilmington-Trenton ozone nonattainment area (Bucks, Chester, Delaware, Montgomery, and Philadelphia counties) because EPA had approved all of the case-by-case RACT determinations submitted by DEP for affected major sources of NO_X and/or VOC sources located in the area. In so doing, EPA converted its limited approval of 25 PA Code Chapters 129.91 through 129.95 to full approval as it applied to that area. That rulemaking became effective on November 29, 2001. On June 16, 2006 (71 FR 34864), EPA published a proposed rule to convert its limited approval of 25 PA Code Chapters 129.91 through 129.95 as they apply in the remainder of the Commonwealth to full approval. No public comments were submitted to EPA on the June 16, 2006 proposed action. Given the length of time that has passed since that proposed action, and to clarify that any future RACT determinations made by the DEP must still be submitted as SIP revisions once 25 PA Code Chapters 129.91 through 129.95 are fully approved, EPA is withdrawing that proposal and is now re-proposing to convert its limited approval of 25 PA Code Chapters 129.91 through 129.95 to full approval as those RACT regulations apply in the remainder of the Commonwealth.

II. Future Submissions of Case-by-Case RACT Determinations

The DEP has submitted and EPA has approved as SIP revisions case-by-case RACT determinations for nearly 600 non-CTG and NO_X sources in Pennsylvania pursuant to Pennsylvania regulations Chapters 129.91–129.95. (See 40 CFR 52.2020(d) for the list of sources.) As stated previously, there are no source-specific RACT determination submissions from DEP currently pending before EPA. In the future, should DEP find it necessary to issue any additional or revised source-specific RACT determinations in plan approvals and/or permits pursuant to the fully approved Pennsylvania regulations Chapters 129.91–95 of the Pennsylvania SIP, those RACT determinations must still be submitted to EPA for approval as source-specific SIP revisions. In order for EPA to consider such submissions for approval, the DEP must ensure that:

A. The sources are not subject to any CTGs or Alternative Control Techniques (ACTs) issued by EPA for which Pennsylvania has adopted or is due to adopt state-wide regulations for approval as SIP revisions. Such sources should be subject to any applicable CTG or ACT regulation. In addition to the CTG documents issued between November 15, 1990 and the date of 1-hour ozone attainment, and the CTG documents issued prior to November 15, 1990; EPA issued CTG and ACT documents in 2006 and 2007. EPA is also due to issue additional control technique documents by September 2008. Pennsylvania is required to adopt statewide RACT regulations pursuant to these control technique documents and is mandated a schedule for doing so. A source in the Commonwealth that has been considered a non-CTG source may no longer be so defined if their source category is covered by the 2006, 2007, or 2008 CTGs or ACTs. At the time DEP adopts statewide RACT regulations pursuant to the 2006, 2007, and 2008 CTGs and ACTs, it must address the applicability of those RACT regulations to sources previously considered non-CTG sources under regulations 129.91–129.95.

B. The RACT Plan approvals and/or RACT permits do not relax any previously SIP approved source-specific RACT approved for the source(s). Any request by such sources to modify (relax) their emission rates, equipments standards, work practice standards, or conditions on the type or amount of materials/fuels combusted or processed; or to seek relief from their daily, monthly and/or annual emission caps would not be approvable as RACT in 2008 or beyond. When such sources seek relief with the operating conditions imposed in their SIP approved RACT plan approvals or RACT permits because they have modified to add additional emission units, or need to increase operation in light of market-based demand for their products; RACT needs to be re-assessed, re-determined and potentially made more stringent not less stringent.

C. The RACT determination is not to be simply based upon an arbitrary dollar per ton figure in a state guidance document that is neither SIP-approved nor approvable by EPA. The very nature of a non-CTG and/or source-specific alternative RACT makes any ''one size fits all'' dollar per ton figure inappropriate when determining and imposing RACT.

D. The RACT plan approval or RACT permit has no expiration date. No regulation, plan approval or permit submitted for approval as a SIP revision to be incorporated by reference and made part of a SIP may have an expiration or sunset provision. By federal statute, a state is responsible to implement and enforce all provisions of its approved SIP at all times.

E. Any RACT plan approvals' or RACT permits' redactions must be done in such a way as to be able to read the redacted text. When a plan approval or permit is issued by DEP to a source, it may impose additional requirements or conditions completely unrelated to the RACT requirements for NO_X and/or VOCs. In those instances, DEP may submit the plan approval or permit as a SIP revision with those portions of the plan approval or permit redacted. Those redactions must be done in such a way as to be able to read the redacted text. This is necessary to ensure that the redacted language is not contrary to the portions being submitted for approval as RACT, does not render the RACT portions less stringent, does not remove or make less stringent any conditions related to enforcement of RACT, or make the RACT requirements subject to change without a SIP revision.

F. When requesting that a RACT plan approval or RACT permit be approved asSIP revision, the DEP's formal SIP revision submission must include a signed/dated technical support document or memorandum prepared by DEP in support of its RACT determination and the SIP revision

request. Sources in Pennsylvania subject to PA Code Chapters 129.91 through 129.95 are not to send their RACT plan proposals directly to EPA. Under the CAA, SIP revision submissions in their entirety must be submitted by the State requesting that the SIP be revised. EPA will consider only the materials formally submitted by DEP in its SIP revision request and any comments submitted during the public comment period provided by EPA on its proposed rule when determining its final action to approve or disapprove a source-specific SIP revision submitted by DEP pursuant to PA Code Chapters 129.91 through 129.95.

G. The SIP submission by DEP must not include any materials that are considered ''confidential business information'' in nature or entitled to any proprietary treatment. Moreover, the DEP plan approvals and permits cannot include conditions that cite to the source's RACT Plan proposal where that proposal includes materials which the company has requested be treated as confidential and proprietary. No materials that are considered ''confidential business information'' in nature or entitled to any proprietary treatment are to be included in a SIP revision submittal because the materials that constitute SIP revisions are required to be made available to the public by both the State and EPA.

III. EPA's Proposed Action

EPA has previously removed the limited status of its approval of Pennsylvania's SIP revisions that requires all major sources of VOC and NO_X to implement RACT as it applies in the Pittsburgh and Philadelphia areas because EPA has approved all of the case-by-case RACT determinations for these areas. In this action, EPA is proposing to convert its limited approval of Pennsylvania's RACT regulation to full approval as it applies in the remainder of the Commonwealth because EPA has approved all of the case-by-case RACT determinations submitted by DEP such that there are no longer any such submissions pending before EPA. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule regarding Pennsylvania's VOC and NO_X RACT regulations Chapters 129.91–129.95 as they apply in the remainder of the Commonwealth of Pennsylvania does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the Pennsylvania SIP is not approved to apply in Indian country, and EPA, therefore, notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: August 14, 2008.

William T. Wisniewski,

Acting Regional Administrator, Region III.

[FR Doc. E8–19756 Filed 8–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0603; FRL–8708–5]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Philadelphia County Reasonably Available Control Technology Under the 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This SIP revision pertains to the requirements in meeting the reasonably available control technology (RACT) under the 8-hour ozone national ambient air quality standard (NAAQS). These requirements are based on the certification that previously adopted RACT controls in Pennsylvania's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; the adoption of new or more stringent regulations that represent RACT control levels; and a negative declaration that certain categories of sources do not exist in Philadelphia County, Pennsylvania. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before September 25, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0603 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. E-mail: fernandez.cristina@epa.gov.

C. *Mail:* EPA–R03–OAR–2008–0603, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency,

Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2008–0603. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Department of Public Health, Air Management Services, 321 University Avenue, Philadelphia, Pennsylvania 19104.

FOR FURTHER INFORMATION CONTACT: Melissa Linden, (215) 814–2096, or by e-mail at *linden.melissa@epa.gov*.

SUPPLEMENTARY INFORMATION: On September 25, 2006, the Pennsylvania Department of Environmental Protection submitted a revision for Philadelphia County to its SIP that addresses the requirements of RACT under the 8-hour ozone NAAQS.

I. Background

Ozone is formed in the atmosphere by photochemical reactions between volatile organic compounds (VOC), oxides of nitrogen (NO_X) and carbon monoxide (CO) in the presence of sunlight. In order to reduce ozone concentrations in the ambient air, the CAA requires all nonattainment areas to apply control on VOC/NO_X emission sources to achieve emission reductions. Among effective control measures, RACT controls are a major group for reducing VOC and NO_X emissions from stationary sources.

RACT is defined as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761 at 53762, September 17, 1979). Section 182 of the CAA sets forth two separate RACT requirements for ozone nonattainment areas. The first requirement, contained in section 182(a)(2)(A) of the CAA, and referred to as RACT fix-up requires the correction of RACT rules for which EPA identified deficiencies before the CAA was amended in 1990. Philadelphia County has no deficiencies to correct under this section of the CAA. The second requirement, set forth in section 182(b)(2) of the CAA, applies to moderate (or worse) ozone nonattainment area as well as to marginal and attainment areas in ozone transport regions (OTRs) established pursuant to section 184 of the CAA, and requires these areas to implement RACT controls on all major VOC and NO_X emission sources and on all sources and source categories covered by a control technique guideline (CTG) issued by EPA.

Under the 1-hour ozone NAAQS, Philadelphia County was designated part of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area located in an OTR. Therefore, the county was subject to RACT requirements under the 1-hour ozone standard. Pennsylvania has implemented numerous RACT controls throughout the Commonwealth to meet the CAA RACT requirements. These RACT controls were promulgated in the Philadelphia Air Management Regulations Part V and Pennsylvania's Regulations in Title 25 Sections 129 and 145.

Under the 8-hour ozone NAAQS, Philadelphia County is part of the Philadelphia-Wilmington-Atlantic City moderate nonattainment area, and is therefore subject to the CAA requirements. Pennsylvania is required to submit to EPA a SIP revision that addresses how Philadelphia County meets the RACT requirements under the 8-hour ozone standard. The entire Commonwealth of Pennsylvania is also part of the OTR established under section 184 of the CAA.

EPA requires under the 8-hour ozone NAAQS that states meet the CAA RACT requirements, either through a certification that previously adopted RACT controls in their SIP revisions approved by EPA under the 1-hour ozone NAAQS represent adequate RACT control levels for 8-hour attainment purposes, or through the adoption of new or more stringent regulations that represent RACT control levels. A certification must be accompanied by appropriate supporting information such as consideration of information received during the public comment period and consideration of new data. This information may supplement existing RACT guidance documents that were developed for the 1-hour standard, such that the State's SIP accurately reflects RACTs for the 8-hour ozone standard based on the current availability of technically and economically feasible controls. Adoption of new RACT regulations will occur when states have new stationary sources not covered by existing RACT regulations, or when new data or technical information indicates that a previously adopted RACT measure does not represent a newly available RACT control level. Another 8-hour ozone NAAQS requirement for RACT is to submit a negative declaration that there are no CTG or non-CTG major sources of VOC and NO_X emissions within Philadelphia County.

II. Summary of SIP Revision

Pennsylvania's SIP revision contains the requirements of RACT set forth by the CAA under the 8-hour ozone NAAQS. Pennsylvania's SIP revision satisfies the 8-hour RACT requirements through (1) certification that previously adopted RACT controls in Pennsylvania's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available

technically and economically feasible controls, and continues to represent RACT for the 8-hour implementation purposes; (2) the adoption of federally enforceable permits that represent RACT control levels; and (3) a negative declaration that certain CTG or non-CTG major sources of VOC and NO_X sources do not exist in Philadelphia County.

VOC RACT Controls

Philadelphia Air Management Regulations Part V and Pennsylvania Regulations Title 25 Section 129 contains Philadelphia County's VOC RACT controls that were implemented and approved in the Pennsylvania SIP under the 1-hour ozone NAAQS. Table 1 lists Philadelphia County's VOC RACT controls.

TABLE 1—PHILADELPHIA COUNTY'S VOC RACT CONTROLS

RACT document basis	Regulation	Date published	**Federal Register** citation
CTG: Control of VOC Emissions from Petroleum Liquid Storage in External Floating Roof Tanks.	Air Management Regulations (AMR) V Section II.	05/31/1972	37 FR 10842
	PA Title 25 Section 129.56	07/26/2000	65 FR 45920
	PA Title 25 Section 129.57	01/19/1983	48 FR 2319
CTG: Control of VOC Emissions from Storage of Petroleum Liquids in Fixed Roof Tanks.	AMR V Section II	05/31/1972	37 FR 10842
	PA Title 25 Section 129.56	07/26/2000	65 FR 45920
	PA Title 25 Section 129.57	01/19/1983	48 FR 2319
CTG: Control of Refinery Vacuum Producing Systems, Wastewater Separators and Process Unit Turnarounds.	AMR V Section III	05/31/1972	37 FR 10842
	PA Title 25 Section 129.55	01/19/1983	48 FR 2319
CTG: Control of VOC Leaks from Petroleum Refinery Equipment	AMR V Section IV	05/31/1972	37 FR 10842
	PA Title 25 Section 129.58	07/27/1984	49 FR 30183
CTG: Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals.	AMR V Section V	05/31/1972	37 FR 10842
	PA Title 25 Section 129.59	08/11/1992	57 FR 35777
	PA Title 25 Section 129.62	12/22/1994	59 FR 65971
CTG: Control of VOC Emissions from Bulk Gasoline Plants	PA Title 25 Section 129.60	08/11/1992	57 FR 35777
CTG: Control of VOC Leaks from Gasoline Tank Trucks and Vapor Collection Systems.	AMR V Section XIII	04/06/1993	58 FR 17778
	PA Title 25 Section 129.62	12/22/1994	59 FR 65971
CTG: Design Criteria for Stage I Vapor Control Systems—Gasoline Service Stations.	PA Title 25 Section 129.61	08/11/1992	57 FR 35777
CTG: Control of VOC Emissions from Solvent Metal Cleaning	AMR V Section VI	05/31/1972	37 FR 10842
	PA Title 25 Section 129.63	01/16/2003	68 FR 2208
Alternative Control Technology (ACT) Document—Halogenated Solvent Cleaners.	PA Title 25 Section 129.63	01/16/2003	68 FR 2208
CTG: Control of VOC from Use of Cutback Asphalt	PA Title 25 Section 129.64	07/27/1984	49 FR 30183
CTG: Control of VOC Emissions from Manufacture of Pneumatic Rubber Tires.	PA Title 25 Section 129.69	12/22/1994	59 FR 65971
CTG: Control of VOC Emissions from Manufacture of Synthesized Pharmaceutical Products.	AMR V Section XII	06/16/1993	58 FR 33200
	PA Title 25 Section 129.68	08/11/1992	57 FR 35777
CTG: Control of VOC Emissions from Large Petroleum Dry Cleaners	AMR V Section XI	04/12/1993	58 FR 19066
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks.	PA Title 25 Section 129.52	07/20/2001	66 FR 37908
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume III: Surface Coatings of Metal Furniture.	PA Title 25 Section 129.52	07/20/2001	66 FR 37908
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume IV: Surface Coating for Insulation of Magnet Wire.	PA Title 25 Section 129.52	07/20/2001	66 FR 37908
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume V: Surface Coating of Large Appliances.	PA Title 25 Section 129.52	07/20/2001	66 FR 37908
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume VI: Surface Coating of Miscellaneous Metal Parts and Products.	PA Title 25 Section 129.52	07/20/2001	66 FR 37908
CTG: Control of VOC Emissions from Existing Stationary Sources, Volume VIII: Graphic Arts—Rotogravure and Flexography.	PA Title 25 Section 129.67	07/26/2000	65 FR 45920
CTG: Control of VOC Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystrene Resins.	PA Title 25 Section 129.71	12/22/1994	59 FR 65971
CTG: Control of VOC Fugitive Emissions from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment.	PA Title 25 Section 129.71	12/22/1994	59 FR 65971
Non-CTG RACT: An industry-specific RACT determination (CAA Section 182(b)(2)(c)).	AMR V Section X	06/16/1993	58 FR 33192
	PA Title 25 Section 129.72	12/22/1994	59 FR 65971
	PA Title 25 Section 129.91—129.95.	07/20/2001	66 FR 37908
CTG—Maximum Achievable Control Technology (MACT): Aerospace.	PA Title 25 Section 129.73	06/25/2001	66 FR 33645
CTG—MACT: Wood Furniture	PA Title 25 Section 129.101—129.107.	07/20/2001	66 FR 37908
ACT: Automobile Body refinishing	PA Title 25 Section 129.75	08/14/2000	65 FR 49501
	AMR V Section VII—processing of Photochemically Reactive Materials.	05/31/1972	37 FR 10842
	AMR V Section VIII—Architectural Coatings.	05/31/1972	37 FR 10842

TABLE 1—PHILADELPHIA COUNTY'S VOC RACT CONTROLS—Continued

RACT document basis	Regulation	Date published	Federal Register citation
	AMR V Section IX—Disposal of Solvents.	05/31/1972	37 FR 10842
	PA Title 25 Section 129.65—Ethylene production plants.	11/14/2002	67 FR 68935
	AMR V Section I—Definitions	06/16/1993	58 FR 33200
	PA Title 25 Section 129.51—General.	06/25/2001	66 FR 33645

Philadelphia Air Management Services (AMS) submitted a negative declaration demonstrating that no surface coating of flat wood paneling facilities exist in Philadelphia County. Philadelphia AMS submitted a list of federally enforceable permits for specific sources that are as stringent as the CTG guidance issued by EPA. These case-by-case RACT determinations are found in Table 2.

TABLE 2—PHILADELPHIA COUNTY'S CASE-BY-CASE RACT DETERMINATIONS

RACT document basis	Facility name	Operating permit No.
CTG: Control of Volatile Organic Equipment Leaks from Natural Gas/Gasoline Processing Plants.	Philadelphia Gas Works	V95–042.
	Sunoco Philadelphia Refinery	V95–038.
CTG/ACT: Shipbuilding/Repair	Aker Philadelphia Shipyard	V01–006.
CTG: Control of Volatile Organic Compound Emissions from Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry.	Sunoco Chemicals	V95–047.
CTG: Control of Volatile Organic Compound Emissions from Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry.	Sunoco Chemicals	V95–047.

NO_X RACT Controls

Philadelphia Air Management Regulations Part VII and Pennsylvania Regulations Title 25 Sections 129 and 145 list NO_X RACT controls that were implemented and approved into the Pennsylvania SIP under the 1-hour ozone NAAQS. Table 3 lists Philadelphia County's NO_X RACT controls.

TABLE 3—PHILADELPHIA COUNTY'S NO_X RACT CONTROLS

RACT document basis	Regulation	Date published	Federal Register citation
	AMR VII Section II—Fuel Burning Equipment	01/14/1987	52 FR 1456
	AMR VII Section III—Nitric Acid Plants	05/14/1973	38 FR 12696
	AMR VII Section IV—Emissions Monitoring	05/14/1973	38 FR 12696
NO_X RACT, CAA Section 182 (b)(2) and Section 182(f).	PA Title 25 Sections 129.91–129.95	07/20/2001	66 FR 37908
NO_X SIP Call	PA Title 25 Sections 145.1–145.100	08/21/2001	66 FR 43795
	PA Title 25 Sections 145.111–145.113	07/14/2006	71 FR 40084
	PA Title 25 Sections 145.141–145.144	07/14/2006	71 FR 40084

III. Proposed Action

EPA is proposing to approve the Pennsylvania SIP revision for Philadelphia County that addresses the requirements of RACT under the 8-hour ozone NAAQS. Pennsylvania submitted this SIP revision on September 25, 2006. This SIP revision is based on a combination of (1) certification that previously adopted RACT controls in Pennsylvania's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; (2) the adoption of federally enforceable permits that represent RACT control levels; and (3) the negative declaration that there are no CTG or non-CTG major sources of VOC and NO_X emissions within Philadelphia County. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by

state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to the Philadelphia County RACT under the 8-hour ozone NAAQS, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: August 18, 2008.

William T. Wisniewski,

Acting Regional Administrator, Region III.

[FR Doc. E8–19753 Filed 8–25–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 88

RIN 0991–AB48

Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law

AGENCY: Office of the Secretary, HHS.

ACTION: Proposed rule.

SUMMARY: The Department of Health and Human Services proposes to promulgate regulations to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law, pursuant to the Church Amendments (42 U.S.C. 300a–7), Public Health Service (PHS) Act § 245 (42 U.S.C. 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. 110–161, § 508(d), 121 Stat. 1844, 2209). This notice of proposed rulemaking proposes to define certain key terms. Furthermore, in order to ensure that recipients of Department funds know about their legal obligations under these nondiscrimination provisions, the Department proposes to require written certification by certain recipients that they will comply with all three statutes, as applicable.

DATES: Submit written or electronic comment on the regulations proposed by this document by September 25, 2008.

ADDRESSES: In commenting, please refer to ''Provider Conscience Regulation''. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.Regulations.gov* or via e-mail to *consciencecomment@hhs.gov*. To submit electronic comments to *http://www.Regulations.gov,* go to the Web site and click on the link ''Comment or Submission'' and enter the keywords ''provider conscience''. (Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address only: Office of Public Health and Science, Department of Health and Human Services, *Attention:* Brenda Destro, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 728E, Washington, DC 20201.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address only: Office of Public Health and Science, Department of Health and Human Services, Attention: Brenda Destro, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 728E, Washington, DC 20201.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to the following address: Room 728E, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government Identification, commenters are encouraged to leave their comments in the mail drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain proof of filing by stamping in and retaining and extra copy of the documents being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submitting Comments: We welcome comments from the public on all issues set forth in this proposed rule to assist us in fully considering issues and developing policies. For all comments submitted, you should specify the subject as ''Provider Conscience Regulation''.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.Regulations.gov.* Click on the link ''Comment or Submission'' on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of

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FOR FURTHER INFORMATION CONTACT:

Brenda Destro, (202) 401–2305, Office of Public Health and Science, Department of Health and Human Services, Room 728E, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

SUPPLEMENTARY INFORMATION:

I. Background

Religious liberty and freedom of conscience have long been protected in the Constitution and laws of the United States. Workers in all sectors of the economy enjoy legal protection of their consciences and religious liberties. In federal law, there are several provisions that prohibit recipients of certain federal funds from coercing individuals in the health care field into participating in actions they find religiously or morally objectionable. These same provisions also prohibit discrimination on the basis of one's objection to, participation in, or refusal to participate in, specific medical procedures, including abortion or sterilization. In addition, there is a provision that prohibits the federal governments and state and local governments from discriminating against individual and institutional providers who refuse, among other things, to receive training in abortions, require or provide such training, perform abortions, or refer for or make arrangements for abortions or training in abortions. More recently, an appropriations provision has been enacted that prohibits certain federal agencies and programs and State and local governments that receive certain federal funds from discriminating against individuals and institutions that refuse to, among other things, provide, refer for, pay for, or cover, abortion.

Conscience Clauses/Church Amendments [42 U.S.C. 300a–7]

The conscience provisions contained in 42 U.S.C. 300a–7 (collectively known as the ''Church Amendments'') were enacted at various times during the 1970s in response to debates over whether receipt of federal funds required the recipients of such funds to provide abortions or sterilizations. The first conscience provision in the Church Amendments, 42 U.S.C. 300a–7(b), provides that ''[t]he receipt of any grant, contract, loan, or loan guarantee under [certain statutes implemented by the Department of Health and Human Services] * * * by any individual or entity does not authorize any court or any public official or other public authority to require'': (1) The individual to perform or assist in a sterilization procedure or an abortion, if it would be contrary to his/her religious beliefs or moral convictions; (2) the entity to make its facilities available for sterilization procedures or abortions, if the performance of sterilization procedures or abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions; or (3) the entity to provide personnel for the performance of sterilization procedures or abortions, if it would be contrary to the religious beliefs or moral convictions of such personnel.

The second conscience provision in the Church Amendments, 42 U.S.C. 300a–7(c)(1), prohibits any entity which receives a grant, contract, loan, or loan guarantee under certain Department-implemented statutes from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or the extension of staff or other privileges because the individual either ''performed or assisted in the performance of a lawful sterilization procedure or abortion,'' or ''because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.''

The third conscience provision, contained in 42 U.S.C. 300a–7(c)(2), prohibits any entity which receives a grant or contract for biomedical or behavioral research under any program administered by the Department from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges ''because he performed or assisted in the performance of any lawful health service or research activity,'' or ''because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.''

The fourth conscience provision, 42 U.S.C. 300a–7(d), provides that ''[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [the Department] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.''

The final conscience provision contained in the Church Amendments, 42 U.S.C. 300a–7(e), prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain Departmentally implemented statutes from denying admission to, or otherwise discriminating against, ''any applicant (including for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.''

Public Health Service Act § 245 [42 U.S.C. 238n]

Enacted in 1996, section 245 of the Public Health Service Act (PHS Act) prohibits the federal government and any State or local government receiving federal financial assistance from discriminating against any health care entity on the basis that the entity: (1) Refuses to receive training in the performance of abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; (2) refuses to make arrangements for such activities; or (3) attends or attended a post-graduate physician training program or any other training program in the health professions that does not (or did not) perform abortions or require, provide, or refer for training in the performance of abortions or make

arrangements for the provision of such training. In addition, PHS Act § 245 requires that, in determining whether to grant legal status to a health care entity (including a State's determination of whether to issue a license or certificate such as a medical license), the federal government and any State or local government receiving federal financial assistance deem accredited any post-graduate physician training program that otherwise would be accredited but for the reliance on an accrediting standard that requires an entity: (1) To perform induced abortions; or (2) to require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training.

Weldon Amendment [Consolidated Appropriations Act, 2008, Public Law No. 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007)]

The Weldon Amendment, originally adopted as section 508(d) of the Labor–HHS Division (Division F) of the 2005 Consolidated Appropriations Act, Public Law 108–447 (Dec. 8, 2004), has been readopted (or incorporated by reference) in each subsequent HHS appropriations act. Title V of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Public Law 109–149, § 508(d), 119 Stat. 2833, 2879–80; Revised Continuing Appropriations Resolution of 2007, Public Law 110–5, § 2, 121 Stat. 8, 9; Consolidated Appropriations Act, 2008, Public Law No. 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209. The Weldon Amendment provides that ''[n]one of the funds made available under this Act [making appropriations for the Departments of Labor, Health and Human Services, and Education] may be made available to a federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.'' It also defines ''health care entity'' to include ''an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.''

The Laws in the Courts

The federal courts have recognized the breadth and importance of statutory and other conscience protections for health care professionals and workers. Shortly after its passage, a federal appellate court decision characterized the importance of conscience protections contained in the Church Amendments. Faced with the question of a denominational hospital's right to refuse to perform sterilization procedures, the Ninth Circuit affirmed a lower court decision protecting the hospital's right to refuse to perform sterilizations and abortions on religious or moral grounds: ''If [a] hospital's refusal to perform sterilization [or, by implication, abortion] infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions.' '' *Taylor* v. *St. Vincent's Hospital,* 523 F.2d 75, 77 (9th Cir. 1975) (citations omitted).

The Problem

There appears to be an attitude toward the health care professions that health care professionals and institutions should be required to provide or assist in the provision of medicine or procedures to which they object, or else risk being subjected to discrimination. Reflecting this attitude, in some instances the standards of professional organizations have been used to define the exercise of conscience to be unprofessional, forcing health care professionals to choose between their capacity to practice in good standing and their right of conscience.[1]

Despite the fact that several conscience statutes protecting health care entities from discrimination have been in existence for decades, the Department is concerned that the public and many health care providers are largely uninformed of the protections afforded to individuals and institutions under these provisions. This lack of knowledge within the health professions can be detrimental to conscience and other rights, particularly for individuals and entities with moral objections to abortion and other medical procedures.

The Department's Response

In general, the Department is concerned that the development of an environment in the health care field that is intolerant of individual conscience, certain religious beliefs, ethnic and cultural traditions, and moral convictions may discourage individuals from diverse backgrounds from entering health care professions. Such developments also promote the mistaken beliefs that rights of conscience and self-determination extend to all persons, except health care providers. Additionally, religious and faith-based organizations have a long tradition of providing medical care in the United States, and they continue to do so today—some of these are among the largest providers of health care in this nation. A trend that isolates and excludes some among various religious, cultural, and/or ethnic groups from participating in the delivery of health care is especially troublesome when considering current and anticipated shortages of health care professionals in many medical disciplines facing the country.

The Department also notes that, while many recipients of Department funds currently must certify compliance with federal nondiscrimination laws, federal conscience protections are not mentioned in existing forms. For example, Form PHS–5161–1, required as part of Public Health Service grant applications, requires applicants to certify compliance with all federal nondiscrimination laws, including laws prohibiting discrimination on the basis of race, color, national origin, religion, sex, handicap, age, drug abuse, and alcohol abuse or alcoholism. The Department seeks to raise awareness of federal conscience laws by specifically including reference to the nondiscrimination provisions contained in the Church Amendments, PHS Act § 245, and the Weldon Amendment in certifications currently required of most existing and potential recipients of Department funds.

Toward these ends, the Department has concluded that regulations and related efforts are necessary, in order to (1) educate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these nondiscrimination laws through the various Department mechanisms, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the healthcare industry, and between providers and patients, fostering a more

[1] ''HHS Secretary Calls on Certification Group to Protect Conscience Rights,'' March 14, 2008. Available at *http://www.hhs.gov/news/press/2008pres/03/20080314a.html.*

inclusive, tolerant environment in the health care industry than may currently exist.

This regulation does not limit patient access to health care, but rather protects any individual health care provider or institution from being compelled to participate in, or from being punished for refusal to participate in, a service that, for example, violates their conscience.

These proposed actions are consistent with the Administration's current efforts to ensure that community and faith-based organizations are able to participate in federal programs on a level playing field with other organizations.

II. Summary of the Proposed Rule

This proposed rule sets out, and provides further definition of, the rights and responsibilities created by the federal nondiscrimination provisions. It clarifies the scope of nondiscrimination protections to applicable members of the Department's workforce, as well as and health care entities and members of the workforces of entities receiving Department funds. This proposed rule would also require certain recipients of Department funds to certify compliance with these requirements. In order to ensure proper enforcement, this proposed rule would define certain terms for the purposes of this proposed regulation.

The Office for Civil Rights of the Department of Health and Human Services has been designated to receive complaints of discrimination based on the nondiscrimination statutes and this proposed regulation. It will coordinate handling of complaints with the staff of the Departmental programs from which the entity with respect to whom a complaint has been filed receives funding. Enforcement of the requirements set forth in this proposed regulation will be conducted through the usual and ordinary program mechanisms. Compliance with the requirements proposed herein would likely be examined as part of any broader compliance review conducted by Department staff. If the Department becomes aware that a State or local government or an entity may be in violation of the requirements or prohibitions proposed herein, the Department would work with such government or entity to assist such government or entity to come into compliance with such requirements or prohibitions. If, despite the Department's assistance, compliance is not achieved, the Department will consider all legal options, including termination of funding, return of funds paid out in violation of nondiscrimination provisions under 45 CFR 74, and other measures.

III. Statutory Authority

On the basis of the above-mentioned statutory authority, the Secretary proposes to promulgate these regulations, requiring certification of compliance with the anti-discrimination statutes.

The statutory provisions discussed above require that the Department and recipients of Department funds (including State and local governments) refrain from discriminating against institutional and individual health care entities for their participation or refusal to participate in certain medical procedures or services, including certain health services, or research activities funded in whole or in part by the Federal Government. The Department has authority to promulgate regulations to enforce these prohibitions. Finally, the Department also has the legal authority to require that recipients certify their compliance with these proposed requirements and to require their sub-recipients to likewise certify their compliance with these proposed requirements. In addition, 5 U.S.C. 301 empowers the head of an Executive department to prescribe regulations ''for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.''

IV. Provisions of the Proposed Rule

Section 88.1 Purpose

The ''Purpose'' section of the regulation sets forth the objective that the proposed regulation would, when finalized, provide for the implementation and enforcement of federal nondiscrimination statutes protecting the conscience rights of health care entities. It also states that the statutory provisions and regulations contained in this Part are to be interpreted and implemented broadly to effectuate these protections.

Section 88.2 Definitions

Assist in the Performance: The Department, in considering how to interpret the term ''assist in the performance,'' seeks to provide broad protection for individuals' consciences. The Department seeks to avoid judging whether a particular action is genuinely offensive to an individual. At the same time, the Department wishes to guard against potential abuses of these protections by limiting the definition of ''assist in performance'' only to those actors who have a reasonable connection to the procedure, health service or health service program, or research activity to which they object.

Therefore, the Department proposes to interpret this term broadly, as encompassing individuals who are members of the workforce of the Department-funded entity performing the objectionable procedure. When applying the term ''assist in the performance'' to members of an entity's workforce, the Department proposes to include participation in any activity with a reasonable connection to the objectionable procedure, including referrals, training, and other arrangements for offending procedures. For example, an operating room nurse would assist in the performance of surgical procedures, and an employee whose task it is to clean the instruments used in a particular procedure would be considered to assist in the performance of the particular procedure.

Health Care Entity/Entity: While both PHS Act § 245 and the Weldon Amendment provide examples of specific types of protected individuals and health care organizations, neither statute provides an exhaustive list of such health care entities. PHS Act § 245 defines ''health care entity'' as ''includ[ing] an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.'' As the Department has previously indicated, the definition of ''health care entity'' in PHS Act § 245 also encompasses institutional entities, such as hospitals and other entities.[2] The Weldon Amendment defines the term ''health care entity'' as ''includ[ing] an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.'' The Church Amendment does not define the term ''entity,'' and does not use the term ''health care entity.''

In keeping with the definitions in PHS Act § 245 and the Weldon Amendment, the Department proposes to define ''health care entity'' to include the specifically mentioned organizations from the two statutes, as well as other types of entities referenced in the Church Amendments. It is important to note that the Department does not intend for this to be a comprehensive list of relevant organizations for

[2] *See* Letter from Secretary Tommy G. Thompson to Hon. W.F. Tauzin, September 24, 2002.

purposes of the regulation, but merely a list of examples.

Health Service/Health Service Program: One of the provisions in the Church Amendments uses the term ''health service,'' another uses the term, ''health service program.'' Neither define the terms, nor does the PHS Act define ''health service program.'' In developing an appropriate definition for ''health service program,'' we have looked at the Social Security Act. Section 1128B(f)(1) of the Social Security Act, 42 U.S.C. 1320a–7b(f)(1), defines a similar term, ''federal health care program'', as ''any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government.''

Building on this broad definition, we propose that the term ''health service program'' should be understood to include an activity related in any way to providing medicine, health care, or any other service related to health or wellness, including programs where the Department provides care directly (e.g., Indian Health Service); programs where grants pay for the provision of health services (e.g., Administration for Children and Families programs such as the Unaccompanied Refugee Minor and the Division of Unaccompanied Children Services programs and HRSA programs such as community health centers); programs where the Department reimburses another entity that provides care (e.g., Medicare); and health insurance programs where federal funds are used to provide access to health coverage (e.g., SCHIP, Medicaid, and Medicare Advantage). Similarly, we propose that the term ''health service'' means any service so provided.

Individual: For the purposes of this part, the Department proposes to define ''individual'' to mean a member of the workforce (see definition of ''workforce'' below) of an entity or health care entity. One conscience clause of the Church Amendments, 42 U.S.C. 300a–7(d), provides that ''[n]o *individual* shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and Welfare [Secretary of Health and Human Services] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions (emphasis added).''

Instrument: We propose to use ''instrument'' to mean the variety of means by which the Department conveys funding and resources to organizations, including: grants, cooperative agreements, contracts, grants under a contract, and memoranda of understanding. The definition of ''instrument'' is intended to include all means by which the Department conveys funding and resources.

Recipient: This term is used to encompass any entity that receives Department funds directly.

Sub-recipient: This term is used to encompass any entity that receives Department funds indirectly through a recipient or sub-recipient.

Workforce: We propose to define ''workforce'' as including employees, volunteers, trainees, and other persons whose conduct, in the performance of work for an entity, is under the control or authority of such entity, whether or not they are paid by the Department-funded entity. The definition is drawn from the ''Administrative Data Standards and Related Requirements'' rules implementing Health Insurance Portability and Accountability Act (HIPAA), 45 CFR Parts 160, 162, and 164 (2006) at 45 CFR 160.103. In keeping with this definition, persons and organizations under contract with an entity, if they are under the control or authority of the entity, would be considered members of the entity's workforce.

In defining both ''individual'' and ''workforce,'' the Department proposes definitions that provide a reasonable scope for the natural persons protected by 42 U.S.C. 300a–7(d) and the corresponding provisions of these regulations. By limiting the scope of persons protected by these regulations to those who are under the control or authority of an entity that implements a health service program or research activity funded in whole or in part under a program administered by the Department, we propose to provide the bright line necessary for Department-funded entities subject to the applicable Church Amendment provisions to set policies or otherwise take steps to secure conscience protections within the workplace and, thus, to comply with the Church Amendment and these regulations.

Section 88.3 Applicability

The proposed ''Applicability'' section of the regulation outlines the certifications various entities must provide in order to receive Department funds. This section would direct entities to the appropriate sections that contain the relevant requirements from the three statutes that form the basis of this regulation.

Section 88.4 Requirements and Prohibitions

The ''Requirements and Prohibitions'' section explains the obligations that the Church Amendments, PHS Act § 245, and the Weldon Amendment impose on entities which receive funding from the Department. These provisions are taken from the relevant statutory language and make up the elements of the certification provided by the entities. We intend for the proposed requirements and prohibitions to be interpreted using the definitions proposed in section 88.2.

Section 88.5 Written Certification of Compliance

In the ''Written Certification of Compliance'' section of the regulation, the Department seeks to require certain recipients and sub-recipients of Department funds to certify compliance with the Church Amendments, PHS Act § 245, and the Weldon Amendment, as applicable, and to provide for the affected recipients and sub-recipients requirements for collecting, maintaining, and submitting written certifications.

We are concerned that there is a lack of knowledge on the part of States, local governments, and the health care industry of the rights of health care entities created by, and the corresponding obligations imposed on the recipients of certain federal funding by, the non-discrimination provisions. Under this proposed rule, recipients of federal funds would be required to submit their certifications directly to the Department as part of the instrument or in a separate writing signed by the recipients' officer or other person authorized to bind the recipient. They would also be required to collect and maintain certifications by sub-recipients who receive Department funds through them.

The proposed regulation requires that entities certify in writing that they will operate in compliance with the Church Amendments, PHS Act § 245, and the Weldon Amendment as applicable. Certification provides a demonstrable way of ensuring that the recipients of such funding know of, and attest that they will comply with, the applicable nondiscrimination provisions. Sub-recipients of federal funds—entities that will receive federal funds indirectly through another entity (a recipient or other sub-recipient)—are required to provide certification as set out in the ''Sub-recipient'' subsection of the ''Certification of Compliance'' section, and submit them to the recipients

through which they receive Department funds for maintenance.

Although it is collected and maintained by the recipient, this certification by sub-recipients is a certification addressed to the Department, not to the recipients collecting the certification. Recipients are expected to comply with requirements for retention of and access to records set forth in 45 CFR 74.53.

While all recipients and sub-recipients of Department funds are required to comply with the Church Amendments, PHS Act § 245, and the Weldon Amendment, as applicable, section 88.5(e) contains three important exceptions from the requirement to provide the written certification: (1) Physicians, physician offices, and other health care practitioners participating in Part B of the Medicare program; (2) physicians, physician offices, or other health care practitioners which participates in Part B of the Medicare program, when such individuals or organizations are sub-recipients of Department funds through a Medicare Advantage plan; and (3) sub-recipients of state Medicaid programs (i.e., any entity that is paid for services by the state Medicaid program). While other providers participating in the Medicare program as well as state Medicaid programs would be required to submit written certification of compliance to the Department, the large number of entities included in these three categories poses significant implementation hurdles for Departmental components and programs. Furthermore, the Department believes that, due primarily to their generally smaller size, the excepted categories of recipients and sub-recipients of Department funds are less likely to encounter the types of issues sought to be addressed in this regulation. However, excepted providers may become subject to the written certification requirement by nature of their receiving Department funds under a separate agency or program. For example, a physician office participating in Medicare Part B may become subject to the written certification requirement by receiving Department funds to conduct clinical research. We note, however, that the State Medicaid programs are responsible for ensuring the compliance of their sub-recipients as part of ensuring that the State Medicaid program is operated consistently with applicable nondiscrimination provisions. The Department is considering whether other recipients of Department funds from programs that do not involve the provision of health care should also be excepted from the certification requirement and we seek comment on this issue.

When finalized, individual Department components will be tasked with determining how best to implement the written certification requirements set out in this regulation in a way that ensures efficient program operation. To this end, Department components will be given discretion to phase in the written certification requirement by no later than the beginning of the next federal fiscal year following the effective date of the regulation.

V. Request for Comment

The Department, in order to craft its final rule to best reflect the environment within the health care field, seeks comment on this Proposed Rule. In particular, the Department seeks the following:

- Comment on all issues raised by the proposed regulation.
- Information with regard to general knowledge or lack thereof of the protections established by these nondiscrimination provisions, including any facts, surveys, audits, reports, or any other evidence of knowledge or lack of knowledge on these matters in the general public, as well as within the healthcare industry and educational institutions.
- In the past, there has been some confusion about whether the receipt of federal funds permitted public officials to require entities to provide abortions or perform sterilizations. The debate was resolved, and statutory provisions like section (b) of the Church Amendments [42 U.S.C. 300a–7(b)] were promulgated to protect entities from public authorities who would claim that the receipt of federal funds creates a legal obligation for the entity to provide abortions or sterilization procedures. The Department seeks information, including any facts, surveys, audits, or reports on whether this remains an issue, that is, do public authorities continue to claim that the receipt of federal funds is sufficient basis for entities to be required to provide abortions or perform sterilizations? If so, how should the Department address this problem?
- Comment on whether written certification of compliance with nondiscrimination provisions should contain language specifying that the certification is a material prerequisite to the payment of Department funds.
- The Department also seeks comment on what constitutes the most effective methods of educating recipients of Department funds, their employees, and participants of the protections against discrimination found in the Church Amendments, PHS Act § 245, and the Weldon Amendment. What is the best method for communicating to the public the protections afforded by these statutes, and any regulation implementing them?
  - One option is to require the physical posting of notices of nondiscrimination protections in conspicuous places within the buildings of recipients of funds, and on applications to educational programs that are recipients of funds. Have notices been effective educational tools with respect to individuals' rights under federal law?
  - Another option is to require inclusion of nondiscrimination protections in notice of applications for training, residency, and educational programs.
  - Another option is requiring notice of nondiscrimination protections on websites and in employee/volunteer handbooks of recipients.

  The Department seeks further comment on this matter—both on the merit of the options mentioned, and on any other means of educating the public with respect to the nondiscrimination protections under federal law.
- Comment on whether there are recipients of Department funds that should be excepted from the proposed certification requirement, for example because the program under which such recipients receive Department funds is unrelated to the provision of health care or medical research.

VI. Impact Analysis

Executive Order 12866—Regulatory Planning and Review

HHS has examined the economic implications of this proposed rule 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. HHS has

determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866.

An underlying assumption of this regulation is that the health care industry, including entities receiving Department funds, will benefit from more diverse and inclusive workforces by informing health care workers of their rights and fostering an environment in which individuals and organizations from many different faiths, cultures, and philosophical backgrounds are encouraged to participate. As a result, we cannot accurately account for all of the regulation's future benefits, but the Department believes the future benefits will exceed the costs of complying with the regulation.

The statutes mandating the requirements for protecting health care entities and individuals in the health care industry as discussed in this rule have been in effect for a number of years and the proposed regulations are consistent with prior Departmental interpretations of these nondiscrimination statutes; [3] therefore, the regulatory burden associated with this rule, if finalized, is largely associated with the incremental costs of a recipient certifying compliance to the federal government and the cost of collecting and maintaining records of certification statements from sub-recipients. We estimate the universe and number of entities that would be required to certify to be, at most, 584,294 (see Table I). We do not distinguish between recipients and sub-recipients of HHS funding. Each entity could be a recipient, a sub-recipient, or both. In accordance with subsection 88.5(e) below, physicians, physician offices, and other health care practitioners participating in Medicare Part B or who are sub-recipients assisting in the implementation of a State Medicaid program are not subject to the written certification requirement; however, a high estimate of the number of physician offices and offices of other health care practitioners who may be required to certify as recipients or sub-recipients of Department funds through other programs, instruments, or mechanisms is included.

TABLE I—AFFECTED ENTITIES

Health care entity	Number of entities
Hospitals (less than 100 beds) [1]	2,403
Hospitals (100–200 beds) [4]	1,129
Hospitals (200–500 beds) [4]	1,160
Hospitals (more than 500 beds) [4]	244
Nursing Homes (less than 50 beds) [2]	2,388
Nursing Homes (50–99 beds) [5]	5,819
Nursing Homes (99–199 beds) [5]	6,877
Nursing Homes (more than 200 beds) [5]	1,037
Physicians Offices [3]	234,200
Offices of Other Health CarePractitioners [6] [4]	115,378
Outpatient Care Centers [6] [5]	26,901
Medical and Diagnostic Laboratories [6]	11,856
Home Health Care Services [6]	20,184
Pharmacies (chain and independent) [6]	58,109
Dental Schools [7]	56
Medical Schools (Allopathic) [4]	125
Medical Schools (Osteopathic) [4]	20
Nursing Schools (Licensed practical) [8]	1,138
Nursing Schools (Baccalaureate) [11]	550
Nursing Schools (Associate degree) [11]	885
Nursing Schools (Diploma) [11]	78
Occupational Therapy Schools [4]	142
Optometry Schools [4]	17
Pharmacy Schools [4]	92
Podiatry Schools [4]	7
Public Health Schools [4]	37
Residency Programs (accredited) [9]	8,494
Health Insurance Carriers and 3rd-Party Administrators [10]	4,578
Grant awards [11]	76,088
Contractors [12]	4,245
State and territorial governments	57
Total	584,294

[1] Health, United States, 2007. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics. Nov. 2007.

[2] Nursing Home Data Compendium, 2007 edition. U.S. Dept. of Health and Human Services, Centers for Medicaid and Medicare Services.

[3] NPRM: Modification to Medical Data Code Set Standards to Adopt ICD–10–CM and ICD–10–PCS.

[4] From the NAICS Code 6213—Office of Other Health Care Practitioners (including Chiropractors, Optometrists, non-Physician Mental Health Practitioners, Physical Occupational and Speech Therapists, Podiatrists, and all other Miscellaneous Health Care Practitioners).

[5] From the NAICS Code 6214—Outpatient Care Centers (including Family Planning Centers, Outpatient Mental Health and Substance Abuse Centers, Other Outpatient Care Centers, HMO Medical Centers, Kidney Dialysis Centers, Freestanding Ambulatory Surgical and Emergency Centers, and all Other Outpatient Care Centers).

[3] The [* * *] suggestion that the requirement to provide options counseling [including abortion counseling] should not apply to employees of a grantee who object to providing such counseling on moral or religious grounds, is likewise rejected [* * *] [S]uch a requirement is not necessary: *under 42 U.S.C. 300a–7(d), grantees may not require individual employees who have such objections to provide such counseling* (emphasis added). 65 FR 41270 (July 3, 2000) [codified at 42 CFR 59 (2008)]; see also Letter from Secretary Tommy G. Thompson to Hon. W.F. Tauzin, September 24, 2002.

[6] 2005 NCPA-Pfizer Digest: Total, Prescription Sales Increase At Nation's Independent Pharmacies. National Community Pharmacies Association Press Release, May 12, 2005.

[7] Dental Education At-A-Glance, 2004. American Dental Education Association. Available at: *http://www.adea.org/CEPR/Documents/2004_Dental_Ed_At_A_Glance.pdf.*

[8] National Center for Health Workforce Analysis: U.S. Health Workforce Personnel Factbook. U.S. Dept. of Health and Human Services, Health Resources and Services Administration.

[9] Number of Accredited Programs by Academic Year (7/1/2007—6/30/2008). Accreditation Council for Graduate Medical Education. Available at: *http://www.acgme.org/adspublic/reports/accredited_programs.asp.*

[10] U.S. Department of Labor, Bureau of Labor Statistics, National Occupational Employment and Wage Estimates, May 2007.

[11] HHS Grants Statistics, 2007. Available at *http://www.hhs.gov/grantsnet.*

[12] General Services Administration (estimated).

The Department envisions three subcategories of potential costs for recipients and sub-recipients of Department funds: (1) Direct costs associated with the act of certification; (2) direct costs associated with collecting and maintaining certifications made by sub-recipients, and (3) indirect costs associated with certification.

The direct cost of certification is the cost of reviewing the certification language, reviewing relevant entity policies and procedures, and reviewing files before signing. We estimate that each of the 584,294 entities will spend an average of 30 minutes on these activities. Although some entities may need to sign a certification statement more than once, we assume that the entity will only carefully review the language, procedures and their files before signing the initial statement each year. We assume the cost of signing subsequent statements to be small. Some existing HHS certification forms specify the certification statement should be signed by the CEO, CFO, direct owner, or Chairman of the Board. According to Bureau of Labor Statistics wage data, the mean hourly wage for occupation code 11–1011, Chief Executives, is $72.77. We estimate the loaded rate to be $145.54. Thus, assuming that the recipient chooses to have a high-level employee such as a Chief Executive certify on its behalf, the cost associated with the act of certification is $42.5 million (584,294 × .5 × $145.54).

The direct cost of collecting and maintaining certifications made by sub-recipients is estimated as the labor cost. We assume that each of the 73,088 grant awards and 4,245 contractors doing business with HHS have at least one sub-recipient. We also assume that, on average, each grant awardee and contractor will spend one hour collecting and maintaining certifications made by sub-recipients. The mean hourly wage for office and administrative support occupations, occupation code 43–0000, is $15.00, or $30 loaded. Thus, the cost of collecting and maintaining records is estimated to be $2 million (77,333 entities × 1 hour × $30).

Indirect costs associated with the certification requirement might include costs for such actions as staffing/scheduling changes and internal reviews to assess compliance. There is insufficient data to estimate the number of funding recipients not currently compliant with the Church Amendments, PHS Act § 245, or the Weldon Amendment. However, because together these three federal statutes have been in existence for many years, we expect the incremental and indirect costs of certification to be minimal for Department funding recipients. We specifically request comment on this assumption.

The total quantifiable costs of the proposed regulation, if finalized, are estimated to be $44.5 million each year.

Regulatory Flexibility Act

HHS 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 (RFA) requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, by virtue of either nonprofit status or having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. While the proposed rule will affect a number of small entities, we preliminarily conclude that the costs of compliance are not economically significant (see discussion above). Moreover, in accordance with subsection 88.5(e) below, physicians, physician offices, and other health care practitioners participating in Medicare Part B or who are sub-recipients assisting in the implementation of a State Medicaid program are not subject to the written certification requirement. Thus, we conclude that this proposal, if finalized, will not impose significant costs on small entities. Therefore, the Secretary certifies that this rule will not result in a significant impact on a substantial number of small entities.

Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications.

All three acts enforced in this proposed regulation—the Church Amendments, PHS Act § 245, and the Weldon Amendment—impose restrictions on States, local governments, and public entities receiving funds from the Department, including under certain Department-implemented statutes. Insofar as these regulations impact State and local governments, they do so only to the extent that States and local governments would be required to submit certifications of compliance with the statutes and these regulations, as applicable. Since we expect the recipients of Department funds to comply with existing federal law, we anticipate the impact on States and local governments of the proposed certification requirement to be negligible.

The Department will consult with States and local governments to seek ways to minimize any burden imposed on the States and local governments by these proposed regulations, consistent with meeting the Department's objectives of ensuring: (1) Knowledge of the obligations imposed, and the rights and protections afforded, by these federal nondiscrimination provisions; and (2) compliance with the nondiscrimination provisions.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires cost-benefit and other analyses before any rulemaking 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 (adjusted annually for inflation) in any 1 year.'' The current inflation-adjusted statutory threshold is approximately $130 million. The Department has determined that this proposed rule would not constitute a significant rule under the Unfunded Mandates Reform Act.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being. If the determination is affirmative, then the Department or agency must prepare an impact assessment to address criteria specified in the law. These regulations will not have an impact on family well-being, as defined in the Act.

Paperwork Reduction Act of 1995

This proposed rule does not create any new requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 45 CFR Part 88

Abortion, Civil rights, Colleges and universities, Employment, Government contracts, Government employees, Grant programs, Grants administration, Health care, Health insurance, Health professions, Hospitals, Insurance companies, Laboratories, Medicaid, Medical and dental schools, Medical research, Medicare, Mental health programs, Nursing homes, Public health, Religious discrimination, Religious liberties, Reporting and recordkeeping requirements, Rights of conscience, Scientists, State and local governments, Sterilization, Students.

Therefore, under the Church Amendments, 42 U.S.C. 300a–7, Public Health Service Act § 245, 42 U.S.C. 238n, and the Weldon Amendment, Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209, the Department of Health and Human Services proposes to add 45 CFR Part 88 to read as follows:

PART 88—ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES

Sec.

88.1 Purpose.
88.2 Definitions.
88.3 Applicability.
88.4 Requirements and prohibitions.
88.5 Written certification of compliance.

Authority: 42 U.S.C. 300a–7, 42 U.S.C. 238n, Pub. L. 120–161, Div. G, section 508(d), 121 Stat. 1884, 2209, 31 U.S.C. 6306, 41 U.S.C. 253, 40 U.S.C. 471, 42 U.S.C. 1395w–22(j)(3)(B), and 42 U.S.C. 1396u–2(b)(3).

§ 88.1 Purpose.

The purpose of this part is to provide for the implementation and enforcement of the Church Amendments, 42 U.S.C. 300a–7, section 245 of the Public Health Service Act, 42 U.S.C. 238n, and the Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law No. 110–161, Div. G, section 508(d), 121 Stat. 1844, 2209. These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services to which they may object for religious, moral, ethical, or other reasons. Consistent with this objective to protect the conscience rights of health care entities/entities, the provisions in the Church Amendments, section 245 of the Public Health Service Act and the Weldon Amendment, and the implementing regulations contained in this Part are to be interpreted and implemented broadly to effectuate their protective purposes.

§ 88.2 Definitions

For the purposes of this part:

Assist in the Performance means to participate in any activity with a reasonable connection to a procedure, health service or health service program, or research activity, so long as the individual involved is a part of the workforce of a Department-funded entity. This includes counseling, referral, training, and other arrangements for the procedure, health service, or research activity.

Entity includes an individual physician or other health care professional, health care personnel, a participant in a program of training in the health professions, an applicant for training or study, a post graduate physician training program, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, laboratory or any other kind of health care organization or facility. It may also include components of State or local governments.

Health Care Entity includes an individual physician or other health care professional, health care personnel, a participant in a program of training in the health professions, an applicant for training or study in the health professions, a post graduate physician training program, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, laboratory or any other kind of health care organization or facility. It may also include components of State or local governments.

Health Service/Health Service Program includes any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded, in whole or in part, by the Department. It may also include components of State or local governments.

Individual means a member of the workforce of an entity/health care entity.

Instrument is the means by which federal funds are conveyed to a recipient, and includes grants, cooperative agreements, contracts, grants under a contract, memoranda of understanding, and any other funding or employment instrument or contract.

Recipient means an organization or individual receiving funds directly from the Department or component of the Department to carry out a project or program. The term includes State and local governments, public and private institutions of higher education, public and private hospitals, commercial organizations, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include foreign or international organizations (such as agencies of the United Nations) which are recipients, sub-recipients, or contractors or subcontractors of recipients or sub-recipients at the discretion of the Department awarding agency.

Sub-recipient means an organization or individual receiving funds indirectly from the Department or component of the Department through a recipient or another sub-recipient to carry out a project or program. The term includes State and local governments, public and private institutions of higher education, public and private hospitals, commercial organizations, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include foreign or international organizations (such as agencies of the United Nations) which are recipients, sub-recipients, or contractors or subcontractors of recipients or sub-recipients at the discretion of the Department awarding agency.

Workforce includes employees, volunteers, trainees, and other persons whose conduct, in the performance of

work for a Department-funded entity, is under the control or authority of such entity, whether or not they are paid by the Department-funded entity.

§ 88.3 Applicability.

(a) The Department of Health and Human Services is required to comply with § 88.4(a), (b)(1), and (d)(1).

(b) Any State or local government that receives federal funds appropriated through the appropriations act for the Department of Health and Human Services is required to comply with *§§ 88.4(b)(1) and 88.5*.

(c) Any entity that receives federal funds appropriated through the appropriations act for the Department of Health and Human Services to implement any part of any federal program is required to comply with §§ 88.4(b)(2) and 88.5.

(d) Any State or local government that receives federal financial assistance is required to comply with §§ 88.4(a) and 88.5.

(e) Any State or local government, any part of any State or local government, or any other public entity must comply with § 88.4(e).

(f)(1) Any entity, including a State or local government, that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, must comply with §§ 88.4(c)(1) and 88.5.

(2) In addition to complying with the provisions set forth in § 88.4(c)(1), any such entity that is an educational institution, teaching hospital, or program for the training of health care professionals or health care workers shall also comply with § 88.4(a)(2).

(g)(1) Any entity, including a State or local government, that carries out any part of any health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services must comply with §§ 88.4(d)(1) and 88.5.

(2) In addition to complying with the provisions set forth in paragraph (g)(1) of this section, any such entity that receives grants or contracts for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services shall also comply with § 88.4(d)(2).

§ 88.4 Requirements and prohibitions.

(a) Entities to whom this paragraph (a) applies shall not:

(1) Subject any institutional or individual health care entity to discrimination for refusing:

(i) To undergo training in the performance of abortions, or to require, provide, refer for, or make arrangements for training in the performance of abortions;

(ii) To perform, refer for, or make other arrangements for, abortions; or

(iii) To refer for abortions;

(2) Subject any institutional or individual health care entity to discrimination for attending or having attended a post-graduate physician training program, or any other program of training in the health professions, that does not or did not require attendees to perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training;

(3) For the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services or benefits, fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard or standards that require an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions;

(b)(1) Any entity to whom this paragraph (b)(1) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

(2) Entities to whom this paragraph (b)(2) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortion as part of the federal program for which it receives funding.

(c) Entities to whom this paragraph (c) applies shall not:

(1) Discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves;

(2) Discriminate against or deny admission to any applicant for training or study because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

(d) Entities to whom this paragraph (d) applies shall not:

(1) Require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions.

(2) Discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.

(e) Entities to whom this paragraph (e) applies shall not, on the basis that the individual or entity has received a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, require:

(1) Such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or

(2) Such entity to:

(i) Make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(ii) Provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

§ 88.5 Written certification of compliance.

(a) *Certification requirement*. Except as provided in paragraph (e) of this

section, recipients shall include the written certifications as set forth in paragraph (c)(4) of this section in the application for the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract, as applicable. Except as provided in paragraph (e) of this section, sub-recipients must provide the Certification of Compliance as set out in paragraph (d)(3) of this section, submitted as part of its original agreement with the recipient in the execution of its grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument, or in a separate writing, signed by the sub-recipients' officer or other person authorized to bind the sub-recipient. Certifications shall be made by an officer or other individual authorized to bind the recipient or sub-recipient. All certifications shall be addressed directly to the Department; recipients are required to submit their certifications directly to the Department. Recipients shall be in full compliance with all applicable certification requirements by no later than the beginning of the federal fiscal year following the effective date of this regulation.

(b) *Notification of certification requirement*. The Department shall notify recipients of funding of the certification requirement at the time of award through the Request for Proposal, Request for Agreement, Provider Agreement, contract, guidance, or other public announcement of the availability of funding. Recipients shall not construe anything in this paragraph to mean that an entity or organization is in any way exempt from providing the certification in the event the Department should fail to provide notification.

(c) *Certification by recipients*.

(1) Except as provided in paragraph (e) of this section, all recipients through any instrument must provide the Certification of Compliance as set out in paragraph (c)(4) of this section, submitted as part of the recipient's application for the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument or in a separate writing signed by the recipients' officer or other person authorized to bind the recipient.

(2) Recipients must file with the Department a renewed certification upon any renewal, extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract that extends the term of such instrument or adds additional funds to it. Recipients that are already recipients as of the effective date of this regulation must file a certification upon any extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument that extends the term of such instrument or adds additional funds to it.

(3) Recipients shall require certifications and re-certifications by all sub-recipients that receive funding through their association with the recipient. Recipients shall require these certifications and re-certifications as often as recipients are required to sign or amend the instrument, for as long as the relationship between the recipient and the sub-recipient lasts. Recipients shall collect and maintain sub-recipient certifications for as long as the relationship between the recipient and the sub-recipient lasts, and for a reasonable time after the relationship ends, for the purpose of investigations, litigation, or other purposes.

(4) *The certification*. Except as provided in paragraph (e) of this section, all recipients shall provide the following certification:

> As the duly authorized representative of the recipient I certify that the recipient of funds made available through this [instrument] will not discriminate on the basis of an entity's past involvement in, or refusal to assist in the performance of, the practices of abortion or sterilization, and will not require involvement in procedures that violate an individual's conscience as part of any part of any health service program, in accord with all applicable sections of 45 CFR part 88.
>
> I further certify that the recipient acknowledges that any violation of these certifications shall be grounds for termination by the Department of any grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract prior to the end of its term and recovery of appropriated funds expended prior to termination. I further certify that, except as provided in 45 CFR 88.5(e), the recipient will include this certification requirement in any [instrument] to a sub-recipient of funds made available under this instrument, and will require, except as provided in 45 CFR 88.5(e), such sub-recipient to provide the same certification that the recipient organization or entity provided. I further certify the recipient organization will collect and maintain sub-recipient certifications for as long as the relationship between the recipient and the sub-recipient lasts, and for a reasonable time after the relationship ends, for the purpose of investigations, litigation, or other purposes.

(d) *Certification by sub-recipients*.

(1) Except as provided in paragraph (e) of this section, organizations or entities that are sub-recipients of the organization or entity providing the initial Certification of Compliance must submit to the recipient for maintenance by the recipient through which the sub-recipient receives Department funds Certification of Compliance as set out in paragraph (d)(3) of this section, as part of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument between the recipient and the sub-recipient or in a separate writing signed by the sub-recipients' officer or other person authorized to bind the sub-recipient.

(2) Except as provided in paragraph (e) of this section, sub-recipients of funds shall renew certification to the recipient through which it receives Department funds upon any renewal, extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract that extends the term of such instrument or adds additional funds to it. Sub-recipients shall submit such renewals to the recipient entities through which they receive Department funding. Entities that are already sub-recipients as of the effective date of this regulation must certify upon any extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument that extends the term of such instrument or adds additional funds to it, and shall submit such certifications to the recipient entity through which they receive Department funding.

(3) *The certification*. Except as provided in paragraph (e) of this section, all sub-recipients of Department funds shall provide the following certification:

> As the duly authorized representative of the sub-recipient I certify that the sub-recipient of funds made available through this [instrument] will not discriminate on the basis of an entity's past involvement in, or refusal to assist in the performance of, the practices of abortion or sterilization, and will not require involvement in procedures that violate an individual's conscience as part of any part of any health service program, in accord with all applicable sections of 45 CFR part 88.
>
> I further certify that the sub-recipient acknowledges that these certifications by the sub-recipient of funds are certifications made directly to the Department and that any violation of these certifications shall be grounds for termination by the Department of the recipient's grant, cooperative agreement,

contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract prior to the end of its term and recovery of appropriated funds expended prior to termination. I further certify that the sub-recipient will submit all certifications to the recipient entity through which it received Department funds.

(e) *Exceptions*. Provided that such individuals or organizations are not recipients or sub-recipients of Department funds through another instrument, program, or mechanism, other than those set forth in paragraphs (e)(1) through (3) of this section, the following individuals or organizations shall not be required to comply with the written certification requirement set forth in this section:

(1) A physician, as defined in 42 U.S.C. 1395(r), physician office, or other health care practitioner participating in Part B of the Medicare program;

(2) A physician, as defined in 42 U.S.C. 1395(r), physician office, or other health care practitioner which participates in Part B of the Medicare program, when such individuals or organizations are sub-recipients of Department funds through a Medicare Advantage plan; or

(3) A sub-recipient of Department funds through a State Medicaid program.

Dated: August 20, 2008.

Michael O. Leavitt,

Secretary.

[FR Doc. E8–19744 Filed 8–21–08; 2:00 pm]

BILLING CODE 4150–28–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 08–65; FCC 08–182]

Assessment and Collection of Regulatory Fees for Fiscal Year 2008

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we seek comment on changes to the regulatory fee schedule and methodology.

DATES: Comments are due September 25, 2008, and reply comments are due October 27, 2008.

ADDRESSES: You may submit comments, identified by MD Docket No. 08–65, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs.* Follow the instructions for submitting comments.
- *E-mail: ecfs@fcc.gov.* Include MD Docket No. 08–65 in the subject line of the message.
- Mail: 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 reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY (202) 418–0432.

FOR FURTHER INFORMATION CONTACT: CORES Helpdesk at (877) 480–3201, option 4 or *ARINQUIRIES@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking, MD Docket No. 08–65, FCC 08–182 adopted on August 1, 2008 and released on August 8, 2008. The full text of this document is available is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at *http://www.fcc.gov.*

Pursuant to sections 1.1206(b), 1.1202 and 1.1203 of the Commission's rules, CFR 1.1206(b), 1.1202, 1.1203, this is as a ''permit-but-disclose'' proceeding. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[1] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

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 or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) procedures for filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998), 13 FCC Rcd 11322 (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,* 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.

[1] *See* 47 CFR 1.1206(b)(2).

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

• *People with Disabilities:* To request information in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

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I. Further Notice of Proposed Rulemaking

A. Background

1. Each year Congress requires the Commission to collect regulatory fees ''to recover the costs of * * * enforcement activities, policy and rulemaking activities, user information services, and international activities.'' [2] The Act states that fees are to ''be derived by determining the full-time equivalent number of employees performing'' these activities ''adjusted to take into account factors that are reasonably related to the benefits provided to the payer of the fee by the Commission's activities * * *.'' [3] Regulatory fees recover: direct costs, such as salary and expenses; indirect costs, such as overhead functions; and support costs, such as rent, utilities, or equipment.[4] Congress sets the amount the Commission collects each year in the annual appropriations law.[5]

2. Section 9 requires the Commission to make certain changes to the regulatory fee schedule ''if the Commission determines that the schedule requires amendment to comply with the requirements'' of section 9(b)(1)(A), cited above. The Commission must add, delete, or reclassify services in the fee schedule to reflect additions, deletions, or changes in the nature of its services ''as a consequence of Commission rulemaking proceedings or changes in law.'' These ''permitted amendments'' require Congressional notification [6] and resulting changes in fees are not subject to judicial review. [7] Neither of these provisions requires amendment of the fee schedule to mirror all changes in regulatory costs.[8]

3. To calculate regulatory fees, the Commission allocates the total collection target, as mandated by Congress each year, to each regulatory fee category. Each regulatee within a fee category must pay its proportionate share based on some objective measure, *e.g.* , revenues or subscribers. The first step, allocating fees to fee categories, is based on the Commission's 1994 calculation of full time employees (''FTEs'') devoted to each regulatory fee category. We recognize that the communications industry has changed

[2] 47 U.S.C. 159(a).

[3] 47 U.S.C. 159(b)(1)(A).

[4] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997,* MD Docket No. 96–186, Report and Order, 12 FCC Rcd 17161, 17170–71, para. 23 (1997) (''*FY 1997 Report and Order*''). Regulatory fees also recover costs attributable to regulatees that Congress has exempted from the fees as well as costs attributable to licensees granted fee waivers. *FY 1997 Report and Order,* 12 FCC Rcd at 17170, para. 22.

[5] *See, e.g.*, Consolidated Appropriations Act, 2008, Public Law 110–161.

[6] 47 U.S.C. 159(b)(4)(B).

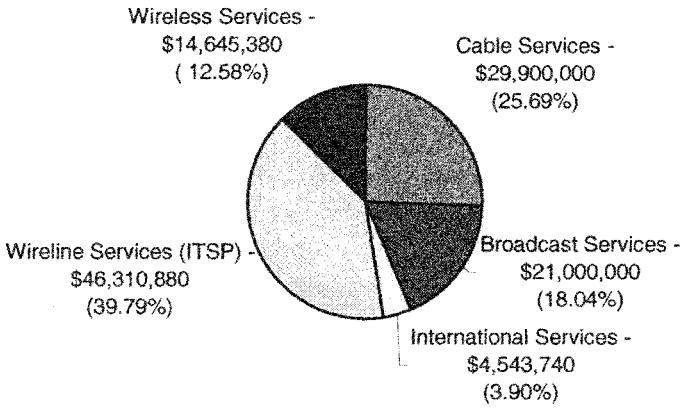
[7] 47 U.S.C. 159(b)(3).

[8] *FY 2004 Report and Order,* 19 FCC Rcd at 11666, para. 9.

considerably since we adopted our regulatory fee schedule in 1994.[9] Services such as wireless, broadband, and voice over Internet protocol (''VoIP'') have exploded in growth in recent years. The Commission itself has reorganized several times since 1994 to reflect industry changes.

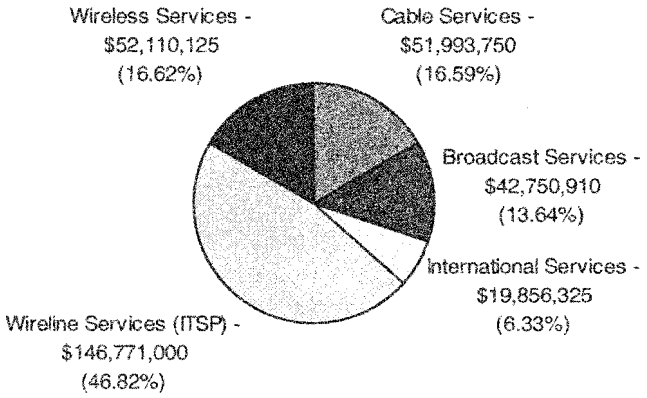
4. As the following charts show, regulatory fee burdens have shifted significantly since 1995:

FY 1995 Regulatory Fees to be Collected



Source: *Assessment and Collection of Regulatory Fees for Fiscal Year 1995,* Report and Order, 60 FR 34004, June 29, 1995. (FY 2005 was the first year in which payment units were included in the Report and Order.)

FY 2008 Regulatory Fees to be Collected



Source: Percentages and dollar amounts based on preliminary calculations while drafting the *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* Report and Order and Further Notice of Proposed Rulemaking.

5. Historically, and in this year's proceeding, parties have challenged the Commission's regulatory fees for certain categories of services by claiming that the fees are not appropriately based on the Commission's regulatory costs.[10] Regulatory fees cannot, however, be precisely calibrated, on a service-by-service basis, to the actual costs of the Commission's regulatory activities for that service.[11] The initial Schedule of Regulatory Fees that Congress enacted in section 9(g) reflects this approach. Two specific examples are satellite regulatory fees and radio and television regulatory fees.[12] Congress required that satellite fees be based on the number of satellites the regulatee has in operation; however, the number of satellites may or may not relate to the actual costs in terms of FTEs of regulating that particular entity.[13] Similarly, radio and television fees are based on the size of the markets served, which also may

[9] *See Implementation of Section 9 of the Communications Act,* Report and Order, 9 FCC Rcd 5333 (1994).

[10] *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2004,* MD Docket No. 04–146, Report and Order, 19 FCC Rcd 11662, 11665–67, para. 5–11 (2004) (''*FY 2004 Report and Order*'').

[11] *See, e.g., FY 1997 Report and Order,* 12 FCC Rcd at 17171–72, para. 27.

[12] FY 2004 Report and Order, 19 FCC Rcd at 11666, para. 8.

[13] *Id.*

have no relationship to the Commission's costs.[14]

6. Notwithstanding that regulatory fees cannot be precisely calibrated to our actual costs of our regulatory activities, there may be several areas in which we can revise and improve our regulatory fee process to better reflect the industry today. Industry, regulatory, and Commission organizational changes may mean that the FTE estimates the Commission has used since 1994 to allocate fees to industry segments require updating. In addition, certain services may be excluded from the regulatory fee process because those services were not offered when the fee schedule was adopted and other services may be paying a disproportionate share of regulatory fees because in the past those services had a larger share of the communications market. We adopt this FNPRM to explore more equitable and reasonable approaches to assessing regulatory fees.

B. Discussion

7. The regulatory fees assessed each year are to recover a fixed amount set by Congress. Thus, increasing the regulatory fee for one category will reduce the fee for the remaining categories and vice versa. We seek comment on ways to improve our regulatory fee process regarding any and all categories of service. In light of the industry changes since 1994, how can we better determine the regulatory fees for services in a way that is aligned with the Commission's regulatory activities? We seek comment on whether we should continue to collect our regulatory fees based on the allocations noted above for FY 2008, or if we should revert to a percentage allocation closer to our FY 1995 regulatory fee allocation, or if we should adopt a different allocation based on the communications marketplace that exists today. We also seek comment on possible methodologies for re-calculating the regulatory fee allocation.

8. Commenters should discuss the fee categories that bear a too heavy regulatory fee burden. For example, some services, such as paging and PLMRS, have declining subscriber bases. Conversely, we seek comment on whether there are categories that should pay higher regulatory fees. In addition, are there categories that should be added, deleted, or reclassified? Would such changes result in a system that is more (or less) equitable and reasonable?

9. We also seek comment on whether we should review the entire regulatory fee process, apart from the annual regulatory fee orders, on a periodic basis. Should the Commission undertake a comprehensive analysis of its resource allocations as it did in 1994? Should the Commission allocate regulatory fees to each category based on the proportionate use of full time equivalent (''FTE'') within the Commission? We seek comment on whether we should examine FTE allocation by industry segment or some other basis, such as strategic goal.[15]

10. Currently, the Commission uses different bases to allocate regulatory fees to entities in different regulatory fee categories. For example, fees for wireless companies are based on subscribers and wireline companies are based on revenues. Should the Commission move to harmonize these bases? Would it be more equitable to allocate fees on a single basis across all regulatory fee categories? Commenters should address the incentives or disincentives of using a particular basis for allocation. For example, do wireless companies have less incentive to sign up subscribers because each new subscriber will increase their regulatory fees?

11. As we discuss below, there are various services or entities that may not be paying their share of regulatory fees. Including more services would lessen the regulatory fee burden on the remaining regulates. We seek comment on whether, and if so how, to include additional services. Increasing compliance with our rules also would lessen the regulatory fee burden on the remaining regulatees. We seek comment on ways to improve compliance with our rules. In addition, we seek comment on whether we should adopt additional oversight measures, such as an audit regime to ascertain that payments are in accordance with our rules.

12. We seek comment on whether we should modify our administration of regulatory fees, such as our collection processes, as well as the forms that we use for regulatory fee payors. We seek comment on whether we should modify our Form 159. Should we use a different procedure for billing and prebilling? Should our regulatory fee procedures be combined with other filing and reporting requirements? We seek comment on whether we should adopt additional performance metrics or measurements pertaining to regulatory fees. Commenters should discuss whether we should adopt additional performance measurements and publish this information regarding, for example, timeliness of payment. We also seek comment on whether there are certain categories of licensees who should qualify for reduced regulatory fees or be exempt entirely.

13. We also invite comment on several specific regulatory fee issues discussed below.

1. Interstate Telecommunications Service Providers (''ITSPs'')

14. ITSPs generally identify themselves as interexchange carriers, incumbent local exchange carriers, toll resellers, or some other provider of interexchange service on the FCC Form 499–A. The FCC Form 499–A is filed each year on April 1 with the interstate revenues from the previous year; the ITSP regulatory fee is based on billed interstate and international end-user revenues.[16]

15. In FY 1995, the ITSP fee rate amounted to a fee factor of .00088 per revenue dollar, representing approximately 40 percent of the revenues to be collected in FY 1995.[17] Carriers were required in FY 1995 to multiply their adjusted gross revenues (gross revenue reduced by the total amount of payments to underlying common carriers for telecommunications facilities or services) by 0.00088 to determine the appropriate regulatory fee. In the Commission's FY 1997 regulatory fee proceeding, the Commission calculated that regulation of ITSPs [18] accounted for approximately 36 percent of all Commission costs.[19] Since FY 1995, the ITSP fee factor rate has increased from .00088 per revenue dollar to .00266 in FY 2007.[20]

16. ITTA, an association of mid-size local exchange carriers, filed comments to the *FY 2008 NPRM,* contending that from 1999 to 2008 the Commission's overall budget has increased by 81 percent yet the percentage of ITSP revenues used to support Commission activities has nearly tripled.[21] ITTA contends that regulatory fees for

[14] *Id.*

[15] *See Federal Communications Commission Fiscal Year 2007 Performance and Accountability Report* at 31–90 *(http://www.fcc.gov/Reports/ar2007.pdf).*

[16] This is explained in our fact sheet, available at *http://www.fcc.gov/fees/regfees.html.*

[17] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995,* Report and Order, 60 FR 34004 at 34025 (Table 4) (June 29, 1995) *(''1995'') (''FY 1995 Report and Order'').*

[18] ITSPs generally identify themselves as interexchange carriers, incumbent local exchange carriers, toll resellers, or some other provider of interexchange service on the FCC Form 499–A which is filed each year on April 1 with the interstate revenues from the previous year; the ITSP regulatory fee is based on billed interstate and international end-user revenues.

[19] *See FY 1997 Report and Order,* 12 FCC Rcd at 17176, para. 39.

[20] *Id.,* 12 FCC Rcd at 17246.

[21] ITTA Reply Comments at 1–2.

wireless carriers have decreased and the disparity in regulatory fee treatment between wireline and wireless services continues to widen.[22] ITTA recommends that the Commission extend the process by which it added interconnected Voice over Internet Protocol (''VoIP'') providers to the ITSP category and also include wireless providers in the ITSP category.[23] We seek comment on this recommendation.

17. Relative to other services that pay regulatory fees, we recognize that the ITSP market has changed since the Commission calculated the cost of ITSP regulation in FY 1997. We agree that it is appropriate to review our methodology for assessing regulatory fees on ITSPs. We seek comment on whether ITSPs current share of regulatory fees, which has not been revised significantly since 1997, is appropriate. Commenters should discuss the ITSP market and how it has changed since 1997 relative to the other services that pay regulatory fees such as wireless and broadcast services. Commenters suggesting a change in the proportionate share for ITSPs should propose a methodology. For example, would it be more appropriate to return to the original Schedule of Regulatory Fees and assess fees per 1,000 access lines? We note that we have experienced significant success and accuracy with a number-based approach for CMRS. Would number of access lines be most appropriate?

2. International and Interstate Toll Services

18. International and interstate toll calls can originate from either a wireless or a landline telephone; if such calls are made from a wireless telephone they are considered wireless revenue and not interstate or international revenue for regulatory fee purposes. Commercial mobile radio services (''CMRS'') regulatory fees are determined on a per unit basis rather than on a revenue basis. For FY 1995, the CMRS regulatory fee was $0.15 per unit; for FY 2007, the CMRS regulatory fee was $0.18 per unit. Thus, international and interstate toll calls made on a wireless telephone, even if billed separately to the customer as international or interstate toll calls, are not paid on a revenue basis for CMRS regulatory fee purposes, but on a subscriber basis. Whereas, international and interstate toll calls made on a landline telephone are considered international and interstate revenue for ITSP regulatory fee purposes. We seek comment on whether this disparity is equitable.

19. Specifically, we seek comment on whether we should include interstate and international toll calls made from wireless handsets as international and interstate revenue for regulatory fee purposes. Commenters should also discuss whether, for example, a wireless international call to Canada or Mexico, even though the call would be carried for the most part on the wireline network, should be considered wireless revenue and feeable for CMRS regulatory fee purposes. To the extent that wireless carriers bill their customers a separate charge for the international call (apart from minutes), should this be considered a call subject to regulatory fees regardless of whether the call originated from a landline or a wireless handset? Commenters should discuss why including (or excluding) revenues from interstate and international calls is reasonable. Commenters should also address the effect on CMRS and ITSP regulatory fees if wireless revenues from interstate and international toll calls become subject to regulatory fees. We seek comment on this proposal.

3. Regulatory Fee Obligations for Digital Broadcasters

20. After February 17, 2009, full-power television broadcast stations must transmit only in digital signals and may no longer transmit analog signals.[24] Digital television (''DTV'') licensees are subject to section 8 application fees but our current schedule of regulatory fees does not include a specific service category for digital broadcasters.[25] Licensees in the broadcast industry pay regulatory fees based on their analog facilities. For licensees that broadcast in both the analog and digital formats, the only regulatory fee obligation at present is for their analog facility. A licensee that has fully transitioned to digital broadcasting and has surrendered its analog spectrum currently has no regulatory fee obligation.

21. In our *FY 2005 Report and Order* we stated that we had sought comment on whether to establish a regulatory fee category for digital broadcasters but received no comments on the issue and therefore we did not establish regulatory fee obligations for digital broadcasters.[26] At that time we recognized the Commission's initiatives to transition analog broadcasters to digital spectrum and that we should address these issues from a regulatory fee perspective. We seek comment on whether we should now establish a specific regulatory fee service category for digital broadcasters.

22. Our rules do not state that regulatory fees are required for analog licenses only,[27] but we have consistently assessed regulatory fees on analog licenses only.[28] We seek comment on whether we should clarify that regulatory fees are required for analog and digital broadcasters, based on their markets. We seek comment on whether a rule change is necessary under these circumstances. We do not intend to assess regulatory fees for both digital and analog licenses from a licensee in the process of transitioning from analog to digital. Our goal is to efficiently and seamlessly account for the collection of fee revenue from digital broadcasters without harming early transitioners to digital spectrum or late transitioners from analog spectrum. We seek comment on ways to achieve this goal.

4. Per-Subscriber Fees for Video Services in Addition to Cable Television Operators

23. We seek comment on whether service providers other than cable operators, such as incumbent local exchange carriers (ILEC) providing video service, should also pay regulatory fees on a per-subscriber basis or otherwise.[29] For example, should ILECs as well as cable providers pay a per-subscriber regulatory fee because ILECs are providing a service similar to cable service? Presently, ILECs that provide video service are not subject to regulatory fees for their video service, unless they are classified as a cable provider. We seek comment on this proposal.

a. Internet Protocol TV (''IPTV'')

24. From the customer's perspective, there is likely not much difference between IPTV and other video services, such as cable service. The IPTV service could be offered to the customer bundled with the customer's Internet

[22] ITTA Reply Comments at 2.

[23] ITTA Reply Comments at 4–5.

[24] 47 U.S.C. 309(j)(14) and 337(e).

[25] *Assessment and Collection of Regulatory Fees for Fiscal Year 2003,* MD Docket No. 03–83, Report and Order, 18 FCC Rcd 15985, 15993, para. 25 (2003) (''*FY 2003 Report and Order*'').

[26] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2005,* MD Docket No. 05–59, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12266–67, para. 23 (2005) (''*FY 2005 Report and Order*'').

[27] 47 CFR 1.1153, ''Schedule of annual regulatory fees and filing locations for mass media services'' provides the fee amounts due for television stations based on the market where the station is broadcast.

[28] The table in section 1.1153 of our rules does, however, refer to ''UHF'' and ''VHF''.

[29] *See* ''FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report,'' MB Docket No. 07–269, Press Release, Nov. 27, 2007.

and landline telephone service.[30] We seek comment on whether this video service should be subject to regulatory fees, and if so, should the IPTV provider count this service for regulatory fee purposes in the same manner as cable services, which is on a subscriber basis? Also, we seek comment on the likely outcome of taking no regulatory fee action for IPTV. Commenters should discuss the impact on cable services and the equities of treating similar services differently for regulatory fee purposes if no regulatory fees are imposed.

25. We also note that any carrier offering this service would pay regulatory fees for the interstate telecommunications service that may be offered together with the IPTV service. We tentatively conclude that in such a situation, the carrier should pay regulatory fees for the ITSP service exclusive of the IPTV service, *i.e.*, the IPTV revenues should not be combined into the ITSP revenue-based regulatory fee. We seek comment on this tentative conclusion. Commenters should discuss the ease or difficulty of separating the ITSP revenues from the IPTV revenues.

b. Direct Broadcast Service (''DBS'') Providers

26. Currently cable service providers pay approximately $0.75 per subscriber in regulatory fees; DBS providers do not pay a per-subscriber fee. Previously, the Commission declined to adopt the same per-subscriber fee for DBS.[31] We seek comment on whether we should impose the same per subscriber fee on DBS that cable providers pay, or continue to assess a space station regulatory fee for the DBS industry and a subscriber-based regulatory fee structure for the cable industry.

5. Cable Television Services—Calculation of Subscriber Numbers

27. In FY 1995, when the Commission assessed payments of $0.49 per cable television subscriber, the Commission explained how cable service providers should calculate their number of subscribers:[32]

Cable Systems should determine their subscriber numbers by calculating the number of single family dwellings, the number of individual households in multiple dwelling units, *e.g.*, apartments, condominiums, mobile home parks, etc., paying at the basic subscriber rate, the number of bulk rate customers and the number of courtesy or fee customers. In order to determine the number of bulk rate subscribers, a system should divide its bulk rate charge by the annual subscription rate for individual households.[33]

28. Cable service providers are still required to pay regulatory fees on a per subscriber basis.[34] We recognize that it may be difficult to identify the number of subscribers that reside in multiple dwelling units (''MDUs'') (*e.g.*, condominiums, apartment buildings, university dormitories) when residents do not contract directly with a cable service provider. We seek comment on whether the ''bulk rate'' calculation described above should be modified to more accurately reflect the number of subscribers in the MDU. If the ''bulk rate'' calculation does need to be revised, commenters should recommend a more accurate way to calculate the number of subscribers in a MDU. We note that if some cable operators are undercounting their subscribers, the remaining cable operators are paying more. Commenters should discuss whether the ''bulk rate'' charge is consistent with the requirement that cable service providers pay regulatory fees on the number of subscribers,[35] and if not, commenters should discuss why it is important for ''bulk rate'' counts to remain separate from subscriber counts. We seek comment on this proposal.

6. Private Land Mobile Radio Services (''PLMRS'')

29. PLMRS, which includes both Exclusive and Shared Services, is contending with a declining unit base and an ever increasing regulatory fee obligation. In its FY 2003 Report and Order, the Commission decided to freeze the Commercial Mobile Radio Service (CMRS) Messaging fee rate at the FY 2002 level.[1] The Commission argued in FY 2003 that because the decline in the CMRS Messaging industry was a unique circumstance, and it was not a temporary phenomenon, it was appropriate to provide such relief. However, the PLMRS industry may not be the only industry that is facing a permanent declining unit base. As a result, it may be necessary for the Commission to consider guidelines for assessing regulatory fees on such industries. For example, what would constitute a declining industry, and under what basis should the Commission provide regulatory fee relief? Should the Commission propose to provide regulatory fee relief in any and all circumstances in which an industry is in decline? We seek comment on this proposal.

7. Other Telecommunications Services

30. We seek comment on whether to add, delete, or reclassify services. We seek comment on adding other services that were not included in our regulatory fee schedule initially that should be included now. For example, should we should we assess regulatory fees on Wi-Fi service providers? Are there other services available today that should share the regulatory fee burden and thus lessen the burden on the more established services? If so, how should we assess the regulatory fees on these services? We also seek comment on whether there are fee categories that should be eliminated.

31. *International Fixed Public Radio.*[36] There is only one licensee in this category and we do not expect any additional licensees or applications. We propose to eliminate this category from our schedule of regulatory fees in order to reduce the administrative burden on the Commission in assessing this fee category. We seek comment on this proposal.

32. *International High Frequency Broadcast Stations.*[37] There are only 25 licensed stations in this category. Most of these licensees are tax-exempt organizations that are exempt from payment of regulatory fees. We propose to eliminate this category from our schedule of regulatory fees in order to reduce the administrative burden on the Commission in assessing this fee category. We seek comment on this proposal.

33. *General Mobile Radio Service (''GMRS'').* GMRS is a two-way radio service licensed to individuals.[38] Prospective licensees pay a $50 license application fee for a five-year license term as well as a $25 regulatory fee. Such costs may be larger than the price of the GMRS device. In addition, other individual radio devices, such as the Family Radio Service,[39] do not pay such

[30] According to AT&T, ''[t]he AT&T U-verse portfolio of IP-based services integrates digital video, AT&T Yahoo! High Speed Internet U-verse Enabled, and in the future, voice over IP services.'' *See http://www.att.com/gen/press-room?pid=5838.*

[31] *FY 2005 Report and Order*, 20 FCC Rcd at 12264, para. 10–11.

[32] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, MD Docket No. 95–3, Report and Order, 10 FCC Rcd 13512, 13579, Appendix H, para. 28 (1995).

[33] *Id.*

[34] 47 CFR 1.1155.

[35] We recognize that there may be other methods to determine the number of subscribers in an MDU, such as counting the number of set top boxes or the premium channels ordered, that may be more accurate than the ''bulk rate'' calculation.

[36] *See* 47 CFR Part 23.

[37] *See* 47 CFR Part 73, Subpart F.

[38] In 1988, the Commission amended the GMRS rules to provide flexibility to the individual user and limit eligibility for new GMRS licenses to individuals. *See Amendment of Subparts A and E of Part 95 to Improve the General Mobile Radio Service ''GMRS''),* Report and Order, PR Docket No. 87–265, 3 FCC Rcd 6554, 6554, para. 3 (1988).

[39] In 1996, the Commission established the Family Radio Service (''FRS'') as a very short range,

fees. These issues may contribute to the low rate of compliance with our licensing requirements for GMRS. We therefore propose to eliminate the regulatory fees for GMRS devices. The application fee would continue to apply for this service. We seek comment on this proposal.

34. The above three services are perhaps more well known to the Commission, but it is possible that there may be additional services that should be consolidated or eliminated because they are based on outmoded technology. We seek comment on this issue.

C. Ex Parte Rules

35. *Permit-But-Disclose.* This is as a ''permit-but-disclose'' proceeding subject to the requirements under section 1.1206(b) of the Commission's rules.[40] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one-or two-sentence description of the views and arguments presented is generally required.[41] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

36. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,[42] interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) procedures for filing paper copies.[43]

37. *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 website 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*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

38. *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.

39. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available free online, via ECFS. Documents will be available electronically in ASCII, Word, and/or Adobe Acrobat.

40. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (''PDF'') at: *http://www.fcc.gov.*

Federal Communications Commission.

Marlene Dortch,

Secretary.

Appendix

Initial Regulatory Flexibility Analysis

41. As required by the Regulatory Flexibility Act (''RFA''), [44] the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules in the Further Notice of Proposed Rulemaking (''NPRM''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates indicated on the first page of this NPRM. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[45] In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.[46]

I. Need for, and Objectives of, the Proposed Rules

42. This NPRM seeks comment on ways the Commission can revise the regulatory fee schedule for various categories of services. The Commission would like to accomplish this in an efficient manner and without undue public burden.

II. Legal Basis

43. This action, including publication of proposed rules, is authorized under sections (4)(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended.[47]

III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

44. The RFA directs agencies to provide a description of, and where feasible, an

two-way voice personal radio service that provides an affordable and convenient means of communications among small groups of persons, including families, with minimal regulation. *See Amendment of Part 95 of the Commission's Rules to Establish a Very Short Distance Two-way Voice Radio Service*, Report and Order, WT Docket No. 95–102, 11 FCC Rcd 12977, 12977, para. 2, 12983, para. 17, 12984, para. 19 (1996). The FRS shares seven frequencies in the 462 MHz band with the GMRS and has seven channels that are offset from GMRS channels in the 467 MHz band. Specifically, FRS channels 1–7 are also GMRS frequencies and FRS channels 8–14 are offset from GMRS frequencies.

[40] *See* 47 CFR 1.1206(b); *see also* 47 CFR 1.1202, 1.1203.

[41] *See* 47 CFR 1.1206(b)(2).

[42] *See id.* section 1.415, 1.419.

[43] *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

[44] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612 has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (''CWAAA''). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'').

[45] 5 U.S.C. 603(a).

[46] *Id.*

[47] 47 U.S.C. 154(i) and (j), 159, and 303(r).

estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[48] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[49] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[50] 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 SBA.[51]

45. Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[52] A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''[53] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[54] The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[55] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[56] We estimate that, of this total, 84,377 entities were ''small governmental jurisdictions.''[57] Thus, we estimate that most governmental jurisdictions are small. Below, we further describe and estimate the number of small entities, applicants and licensees, that may be affected by our action.

46. Incumbent Local Exchange Carriers (''ILECs''). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[58] According to Commission data,[59] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by these rules.

47. Competitive Local Exchange Carriers (''CLECs''), Competitive Access Providers (''CAPs''), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.'' Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[60] According to Commission data,[61] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by these rules.

48. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[62] According to Commission data,[63] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by these rules.

1. Toll Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[64] According to Commission data,[65] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by these rules.

2. Payphone Service Providers (''PSPs''). Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[66] According to Commission data,[67] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by these rules.

3. Interexchange Carriers (''IXCs''). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[68] According to Commission data,[69] 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by these rules.

4. Operator Service Providers (''OSPs''). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[70] According to Commission data,[71] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by these rules.

5. Prepaid Calling Card Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[72] According to Commission data,[73] 89 carriers have reported that they are

[48] 5 U.S.C. 603(b)(3).

[49] 5 U.S.C. 601(6).

[50] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[51] 15 U.S.C. 632.

[52] *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at p. 40 (July 2002).

[53] 5 U.S.C. 601(4).

[54] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[55] 5 U.S.C. 601(5).

[56] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[57] We assume that the villages, school districts, and special districts are small and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[58] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110.

[59] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, Page 5–5 (June 2005) (hereinafter ''*Trends in Telephone Service*'').

[60] 13 CFR 121.201, NAICS code 517110.

[61] ''Trends in Telephone Service'' at Table 5.3.

[62] 13 CFR 121.201, NAICS code 517310.

[63] ''Trends in Telephone Service'' at Table 5.3.

[64] 13 CFR 121. 201, NAICS code 517310.

[65] ''Trends in Telephone Service'' at Table 5.3.

[66] 3 CFR 121.201, NAICS code 517110.

[67] ''Trends in Telephone Service'' at Table 5.3.

[68] 13 CFR 121.201, NAICS code 517110.

[69] ''Trends in Telephone Service'' at Table 5.3.

[70] 13 CFR 121.201, NAICS code 517110.

[71] ''Trends in Telephone Service'' at Table 5.3.

[72] 13 CFR 121.201, NAICS code 517310.

[73] ''Trends in Telephone Service'' at Table 5.3.

engaged in the provision of prepaid calling cards. Of these, an estimated 88 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by these rules.

6. 800 and 800-Like Service Subscribers.[74] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (''toll free'') subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[75] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission receives from Database Service Management on the 800, 866, 877, and 888 numbers in use.[76] According to our data, at the end of December 2004, the number of 800 numbers assigned was 7,540,453; the number of 888 numbers assigned was 5,947,789; the number of 877 numbers assigned was 4,805,568; and the number of 866 numbers assigned was 5,011,291. We do not have data specifying the number of these subscribers that are independently owned and operated or have 1,500 or fewer employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,540,453 or fewer small entity 800 subscribers; 5,947,789 or fewer small entity 888 subscribers; 4,805,568 or fewer small entity 877 subscribers, and 5,011,291 or fewer entity 866 subscribers.

7. International Service Providers. There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of ''Satellite Telecommunications'' and ''Other Telecommunications.'' Under both categories, such a business is small if it has $13.5 million or less in average annual receipts.[77]

8. The first category of Satellite Telecommunications ''comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [78] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[79] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[80] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

9. The second category of Other Telecommunications ''comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.'' [81] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[82] Of this total, 259 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[83] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

10. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[84] Prior to that time, such firms were within the now-superseded categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' [85] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[86] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[87] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[88] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[89] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[90] Thus, we estimate that the majority of wireless firms are small.

11. Internet Service Providers. The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.'' [91] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[92] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[93] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[94] Thus, under this size standard, the great majority of firms can be considered small entities.

12. Television Broadcasting. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [95] The SBA has created a small business size standard for Television Broadcasting entities, which is: Such firms having $13 million or less in annual receipts.[96] According to Commission staff review of the BIA Publications, Inc., Media Access Pro Television Database as of December 7, 200, about 825 (66 percent) of the 1,250 commercial television stations in the United States had revenues of $13 million or less. We note, however, that in assessing whether a business entity qualifies as small under the

[74] We include all toll-free number subscribers in this category, including those for 888 numbers.

[75] 13 CFR 121.201, NAICS code 517310.

[76] ''Trends in Telephone Service'' at Tables 18.4, 18.5, 18.6, and 18.7.

[77] 13 CFR 121.201, NAICS codes 517410 and 517910.

[78] U.S. Census Bureau, 2002 NAICS Definitions, ''517410 Satellite Telecommunications;'' *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[79] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517410.

[80] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[81] U.S. Census Bureau, 2002 NAICS Definitions, ''517910 Other Telecommunications;'' *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[82] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517910.

[83] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[84] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[85] U.S. Census Bureau, 2002 NAICS Definitions, ''517211 Paging''; *http:// www.census.gov/epcd/naics02/def/NDEF517.HTM.*; U.S. Census Bureau, 2002 NAICS Definitions, ''517212 Cellular and Other Wireless Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[86] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[87] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

[88] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1,000 employees or more.''

[89] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[90] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[91] Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 518111, ''On-Line Information Services.''

[92] 13 CFR 121.201, NAICS code 518111.

[93] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191.

[94] *Id.*

[95] U.S. Census Bureau, 2002 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/epcd/naics02/def/NDEF515.HTM.*

[96] 13 CFR 121.201, NAICS code 515120.

above definition, business (control) affiliations [97] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

13. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

14. There are also 2,117 low power television stations (''LPTV'').[98] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

15. Radio Broadcasting. The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business.[99] Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.'' [100] According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations [101] are included.[102] Our estimate, therefore likely overstates the number of small businesses that might be affected by the rules adopted herein.

16. Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[103]

17. The Commission estimates that there are approximately 5,618 FM translators and boosters.[104] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($6.5 million for a radio station or $13.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[105]

18. Cable and Other Program Distribution. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.'' [106] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: All such firms having $13.5 million or less in annual receipts.[107] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[108] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[109] Thus, under this size standard, the majority of firms can be considered small.

19. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[110] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[111] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[112] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have less than 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[113] Thus, under this second size standard, most cable systems are small.

20. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [114] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[115] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[116] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[117] and therefore we are unable to

[97] ''Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

[98] *FCC News Release*, ''Broadcast Station Totals as of September 30, 2007.''

[99] *See* OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 515112).

[100] *Id.*

[101] ''Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.'' 13 CFR 121.103(a)(1).

[102] ''SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.'' 13 CFR 121(a)(4).

[103] 13 CFR 121.201, NAICS codes 513111 and 513112.

[104] FCC News Release, ''Broadcast Station Totals as of September 30, 2007.''

[105] 15 U.S.C. 632.

[106] U.S. Census Bureau, 2002 NAICS Definitions, ''517510 Cable and Other Program Distribution;'' *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[107] 13 CFR 121.201, NAICS code 517510.

[108] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[109] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[110] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[111] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2; Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[112] 47 CFR 76.901(c).

[113] Warren Communications News, *Television & Cable Factbook 2006*, ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[114] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[115] 47 CFR 76.901(f); *see* Public Notice, ''*FCC Announces New Subscriber Count for the Definition of Small Cable Operator*,'' 16 FCC Rcd 2225 (Cable Services Bureau, 2001).

[116] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2; Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[117] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's

estimate more accurately the number of cable system operators that would qualify as small under this size standard.

21. Open Video Services. Open Video Service (''OVS'') systems provide subscription services.[118] The SBA has created a small business size standard for Cable and Other Program Distribution.[119] This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[120] Affiliates of Residential Communications Network, Inc. (''RCN''), received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

22. Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: All such firms having $13.5 million or less in annual receipts.[121] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[122] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[123] Thus, under this size standard, the majority of firms can be considered small.

23. Multichannel Video Distribution and Data Service (''MVDDS''). MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[124] These definitions were approved by the SBA.[125] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[126] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[127]

24. Amateur Radio Service. These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

25. Aviation and Marine Services. Small businesses in the aviation and marine radio services use a very high frequency (''VHF'') marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[128] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[129] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

26. Personal Radio Services. Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[130] These services include Citizen Band Radio Service (''CB''), General Mobile Radio Service (''GMRS''), Radio Control Radio Service (''R/C''), Family Radio Service (''FRS''), Wireless Medical Telemetry Service (''WMTS''), Medical Implant Communications Service (''MICS''), Low Power Radio Service (''LPRS''), and Multi-Use Radio Service (''MURS'').[131] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being adopted. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons.[132] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the rules adopted herein.

27. Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[133] There are a total of

finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[118] *See* 47 U.S.C. 573.

[119] 13 CFR 121.201, NAICS code 517510.

[120] *See http://www.fcc.gov/csb/ovs/csovscer.html*.

[121] 13 CFR 121.201, NAICS code 517510.

[122] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[123] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[124] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide A Fixed Service in the 12.2–12.7 GHz Band, ET Docket No. 98–206*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[125] *See* Letter from Hector V. Barreto, Administrator, SBA, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

[126] *See* ''Multichannel Video Distribution and Data Service Auction Closes,'' *Public Notice*, 19 FCC Rcd 1834 (2004).

[127] *See* ''Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,'' *Public Notice*, 20 FCC Rcd 19807 (2005).

[128] 13 CFR 121.201, NAICS code 517212.

[129] Amendment of the Commission's Rules Concerning Maritime Communications, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[130] 47 CFR Part 90.

[131] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. See generally 47 CFR Part 95.

[132] 13 CFR 121.201, NAICS Code 517212.

[133] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype

Continued

approximately 127,540 licensees in these services. Governmental entities[134] 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.[135] The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[136] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[137] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[138] 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 SBA.[139]

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

28. The Commission is concerned that some entities are paying too much and others are not paying enough regulatory fees. In this FNPRM, the Commission seeks comment on ways to modify the regulatory fee rules to better reflect the current industry and offered services. In addition, the Commission is concerned with rule non-compliance. The Commission could reduce such noncompliance by various means, including adopting filing requirements for international bearer circuits for non-common carriers. Common carriers already have filing requirements.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (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.[140] The Commission is seeking comment on ways to revise the regulatory fees to possibly include more entities and to reduce or increase the fee burden on certain fee categories. The Commission is also seeking comment on reducing international bearer circuit regulatory fee non-compliance and close loopholes in the Commission's rules. It is possible that additional filing requirements for non-common carriers will be considered, with respect to international bearer circuits. These filing requirements already apply to common carriers. There may be other proposals offered by commenters to add or reduce regulatory fees or to reduce non-compliance with our rules. Such proposals may include reporting or recordkeeping requirements. It is important that all entities bear their required share of regulatory fees; otherwise, the companies that comply with the rules must pay for those that refuse to comply.

VI. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

30. None.

[FR Doc. E8–19431 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (''EMRS'') use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[134] 47 CFR 1.1162.

[135] 5 U.S.C. 601(5).

[136] 5 U.S.C. 603(b)(3).

[137] 5 U.S.C. 601(6).

[138] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[139] 15 U.S.C. 632.

[140] 5 U.S.C. 603.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1722; MB Docket No. 07–296; RM–11412]

Radio Broadcasting Services; French Lick, Indiana; Irvington, KY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by L. Dean Spencer, requesting the allotment of Channel 261A at Irvington, Kentucky, as the community's first local aural transmission service. Channel 261A can be allotted at Irvington, Kentucky at a site 13.8 kilometers (8.5 miles) northwest of the community at coordinates 37–56–52 NL and 86–24–54 WL.

DATES: Comments must be filed on or before September 22, 2008, and reply comments on or before October 7, 2008.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel as follows: John F. Garziglia, Esq., Womble, Carlyle Sandridge & Rice, PLLC, 1401 Eye Street, NW., Seventh Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Victoria McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making and Order to Show Cause, MB Docket No. 07–296, adopted July 30, 2008, and released August 1, 2008. 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, CY–A257, 445 Twelfth Street, SW., Washington, DC 20554. This document may also be purchased from the Commission's copy 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.*

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). Provisions of the Regulatory Flexibility Act of l980 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, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kentucky is amended by adding Irvington, Channel 261A.

Federal Communications Commission.

Robert A. Haynes,

Senior Attorney.

[FR Doc. E8–19651 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1756; MB Docket No. 08–151; RM–11476]

Radio Broadcasting Services; Blythe, CA

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 Commission requests comment on a petition filed by Prescott Valley Broadcasting Company, Inc. Petitioner proposes the substitution of FM Channel 247B for vacant Channel 239B at Blythe, California. The purpose of the requested channel substitution at Custer is to accommodate Petitioner's pending application to operate as a full-spaced Class C3 channel at Parker, Arizona. Channel 247B can be allotted at Blythe in compliance with the Commission's minimum distance separation requirements with a site restriction of 1 km (.61 miles) northeast of Blythe. The proposed coordinates for Channel 247B at Blythe are 33–37–02 North Latitude and 114–35–20 West Longitude. Concurrence by the Government of Mexico is required for the allotment of Channel 247B at Blythe, California, because the proposed allotment is located within 320 kilometers (200 miles) of the U.S.-Mexican border. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Comments must be filed on or before September 22, 2008, and reply comments on or before October 7, 2008.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve petitioner's counsel as follows: David Tillotson, Esq., 4606 Charleston Terrace, NW., Washington, DC 20007.

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. 08–151, adopted July 30, 2008, and released August 1, 2008. The full text of this Commission decision 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 20554. 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, *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, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 239B and by adding Channel 247B at Blythe.

Federal Communications Commission.

Robert A. Haynes,

Senior Attorney.

[FR Doc. E8–19652 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1711; MB Docket No. 08–150; RM–11390]

Radio Broadcasting Services; Asbury and Maquoketa, IA, and Mineral Point, WI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division at the request of KM Radio of Independence, LLC, licensee of Station KQMG–FM, Independence, Iowa, proposes the allotment of Channel 238A at Mineral Point, Wisconsin, as its first local service, and the substitution of Channel *254A, reserved for noncommercial educational (NCE) use, for vacant Channel *238A, reserved for NCE use, at Asbury, Iowa to accommodate a hybrid community of license application, proposing the substitution of Channel 236A for Channel 237A at Independence, Iowa, the reallotment of Channel 236A to Solon, Iowa, and the associated modification of the license of Station KQMG–FM. See File No. BPH–20070119AEI. To facilitate the hybrid community of license application and the proposed Asbury channel substitution, the Commission issue an order to show cause to Maquoketa Broadcasting Company, licensee of Station KMAQ–FM, Channel 236A, Maquoketa, Iowa, as to why KMAQ–FM's channel should not be changed to Channel 237A at Maquoketa. *See* **SUPPLEMENTARY INFORMATION.**

DATES: Comments must be filed on or before September 22, 2008, and reply comments on or before October 7, 2008.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Jeffrey L. Timmons, Esq., Counsel to KM Radio of Independence, LLC, 1400 Buford Highway, Suite G–5, Sugar Hill, Georgia 30518.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–150, adopted July 30, 2008, and released August 1, 2008. 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, CY–A257, 445 Twelfth Street, SW., Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or via e-mail *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).

A staff engineering analysis confirms that Channel 238A can be allotted to Mineral Point consistent with the minimum distance separation requirements of the Commission's rules at city reference coordinates 42–51–36 NL and 90–10–47 WL. Additionally, a staff engineering analysis indicates that Channel *254A can be allotted to Asbury consistent with the minimum distance separation requirements of the Rules with a site restriction 3.7 kilometers (2.3 miles) southwest of the community located at reference coordinates 42–29–23 NL and 90–46–56 WL. Moreover, Channel 237A can be allotted at Station KMAQ–FM's current licensed site at coordinates 42–05–26 NL and 90–37–43 WL.

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, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Iowa, is amended by removing Channel *238A and by adding Channel *254A at Asbury.

3. Section 73.202(b), the Table of FM Allotments under Wisconsin, is amended by adding Mineral Point, Channel 238A.

Federal Communications Commission.

Robert A. Haynes,

Senior Attorney.

[FR Doc. E8–19647 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 73, No. 166

Tuesday, August 26, 2008

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

Agricultural Marketing Service

[Doc. No. AMS–TM–08–0077; TM–08–11]

Request for an Extension to a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension of the currently approved information collection for the Farmers Market Questionnaire.

DATES: Comments received by October 27, 2008 will be considered.

Additional Information or Comments: Contact Ed Ragland, Marketing Services Division, Transportation and Marketing Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 2646 South Building, Ag Stop 0269, Washington, DC 20250–0269; 202–720–8317. Comments should reference Docket No. AMS–TM–08–0077; TM–08–11.

SUPPLEMENTARY INFORMATION:

Title: Farmers Market Questionnaire.

OMB Number: 0581–0169.

Expiration Date of Approval: April 30, 2009.

Type of Request: Extension to the currently approved information collection.

Abstract: Under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), AMS is responsible for conducting research to enhance market access for small- and medium-sized farmers. The role of the Marketing Services Division (MSD) of AMS is to facilitate distribution of U.S. agricultural products. The division identifies marketing opportunities, provides analysis to help take advantage of those opportunities and develops and evaluates solutions including improving farmers markets and other direct-to-consumer marketing activities. Various types of farmers markets serve different parts of the food marketing chain but all focus on the small- to medium-sized agricultural producers that have difficulty obtaining access to large scale commercial distribution channels. Information has been collected by the MSD periodically about the size and growth of markets, farmers served, products sold, sales, and management structure to better monitor how this marketing channel changes over time and the impact farmers markets have on the farming community nationwide.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .316 hours per response.

Respondents: Farmers market managers.

Estimated Number of Respondents: 4700.

Estimated Number of Responses: 1622.

Estimated Number of Responses per Respondent: .345.

Estimated Total Annual Burden on Respondents: 512 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) 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; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to the following addresses:

- *Mail:* Ed Ragland, Marketing Services Division, Transportation and Marketing Programs, Agricultural Marketing Services, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 2646 South Building, Ag Stop 0269, Washington, DC 20250–0269.
- *Internet: http://www.regulations.gov.*

All written comments should be identified with the docket number AMS–TM–08–0077; TM–08–11. It is our intention to have all comments whether submitted by mail or Internet available for viewing on the Regulations.gov (*http://www.regulations.gov*) Internet site. Comments submitted will also be available for public inspection in person at USDA–AMS, Transportation and Marketing Programs, Marketing Services Division, Room 2646–South Building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday, (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received are requested to make an appointment in advance by calling (202) 720–8317.

The information collected is used only by authorized employees of the USDA, AMS.

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

Dated: August 20, 2008.

Lloyd C. Day,

Administrator,Agricultural Marketing Service.

[FR Doc. E8–19699 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Motorized Vehicle Use on the Rogue River-Siskiyou National Forest

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to prepare an Environmental Impact Statement.

SUMMARY: The Rogue River-Siskiyou National Forest (Forest) will prepare an Environmental Impact Statement (EIS) to document and disclose the potential environmental effects of establishing and designating a system of roads, trails and areas for wheeled motorized vehicles. The Proposed Action would designate the location, type of vehicle and season of use for motorized vehicles

across the entire Forest in order to meet the intent of the Travel Management; Designated Routes and Areas for Motor Vehicle Use, Final Rule that was published on November 9, 2005 (70 FR 216). Over-the-snow vehicles are excluded from this Proposed Action. A Forest Plan Amendment would be required to achieve the purpose and need, and implement the Proposed Action.

DATES: Comments concerning the scope of the analysis, issues about the Proposed Action, or alternatives to the Proposed Action are most helpful if received within 45 days following the date that this notice appears in the **Federal Register**.

ADDRESSES: Send electronic comments to: *con-iments-pacificnorthwest-rogueriver siskiyou@fs.fed.us*. Send written comments to: Travel Management Team, Rogue River Siskiyou National Forest, Siskiyou Mountains Ranger District, 645Washington St., Ashland, OR 97520.

FOR FURTHER INFORMATION CONTACT: Steve Johnson, Team Leader, Siskiyou Mountains Ranger District, 645 Washington St., Ashland, OR 97520. Phone: (541) 552–2900.

SUPPLEMENTARY INFORMATION:

Background

On November 9, 2005, the Forest Service published final travel management regulations in the **Federal Register** (FR Vol. 70, No. 216-Nov. 9, 2005, pp. 68264–68291). This final Travel Management Rule requires designation of those roads, trails, and areas that are open to motor vehicle use by the public on National Forests. Designations will be made by class of vehicle and, if appropriate, by time of year. The final rule prohibits the use of motor vehicles by the public off the designated system as well as use of motor vehicles on routes and in areas that are not designated. Persons exempt from the final rule prohibitions would be those with a permit specifically authorizing access. Examples include access to private property, a mining claim or a communication site.

In June 2007, the Forest hosted a series of four open houses in southwest Oregon to provide people an opportunity to learn more about the Travel Analysis process that identifies and designates roads, trails, and areas open to motor vehicles. In addition, Forest representatives met with a number of individuals, groups and neighboring land management agencies in order for motorized and non-motorized users alike to get involved early as we began to gather information for the project.

Since that time Forest planners and resource specialists have verified and completed an inventory of existing open roads and trails. Currently, there are approximately 4,620 road miles and approximately 1,155 trail miles. Motorized trails account for approximately 15% (170 miles) of the total trail miles.

Under the Proposed Action, roads, trails and areas that are currently part of the Forest transportation system and are open to wheeled motorized vehicle travel would remain designated for such use except as described below. This proposal focuses on the designation of wheeled motorized vehicle routes and areas. The Proposed Action is being carried forward in accordance with the Travel Management Rule (36 CFR Part 212).

In accordance with the rule and following a decision on this proposal, the Forest will publish a Motor Vehicle Use Map (MVUM) identifying all Forest roads, trails and areas that are designated open for motor vehicle use by the public. The MVUM shall specify the classes of vehicles and, if appropriate, the times of year for which use is authorized. The MVUM will be updated and published annually (or more frequently if needed) when changes to the Forest's transportation system are made. Future decisions associated with changes to the MVUM may trigger the need for documentation of additional environmental analysis.

Purpose and Need

The purpose for action is to enact the Travel Management Rule. Motorized use is a popular use and is an important form of recreation for many individuals, families, and groups. A designated and managed system is needed to provide this use. Increased demand for motorized use, lack of designated areas/routes, and the inconsistent direction contained in the Forest Plans, has led to resource damage and social impacts, user conflicts, and safety concerns.

Proposed Action

Based on the stated purpose and need for action and as a result of the recent Travel Analysis process, the Forest proposes to:

- Prohibit motorized public access on approximately 60–65 miles of roads currently open in order to minimize or reduce resource damage;
- Formally designate approximately 3,390 miles of road where mixed use would be allowed. Mixed use is defined as designation of a National Forest System (NFS) road for use by both highway-legal and non-highway-legal motor vehicles;
- Construct two motorized trails to provide loop route opportunities (approximately 2 miles);
- Convert approximately 20–25 miles of NFS roads to motorized trails;
- Designate two areas where off-road motorized use is allowed. This includes continued use of the Woodruff area near Prospect and the development of an additional area near Willow Lake. Both areas are located on the High Cascades Ranger District; and
- Enact Forest Plan amendments to make the plans consistent with the Travel Management Rule. The Rogue River-Siskiyou National Forest is guided by two separate Forest Plans.

Maps illustrating the Proposed Action can found at: *http://www.fs.fed.us/r6/rogue siskiyou/projects/travel/*.

In addition, maps will be available for viewing at:

Forest Supervisor's Office, 3040 Biddle Road, Medford, OR 97504

Gold Beach Ranger District, 29279 Ellensburg Ave., Gold Beach, OR 97444 or 539 Chetco Aye, Brookings, OR 97415

High Cascades Ranger District, 47201 Highway 62, Prospect, OR 97536 or 730 Laurel St., Butte Falls, OR 97522

Powers Ranger District, 42861 Highway 242, Powers, OR 97466

Siskiyou Mountains Ranger District, 6941 Upper Applegate Road, Jacksonville, OR 97530 or 645 Washington Street, Ashland, OR 97520

Wild Rivers Ranger District, 2164 N.E. Spalding Avenue, Grants Pass, OR 97526 or 26568 Redwood Hwy., Cave Junction, OR 97523

Responsible Official

The Forest Supervisor, Scott D. Conroy, is the Responsible Official for making the decision and providing direction for the analysis under the National Environmental Policy Act (NEPA).

Scoping and NEPA Process

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from the federal, state, and local agencies and other individuals or organizations who may be interested in or affected by the Proposed Action.

The Draft Environmental Impact Statement is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by December 2008. EPA will publish a notice of availability (NOA) of the Draft EIS in the **Federal Register**.

The comment period on the Draft EIS will extend 45 days from the date the EPA publishes the NOA in the **Federal Register**. At that time, copies of the Draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the management of the Rogue River-Siskiyou National Forest participate at that time. Submission of comments in response to the Draft EIS is a prerequisite for eligibility to appeal under the 36 CFR part 217 regulations.

The Final EIS is scheduled to be completed in February 2009. In the Final EIS, the Forest Service will respond to comments received during the comment period that pertain to the environmental consequences discussed in the Draft EIS and applicable laws, regulations, and policies considered in making the decision.

Comment Requested

This Notice of Intent initiates the scoping process which guides the development of the Environmental Impact Statement. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of Draft Environmental Impact Statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978)). Also, environmental objections that could be raised at the Draft Environmental Impact Statement stage, but that are not raised until after completion of the Final Environmental Impact Statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this Proposed Action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the Final Environmental Impact Statement.

To assist the Forest Service in identifying and considering issues and concerns on the Proposed Action, comments on the Draft Environmental Impact Statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the Draft Environmental Impact Statement. Comments may also address the adequacy of the Draft Environmental Impact Statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: August 18, 2008.

Scott D. Conroy,

Forest Supervisor, Rogue River-Siskiyou National Forest.

[FR Doc. E8–19675 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Sequoia National Forest, Western Divide Ranger District; California; Tule River Reservation Protection Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The proposed project is to reduce surface and ladder fuels on approximately 1,574 acres by constructing fuel breaks, treating planted stands, and prescribed burning between planted stands and fuel breaks. The purpose of the project is to respond to a proposal from the Tule River Tribal Council under the Tribal Forest Protection Act and to reduce the spread of wildland fire starting on the Sequoia National Forest or private lands onto the Tule River Indian Reservation.

DATES: Comments concerning the scope of the analysis must be received by Wednesday, September 24, 2008. The draft environmental impact statement is expected June 2009 and the final environmental impact statement is expectedNovember 2009.

ADDRESSES: Send written comments to Priscilla Summers, District Ranger, Western Divide Ranger District, 32588 Hwy 190, Springville, CA 93265.

FOR FURTHER INFORMATION CONTACT: Teresa Sue, Planner, Western Divide Ranger District, 32588 Hwy 190, Springville, CA 93265.

SUPPLEMENTARY INFORMATION: In July 2004, Congress passed the Tribal Forest Protection Act (Act). The Act was in response to devastating wildfires that started on Federal lands and crossed onto adjacent Tribal lands. The Act provides a tool for tribes to propose work that will reduce the threat of fires starting on Federal lands from spreading onto trust lands for Indian tribes. The Act allows tribes to enter into contracts and agreements with the U.S. Forest Service or Bureau of Land Management to accomplish the work.

In October 2005, the Tule River Tribal Council submitted a project proposal to the Forest Supervisor of the Sequoia National Forest under the authority of the Tribal Forest Protection Act of 2004. The Pacific Southwest RegionalForester granted authority to work with the Tule River Tribal Council on their proposal. This project is the first under this authority. Subsequent projects will be analyzed separately.

Purpose and Need for Action

To respond to the proposal from the Tule River Tribal Council under the TribalForest Protection Act and to reduce the risk of wildland fire starting on the Sequoia National Forest or private lands from spreading onto the Tule RiverIndian Reservation by reducing surface and ladder fuels.

Proposed Action

The proposed action is to reduce surface and ladder fuels on approximately 1,574 acres along the northern boundary between the Sequoia National Forest,Giant Sequoia National Monument, and the Tule River Indian Reservation. The proposed action includes the construction of shaded fuel breaks along ridgelines, private land, and roads; the reduction of fuels in planted stands by thinning, limbing and removing brush; disposal of resulting fuels by pile and burning, jackpot burning, or utilizing biomass as commercial and/or personal fuel; and prescribed burn between planted stands and shaded fuel breaks.

Responsible Official

Tina Terrell, Forest Supervisor, Sequoia National Forest, 1839 South NewcombStreet, Porterville, CA 93257.

Nature of Decision To Be Made

The decision to be made is whether or not to approve the fuels reduction project as described. The decision will not include a Forest Plan Amendment.

Scoping Process

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies and other individuals or organizations interested in or affected by the proposed action.

The comment period on the proposed action will extend 30 days from the date the Notice of Intent is published in the **Federal Register**.

The draft environmental impact statement is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by June 2009. EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will extend 45 days from the date the EPA notice appears in the **FederalRegister**. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the Tule River Reservation Protection Project participate at that time.

The final EIS is scheduled to be completed in November 2009. In the final EIS, the Forest Service is required to respond to substantive comments received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making the decision. Substantive comments are defined as ''comments within the scope of the proposed action, specific to the proposed action, and have a direct relationship to the proposed action, and include supporting reasons for the responsible official to consider'' (36 CFR 215.2). Submission of substantive comments is a prerequisite for eligibility to appeal under the 36 CFR part 215 regulations.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (ED. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental PolicyAct at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(**Authority:** 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21).

Dated: August 18, 2008.

Tina J. Terrell,

Forest Supervisor.

[FR Doc. E8–19621 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of a Public Meeting on Implementation of Title IX, Energy Authorities of the Food, Conservation and Energy Act of 2008

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: The Business and Cooperative Programs, an Agency in the Rural Development Mission Area of the United States Department of Agriculture, will hold a public meeting September 4, 2008, entitled ''Expanding Rural Renewable Energy Opportunities—Inviting a Dialogue with the Public on the new authorities of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234) (''the Act'').'' The purpose of this event is to gather public comments and suggestions on how to implement certain new authorities authorized under Title IX of the Act.

DATES: The meeting will be held on Thursday, September 4, 2008. Registration will start at 8 a.m.; the program will begin at 8:30 a.m. and conclude by 4 p.m. Eastern Time.

ADDRESSES: The meeting will be held in the Jefferson Auditorium, South Agriculture Building, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC. Participants should enter the building through the 5th wing entrance of the South Building located on Independence Avenue between 12th and 14th Street. Valid photo identification is required for clearance by building security personnel.

FOR FURTHER INFORMATION CONTACT: Robin Robinson, Confidential Assistant, Office of the Administrator, USDA, Rural Development, Business and Cooperative Programs, Room 5803, South Agriculture Building, STOP 3201, 1400 Independence Avenue, SW., Washington, DC 20250–3201, *Telephone:* (202) 690–4730, *E-mail: robin.robinson@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: Specifically, USDA has an interest in initiating a dialogue on the following sections of Title IX of the Act:

Section numbers below refer to sections of the Farm Security and Rural Investment Act that are amended by section 9001 of the Food, Conservation, and Energy Act of 2008.

Section 9003, Biorefinery Assistance—Provides loan guarantees to fund the development, construction,

and retrofitting of commercial-scale biorefineries and grants to assist in paying the cost of the development and construction of demonstration-scale biorefineries. The Act provides $75 million in fiscal year (FY) 2009 and $245 million for FY 2010 for loan guarantee costs for the financing of commercial-scaled biorefineries. In addition, the Act authorizes appropriated funding of $150 million for each of FY 2009–2012, for both the demonstration and commercial scaled biorefineries.

Section 9004, Repowering Assistance—Provides for payments to be made to biorefineries in existence at time of enactment of the Act to replace fossil fuels used to produce heat or power to operate the biorefineries with renewable biomass. The Act provides $35 million for FY 2009, to remain available until expended. In addition, the Act authorizes additional appropriated funding in the amount of $15 million for each of FY 2009–2012.

Section 9005, Bioenergy Program for Advanced Biofuels—Provides for payments to be made to eligible producers to support and ensure an expanding production of advanced biofuels. The Act provides $55 million for FY 2009 and 2010, $85 million for FY 2011, and $105 million for FY 2012. In addition, the Act authorizes appropriated funding in the amount of $25 million for each of FY 2009–2012.

Section 9007, Rural Energy for America Program—Expands and renames the program formerly referred to as the Renewable Energy Systems and Energy Efficiency Improvements Program. Under the expansion, hydroelectric source technologies will be added as eligible; energy audits will be included as eligible costs, and loan limits will be increased. The Act provides $55 million for FY 2009, $60 million for FY 2010, and $70 million for FY 2011 and 2012. In addition, the Act authorizes additional appropriated funding in the amount $25 million for each of FY 2009–2012.

Section 9009, Rural Energy Self-Sufficiency Initiative—Provides financial assistance (grants) for the purpose of enabling eligible rural communities to substantially increase the energy self-sufficiency of the eligible rural communities. The Act authorizes appropriated funding in the amount of $5 million for each of FY 2009–2012.

Section 9011, Biomass Crop Assistance Program (BCAP)—Provides support to the establishment and production of crops for conversion to bio-energy in project areas and to assist with collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. The BCAP will be implemented by the Farm Service Agency with the support of other Federal and local agencies.

Section 9012, Forest Biomass for Energy—The Forest Service is authorized to conduct a competitive research and development program to use forest biomass for energy. Forest Service R&D and other federal agencies, state and local governments, Indian tribes, land-grant colleges and universities, and private entities are eligible to compete in the program. Priority research projects include:

- The use of low-value forest biomass for energy from forest health and hazardous fuels reduction treatment.
- The integrated production of energy from forest biomass into biorefineries or other existing manufacturing.
- The development of new transportation fuels from forest biomass.
- The improved growth and yield of trees for renewable energy production.

The Act authorizes appropriation funding in the amount $15 million for each of FY 2009 through 2012.

Section 9013, Community Wood Energy Program—Reducing the Nation's dependence on foreign energy sources remains a top Administration priority. USDA Secretary Schafer is committed to increasing domestic energy production, including the development of farm- and forest-based energy sources, strengthening the economy of rural America, and reducing our dependence on imported oil. Program provides grants to State and local governments to develop community wood energy plans and to acquire or upgrade wood energy systems. The act authorizes appropriated funding in the amount of $5 million for each of fiscal years 2009 through 2012.

Instructions for Participation

Although registration is encouraged, walk-ins will be accommodated to the extent that space permits. Registered participants will be given priority for making presentations prior to walk-ins. Anyone interested in the Act programs that support renewable energy development and energy efficiency improvements is encouraged to attend the public meeting. Presentations will be limited to no more than 10 minutes in duration. To register and request time for an oral statement, contact Robin Robinson, Office of the Administrator, USDA, Rural Development, Business and Cooperative Programs, Room 5803 South Agriculture Building, STOP 3201, 1400 Independence Avenue, SW., Washington, DC 20250–3201; *Telephone:* 202–690–4730, *E-mail: robin.robinson@wdc.usda.gov.* Comments by e-mail should be in an ASCII file. Written comments should clearly identify which of the above referenced sections the comments are addressing. Anyone may attend without preregistering.

Anyone intending in making an electronic presentation must provide such presentation via e-mail to Robin Robinson no later than Friday, August 29th and bring a copy of the presentation with them on a portable electronic media to the meeting. You will be notified if USDA does not have the equipment available to permit you to make the presentation. Due to technical problems that can arise, you are advised to have a backup plan for making the presentation.

Depending on the level of interest expressed by the registered participants, certain blocks of time will be allotted for oral presentations by referenced sections mentioned in this notice.

In addition, the Department will allow written comments to be provided on the referenced Sections of Title IX of the Act up to 15 days following the date of the public meeting. These written comments should be submitted to Robin Robinson, Room 5803 SouthAgriculture Building, STOP 3201, 1400 Independence Avenue, SW., Washington, DC 20250–3201.

Copies of the presentations and any additional written comments that are received within the 15 days following the public meeting will be available for review at *http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_2KD?navid=FARMBILL2008.*

Participants who require a sign language interpreter or other special accommodations should contact Robin Robinson as directed above.

The oral and written information obtained from interested parties will be considered in implementing provisions of Sections 9003, 9004, 9005, 9007, 9009, 9011, 9012, and 9013. In order to assure that the Act is implemented to meet constituent needs, USDA, Rural Development is sponsoring a listening forum and soliciting written comments to encourage public comment in conjunction with Farm Service Agency and Forest Service participation in gathering input and comments and in making recommendations on program implementation. All comments are welcome, and no attempt will be made to establish a consensus.

Non-Discrimination Statement

''The U.S. Department of Agriculture (USDA) prohibits discrimination in all its program and activities on the basis of race, color, national origin, age, disability, and where applicable, sex,

marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs). Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Adjudication andCompliance, 1400 Independence Avenue, SW., Washington, DC 20250–9410, or call (800) 795–3272 (voice), or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.''

Dated: August 15, 2008.

Thomas C. Dorr,

Under Secretary,Rural Development.

[FR Doc. E8–19703 Filed 8–25–08; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

International Trade Administration

(C–570–942)

Notice of Initiation of Countervailing Duty Investigation: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China

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

EFFECTIVE DATE: August 26, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Holland and Yasmin Nair, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1279 and (202) 482–3813, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On July 31, 2008, the Department of Commerce (the ''Department'') received a petition filed in proper form by Nashville Wire Products Inc., SSW Holding Company, Inc., United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied–Industrial and Service Workers International Union, and the International Association of Machinists and Aerospace Workers, District Lodge 6 (Clinton, IA) (the ''petitioners''), domestic producers of certain kitchen appliance shelving and racks (''kitchen shelving and racks''). In response to the Department's requests, the petitioners provided timely information supplementing the petition on August 13 and 15, 2008.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''the Act''), the petitioners allege that manufacturers, producers, or exporters of certain kitchen appliance shelving and racks in the People's Republic of China (the ''PRC''), receive countervailable subsidies within the meaning of section 701 of the Act and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that the petitioners filed the petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) and (D) of the Act and the petitioners have demonstrated sufficient industry support with respect to the countervailing duty investigation (*see* ''Determination of Industry Support for the Petition'' section below).

Period of Investigation

The period of investigation is January 1, 2007, through December 31, 2007.

Scope of the Investigation

The scope of this investigation consists of shelving and racks for refrigerators, freezers, combined refrigerator–freezers, other refrigerating or freezing equipment, cooking stoves, ranges, and ovens (''certain kitchen appliance shelving and racks'' or ''the subject merchandise''). Certain kitchen appliance shelving and racks are defined as shelving, baskets, racks (with or without extension slides, which are carbon or stainless steel hardware devices that are connected to shelving, baskets, or racks to enable sliding), side racks (which are welded wire support structures for oven racks that attach to the interior walls of an oven cavity that does not include support ribs as a design feature), and subframes (which are welded wire support structures that interface with formed support ribs inside an oven cavity to support oven rack assemblies utilizing extension slides) with the following dimensions:

—shelving and racks with dimensions ranging from 3 inches by 5 inches by 0.10 inch to 28 inches by 34 inches by 6 inches; or

—baskets with dimensions ranging from 2 inches by 4 inches by 3 inches to 28 inches by 34 inches by 16 inches; or

—side racks from 6 inches by 8 inches by 0.1 inch to 16 inches by 30 inches by 4 inches; or

—subframes from 6 inches by 10 inches by 0.1 inch to 28 inches by 34 inches by 6 inches.

The subject merchandise is comprised of carbon or stainless steel wire ranging in thickness from 0.050 inch to 0.500 inch and may include sheet metal of either carbon or stainless steel ranging in thickness from 0.020 inch to 0.2 inch. The subject merchandise may be coated or uncoated and may be formed and/or welded. Excluded from the scope of this investigation is shelving in which the support surface is glass. The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') statistical reporting numbers 8418.99.80.50, 7321.90.50.00, 7321.90.60.90 and 8516.90.80.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Comments on the Scope of the Investigation

During our review of the petition, we discussed the scope with the petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments within 20 calendar days of the publication of this notice. Comments should be addressed to Import Administration's Central Records Unit (''CRU''), Room 1117, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, the Department invited representatives of the Government of the PRC for consultations with respect to the countervailing duty petition. The Department held these consultations in Beijing, China, with representatives of the Government of the PRC on August 15, 2008. *See* the Memorandum to The File, entitled, ''Consultations with Officials from the Government of the People's Republic of China'' (August 15,

2008) on file in the CRU of the Department of Commerce, Room 1117.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners contend that there are two domestic like products: certain refrigeration shelving and certain oven racks. The petitioners note that the two like products, when considered together, correspond to the product scope description. Based on our analysis of the information submitted on the record, we have determined that refrigeration shelving and certain oven racks constitute two domestic like products, and we have analyzed industry support in terms of those domestic like products. For a discussion of the domestic like product analysis in this case, *see* ''Countervailing Duty Investigation Initiation Checklist: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (''Initiation Checklist''), Industry Support at Attachment II, on file in the CRU, Room 1117 of the main Department of Commerce building.

With regard to section 702(c)(4)(A) of the Act, in determining whether the petitioners have standing (*i.e.*, the domestic workers and producers supporting the Petition account for (1) at least 25 percent of the total production of the domestic like product and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition), we considered the industry support data contained in the Petition with reference to the domestic like products. To establish industry support, the petitioners provided their own production volume of the domestic like products for calendar year 2007, and compared that to total production volume of the domestic like products for the industry. We have relied upon data the petitioners provided for purposes of measuring industry support. For further discussion, *see* Initiation Checklist at Attachment II (Industry Support).

The Department's review of the data provided in the petition, supplemental submissions, and other information readily available to the Department indicates that petitioners have established industry support. First, the petition establishes support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like products and, as such, the Department is not required to take further action in order to evaluate industry support (*i.e.*, polling). *See* section 702(c)(4)(D) of the Act and Initiation Checklist at Attachment II (Industry Support). Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the petition account for at least 25 percent of the total production of the domestic like products. *See* Initiation Checklist at Attachment II (Industry Support). Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the petition account for more than 50 percent of the production of the domestic like products produced by that portion of the industry expressing support for, or opposition to, the petition. Accordingly, the Department determines that the petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. *See* Initiation Checklist at Attachment II (Industry Support).

The Department finds that the petitioners filed the petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and (D) of the Act and have demonstrated sufficient industry support with respect to the countervailing duty investigation that they are requesting the Department initiate. *See* Initiation Checklist at Attachment II (Industry Support).

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioners allege that imports of certain refrigeration shelving and certain oven racks from the PRC are benefitting from countervailable subsidies and that such imports are causing or threaten to cause, material injury to the domestic industries producing certain refrigeration shelving and certain oven racks. In addition, the petitioners allege that subsidized imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

The petitioners contend that the industries' injured condition is illustrated by reduced market share, underselling and price depressing and

suppressing effects, lost sales and revenue, reduced production and capacity utilization, reduced shipments, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* Initiation Checklist at Attachment III (Injury).

We are including in our investigation the following programs alleged in the petition to have provided countervailable subsidies to producers and exporters of the subject merchandise in the PRC:

A. Income Tax Programs

1. ''Two Free, Three Half'' program
2. Income tax exemption program for export–oriented FIEs
3. Income tax refund for reinvestment of profits in export–oriented enterprises
4. Income tax subsidies for FIEs based on geographic location
5. Preferential tax subsidies for research and development by FIEs
6. Income tax credits on purchases of domestically–produced equipment by FIEs
7. Income tax credits for domestically–owned companies purchasing domestically–produced equipment
8. Income tax exemption for investment in domestic ''Technological Renovation≥
9. Reduction in or exemption from the fixed assets investment orientation regulatory tax

B. Indirect Tax Programs and Import Tariff Programs

10. Value Added Tax (''VAT'') rebates for FIEs purchasing domestically–produced equipment
11. Import tariff and VAT exemptions for FIEs and certain domestic enterprises using imported equipment in encouraged industries
12. Import tariff exemptions for the ''encouragement of investment by Taiwan Compatriots≥

C. Provincial/Local Subsidy Programs

13. Local income tax exemption and reduction program for ''productive'' FIEs

Guangdong Province:

14. Exemption from city construction tax and education tax for FIEs in Guangdong Province
15. Exemption from real estate tax and dyke maintenance fee for FIEs in Guangdong Province
16. Import tariff refunds and exemptions for FIEs in Guangdong Province
17. Preferential loans and interest rate subsidies in Guangdong Province
18. Direct grants in Guangdong Province
19. Funds for ''outward expansion'' of industries in Guangdong Province
20. Land–related subsidies to companies located in specific regions of Guangdong Province
21. Government provision of electricity and water at less than adequate remuneration to companies located in development zones in Guangdong Province

Zhejiang Province

22. Import tariff and VAT refunds and exemptions for FIEs in Zhejiang
23. Grants to promote exports from Zhejiang Province
24. Land–related subsidies to companies located in specific regions of Zhejiang

D. Provision of Goods and Services for Less than Adequate Remuneration by the GOC

25. Wire Rod and Nickel

For further information explaining why the Department is investigating these programs, *see* Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers and exporters of the subject merchandise in the PRC:

A. Government Restraints on Exports

1. Wire Rod and Nickel

Petitioners allege the GOC restrains exports of wire rod and nickel by means of export taxes and export licenses, which artificially suppress the prices wire rod and nickel producers in China can charge for these products. Petitioners have not adequately shown how these particular export taxes and licenses constitute entrustment or direction of private entities by the GOC to provide a financial contribution to producers of subject merchandise. Moreover, the petitioners have not provided sufficient data regarding historic price trends demonstrating, *e.g.*, price decreases correlated with the imposition of the alleged export restraints. Therefore, we do not plan to investigate this program.

B. Preferential Lending

1. Preferential policy loans to favored industries, including the electrical appliance industry in Guangdong Province

The petitioners allege that the Guangdong province's five-year plan stipulates that the provincial government will actively coordinate financing from the financial market. According to this policy, the provincial government will support the home electric appliances industry, including suppliers of parts or components, by coordinating financial institutions to assemble funds to stimulate investments in the form of bank credit or loans. Petitioners have not sufficiently alleged the elements necessary for the imposition of a countervailing duty and did not support the allegation with reasonably available information. For example, there is insufficient evidence that kitchen shelving and racks products are within the scope of the provincial government's economic development plans. Moreover, there is no clear indication that any such plans include lending to the kitchen shelving and racks producers. Therefore, we do not plan to investigate this program.

2. Preferential policy loans to favored industries, including the electrical appliance industry in Zhejiang Province

Petitioners allege that the electrical appliance industry is considered a ''pillar'' industry at both the provincial and local–levels in Zhejiang province. Petitioners assert that preferential lending exists to support ''pillar'' industries pursuant to five-year plans or other policies issued by provincial and local authorities in these provinces. Petitioners have not sufficiently alleged the elements necessary for the imposition of a countervailing duty and did not support the allegation with reasonably available information. For example, there is insufficient evidence that kitchen shelving and racks products are within the scope of the provincial government's economic development plans. Moreover, there is no clear indication that any such plans include lending to the kitchen shelving and racks producers. Therefore, we do not plan to investigate this program.

C. Income Tax Programs

1. Tax reduction for enterprises making little profit

Petitioners allege that ''enterprises making little profit'' pay reduced income taxes and that such enterprises comprise a *de jure* specific group. Petitioners have not established with reasonably available evidence that ''enterprises making little profit'' are a specific group pursuant to section 771(5A)(D) of the Act. Therefore, we do not plan to investigate tax reductions for enterprises making little profit.

2. Tax incentives for domestic enterprises engaging in research and development

According to China's WTO subsidies notification, domestic industrial enterprises whose research and development expenses increased 10 percent from the previous year may offset 150 percent of the research expenditures from their income tax obligation. Petitioners allege that domestic companies engaging in research and development comprise a *de jure* specific group. Petitioners have not established with reasonably available evidence that such enterprises are a specific group pursuant to section 771(5A)(D) of the Act. Therefore, we do not plan to investigate this program.

D. Indirect Tax Programs

1. Import tariff and VAT refunds to promote the development of equipment manufacturing in China

Petitioners allege that the Chinese government refunds import tariffs and VAT for equipment and raw materials that cannot be domestically produced. Petitioners have not sufficiently established that this import tariff and VAT refund program is specific. Therefore, we do not plan to investigate this program.

2. VAT exemptions for the ''encouragement of investment by Taiwan Compatriots''

Petitioners allege that the Chinese government offers VAT exemptions to encourage Taiwanese investors to establish export–oriented and technologically advanced enterprises. Petitioners have not sufficiently established that this VAT exemption program constitutes a countervailable subsidy because our regulations permit exemption or remission of indirect taxes such as the VAT, unless the exemption or remission is excessive in accordance with 19 C.F.R. 351.517(a). Therefore, because petitioners have not shown that there is an excessive exemption, remuneration or rebate of VAT, we do not plan to investigate this program.

E. Provincial/Local Subsidy Programs

1. VAT Refunds and Exemptions for FIEs in Guangdong Province

The petitioners allege that, in Guangdong province, export–oriented FIEs are exempt from import–related VAT on raw materials, parts and components, accessories, packing materials, and other inputs used in production. Encouraged FIEs in Guangdong also receive VAT exemptions on imported equipment. The petitioners provided evidence that certain Chinese producers of kitchen shelving and racks are export–oriented FIEs that are located in Guangdong province. However, petitioners have not sufficiently established that the VAT exemption program for export–oriented FIEs in Guangdong constitutes a countervailable subsidy because our regulations permit exemption or remission of VAT, unless the exemption or remission is excessive, and petitioners have not provided allegation or information regarding excessivity in accordance with 19 C.F.R. 351.517(a). Therefore, we do not plan to investigate this program.

2. Provision of land at less than adequate remuneration in specific regions of Zhejiang Province

Petitioners allege that firms in the Ningbo Economic and Technological Development Zone (''ETDZ'') are eligible to receive reductions or exemptions of the land–use fee and site–developing fee. We do not recommend plan to investigate the provision of land for less than adequate remuneration in Ningbo ETDZ or the reduction in or exemption from site use fees in Ningbo ETDZ, because the petitioners have not provided evidence that any Chinese producers of kitchen shelving or racks are located in Ningbo city, generally, or in the Ningbo EDTZ.

F. Currency Manipulation

Petitioners allege that the PRC government's policy of maintaining an undervalued RMB is an export subsidy that provides either a direct transfer of funds or the provision of a good or service at less than adequate remuneration. Petitioners have not sufficiently alleged the elements necessary for the imposition of a countervailing duty and did not support the allegation with reasonably available information. Therefore, we do not plan to investigate the currency manipulation program.

Respondent Selection

To determine the total and relative volume and value of import data for each potential respondent, the Department normally relies on Customs and Border Protection import data for the POI. However, in the instant proceeding, HTSUS categories that include subject merchandise are very broad, and include products other than products subject to this investigation. Therefore, because of the unique circumstances of this case, the Department will issue ''Quantity and Value Questionnaires'' to potential respondents for the purposes of respondent selection.

The Department will send the quantity and value questionnaire to those PRC companies identified in the July 31, 2008, petition, at Exhibit 3. The responses must be submitted by those exporters/producers that receive a quantity and value questionnaire no later than September 4, 2008. The Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration's website, at http://ia.ita.doc.gov/ia–highlights-and–news.html.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act, a copy of the public version of the petition has been provided to the Government of the PRC. As soon as and to the extent practicable, we will attempt to provide a copy of the public version of the petition to each exporter named in the petition, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 25 days after the date on which it receives notice of the initiation, whether there is a reasonable indication that imports of subsidized kitchen appliance shelving and racks from the PRC are causing material injury, or threatening to cause material injury, to a U.S. industry. *See* section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: August 20, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–19778 Filed 8–25–08; 8:45 am]

Billing Code: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administation

(C–570–940)

Certain Tow–Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

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

EFFECTIVE DATE: August 26, 2008.

FOR FURTHER INFORMATION CONTACT: Gene Calvert or Paul Matino, AD/CVD

Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–3586 and (202) 482–4146, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 14, 2008, the Department of Commerce (the Department) initiated the countervailing duty investigation on certain tow–behind lawn groomers and certain parts thereof (lawn groomers) from the People's Republic of China (PRC). *See Certain Tow–Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 73 FR 42324 (July 21, 2008). The preliminary determination is currently due no later than September 17, 2008.

Postponement of Due Date for Preliminary Determination

On August 8, 2008, Agri–Fab, Inc., petitioner, requested that the Department postpone the preliminary determination in the countervailing duty investigation on lawn groomers from the PRC until November 17, 2008. Under section 703(c)(1)(A) of the Tariff Act of 1930, as amended (the Act), the Department may extend the deadline for the preliminary determination in a countervailing duty investigation until no later than the 130th day[1] after the date on which the administering authority initiates an investigation, if the petitioner makes a timely request for an extension of the period within which the determination must be made under section 703(b) of the Act. Pursuant to 19 CFR 351.205(e), petitioner's request for postponement of the preliminary determination was made 25 days or more before the scheduled date of the preliminary determination. Accordingly, we are extending the due date for the preliminary determination to no later than November 17, 2008.

This notice is issued and published pursuant to section 703(c)(2) and of the Act.

Dated: August 20, 2008.

David M. Spooner,

Assistant Secretary For Import Administration.

[FR Doc. E8–19777 Filed 8–25–08; 8:45 am]

Billing Code: 3510–DS–S

[1] In this investigation, the 130th day after the date of initiation is November 21, 2008.

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with July anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: August 26, 2008

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2002), for administrative reviews of various antidumping and countervailing duty orders and findings with July anniversary dates.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of this initiation notice and to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of this **Federal Register** notice.

Separate Rates

In proceedings involving non–market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2,1994) (''*Silicon Carbide*'').

In accordance with the separate–rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate–rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate–rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate–rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's website at http://www.trade.gov/ia on the date of publication of this **Federal Register**. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

For entities that have not previously been assigned a separate rate, to demonstrate eligibility for such, the Department requires a Separate Rate Status Application. The Separate Rate Status Application will be available on the Department's website at http://www.trade.gov/ia on the date of publication of this **Federal Register**

notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Initiation of Reviews:

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than July 31, 2009.

Antidumping Duty Proceedings	Period to be Reviewed
FINLAND: Purified Carboxymethylcellulose.	
A–405–803	7/1/07—6/30/08
CP Kelco Oy.	
INDIA: Polyethylene Terephthalate (PET) Film.	
A–533–824	7/1/07—6/30/08
Jindal Poly Films Limited of India.	
ITALY: Certain Pasta.	
A–475–818	7/1/07—6/30/08
Arrighi, S.p.A..	
Domenico Paone fu Erasmo S.p.A..	
F. Divella SpA.	
Industria Alimentare Colavita, S.p.A..	
P.A.M. S.p.A..	
Pasta Lensi.	
Pasta Zara SpA.	
Pastificio Di Martino Gaetano & F.lli S.r.L..	
Pastificio Felicetti S.r.L..	
Pastificio Fratelli Pagani S.p.A..	
Pastificio Labor S.r.L..	
Pastificio Lucio Garafalo.	
Pastificio Riscossa F.lli Mastromauro S.r.L..	
Rummo S.p.A. Molino e Pastificio.	
Rustichella d'Abruzzo S.p.A..	
JAPAN: Stainless Steel sheet and Strip in Coils.	
A–588–845	7/1/07 6/30/08
Hitachi Cable LLP.	
Nippon Kinzoku Co., Ltd..	
MEXICO: Purified Carboxymethylcellulose.	
A–201–834	7/1/07—6/30/08
Quimica Amtex, S.A. de C.V..	
MEXICO: Stainless Steel Sheet and Strip in Coils.	
A–201–822	7/1/07—6/30/08
ThyssenKrupp Mexinox S.A. de C.V..	
SWEDEN: Purified Carboxymethylcellulose.	
A–401–808	7/1/07—6/30/08
CP Kelco AB.	
TAIWAN: Stainless Steel Sheet and Strip in Coils.	
A–583–831	7/1/07—6/30/08
Ta Chen Stainless Pipe Co., Ltd..	
Yieh United Steel Corporation.	
Chia Far Industrial Factory Co., Ltd..	
China Steel Corporation.	
Dah Shi Metal Industrial Co., Ltd..	
KNS Enterprise Co., Ltd..	
Lih Chan Steel Co., Ltd..	
Tang Eng Iron Works.	
PFP Taiwan Co., Ltd..	
Yieh Loong Enterprise Co., Ltd. (aka Chung Hung Steel Co., Ltd.).	
Yieh Trading Corp..	
Tibest International, Inc..	
Goang Jau Shing Enterprise Co., Ltd..	
Yieh Mau Corp..	
Maytun International Corp..	
Shih Yuan Stainless Steel Enterprise Co., Ltd..	
Chien Shing Stainless Co..	
Chain Chon Industrial Co., Ltd..	
Emerdex Stainless Flat–Rolled Products, Inc..	
Emerdex Stainless Steel, Inc..	
Emerdex Group.	
Waterson Corp..	
Well Harvest Metal Co., Ltd..	
THAILAND: Carbon Steel Butt Weld Pipe Fittings.	
A–549–807	7/1/07—6/30/08
Thai Benkan Co., Ltd..	

Antidumping Duty Proceedings	Period to be Reviewed
THE NETHERLANDS: Purified Carboxymethylcellulose.	
A–421–811	7/1/07—6/30/08
CP Kelco BV.	
Akzo Nobel Functional Chemicals, B.V..	
THE PEOPLE'S REPUBLIC OF CHINA: Persulfates[1].	
A–570–847	7/1/07—6/30/08
Degussa–AJ Shanghai Initiators Co., Ltd..	
Shanghai AJ Import & Export Corporation.	
Countervailing Duty Proceedings.	
INDIA: Polyethylene Terephthalate (PET) Film.	
C–533–825	1/1/07—12/31/07
Jindal Poly Films Limited of India.	
ITALY: Certain Pasta.	
C–475–819	1/1/07—12/31/07
DeMatteis Agroalimentare S.p.A..	
F.lli De Cecco di Filippo Fara San Martino S.p.A..	
Suspension Agreements.	
None..	

[1] If one of the above named companies does not qualify for a separate rate, all other exporters of Persulfates from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under section 351.211 or a determination under section 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with FAG Italia v.United States, 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.On January 22, 2008, the Department published Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures (73 FR 3634). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (e.g., the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 USC 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: August 20, 2008.

Eward C. Yang,

Acting Deputy Assistant Secretaryfor Import Adminstration.

[FR Doc. E8–19776 Filed 08–25–08; 8:45 am]

Billing Code: 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Advisory Committee on Commercial Remote Sensing; Meeting

ACTION: Notice of public meeting.

SUMMARY: The Advisory Committee on Commercial Remote Sensing (ACCRES) will meet October 7, 2008.

DATE AND TIME: The meeting is scheduled as follows:

October 7, 2008, 9 a.m.–4 p.m. The first part of this meeting will be closed to the public. The public portion of the meeting will begin at 1 p.m.

ADDRESSES: The meeting will be held in the Auditorium of the National Association of Home Builders Building, Washington, DC, located at 1201 15th Street, NW., Washington, DC 20005. While open to the public, seating capacity may be limited.

SUPPLEMENTARY INFORMATION: As required by section 10(a)(2)of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of the meeting of ACCRES. ACCRES was established by the Secretary of Commerce (Secretary) on May 21, 2002, to advise the Secretary through the Under Secretary of Commerce for Oceans and Atmosphere on long- and short-range strategies for the licensing of commercial remote sensing satellite systems.

Matters To Be Considered

The first part of the meeting will be closed to the public pursuant to Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended by Section 5(c) of the Government in Sunshine Act, Public Law 94–409 and in accordance with Section 552b(C)(1) of Title 5, United States Code. Accordingly, portions of this meeting which involve the ongoing review and implementation of the April 2003 U.S. Commercial Remote Sensing Space Policy and related national security and foreign policy considerations for NOAA's licensing decisions are closed to the public. These briefings are likely to disclose matters that are specifically authorized under criteria established by Executive Order 12958 to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.

All other portions of the meeting will be open to the public. During the open portion of the meeting, the Committee will receive updates on NOAA's commercial remote sensing licensing activities and foreign systems. The committee will also be available to receive public comments on its activities.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed to ACCRES, NOAA/NESDIS International and Interagency Affairs Office, 1335 East-West Highway,

Room 7311, Silver Spring, Maryland 20910.

Additional Information and Public Comments

Any member of the public wishing further information concerning the meeting or who wishes to submit oral or written comments should contact Kay Weston, Designated Federal Officer for ACCRES, NOAA/NESDIS International and Interagency Affairs Office, 1335 East-West Highway, Room 7311, Silver Spring, Maryland 20910. Copies of the draft meeting agenda can be obtained from Alan Robinson at (301) 713–2024 ext. 213, fax (301) 713–2032, or e-mail *Alan.Robinson@noaa.gov.*

The ACCRES expects that public statements presented at its meetings will not be repetitive of previously-submitted oral or written statements. In general, each individual or group making an oral presentation may be limited to a total time of five minutes. Written comments (please provide at least 13 copies) received in the NOAA/NESDIS International and Interagency Affairs Office on or before September 29, 2008, will be provided to Committee members in advance of the meeting. Comments received too close to the meeting date will normally be provided to Committee members at the meeting.

FOR FURTHER INFORMATION CONTACT: Kay Weston, NOAA/NESDIS International and Interagency Affairs, 1335 East West Highway, Room 7313, Silver Spring, Maryland 20910; telephone (301) 713–2024 x205, fax (301) 713–2032, e-mail *Kay.Weston@noaa.gov,* Alan Robinson at (301) 713–2024 ext. 213, fax (301) 713–2032, or e-mail *Alan.Robinson@noaa.gov.*

Mary E. Kicza,

Assistant Administrator for Satellite and Information Services.

[FR Doc. E8–19738 Filed 8–25–08; 8:45 am]

BILLING CODE 3510–HR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XJ98

North Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of an Aleutian Island Ecosystem Team Workshop.

SUMMARY: The North Pacific Fishery Management Council's (Council) Aleutian Islands Ecosystem Team will meet in Seattle, WA.

DATES: The meetings will be held September 9–10, 2008, 8:30 a.m. to 4:30 p.m.

ADDRESSES: The meetings will be held at the Alaska Fishery Science Center, 7600 Sand Point Way, NE, Building 4, National Marine Mammal Laboratory Conference Room, Room 2039, Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Evans, North Pacific Fishery Management Council; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The agenda will include the following discussions: Review new information on the Aleutian Island ecosystem; review and re-evaluate Fishery Ecosystem Plan (FEP) indicators; develop ecosystem policy metrics for Council review; and address how to incorporate social science and human dimensions in the FEP.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions 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 Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: August 21, 2008.

Emily H. Menashes,

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

[FR Doc. E8–19787 Filed 8–25–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XJ99

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Joint Protocol Committee of the Alaska Board of Fisheries and Council will meet in Anchorage, AK.

DATES: The meeting will be held on September 12, 2008, from 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held at the Anchorage Hilton Hotel, 500 W 3rd Avenue, Dillingham Room, Anchorage, AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Council staff, telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The meeting agenda: Annual catch limits (ABC/TAC) and possible revisions to scallop and crab management; salmon bycatch amendments; subsistence halibut program bycatch retention; Gulf of Alaska (GOA) issues including the Pacific cod sector split, fixed gear LLP recency, and state/federal options for Pacific cod jig gear fisheries; parallel waters licensing and catch accounting issues; State report on state/federal data collection differences on octopus; and Board of Fisheries agenda change requests.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions 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 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 Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: August 21, 2008.

Emily H. Menashes,

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

[FR Doc. E8–19788 Filed 8–25–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Meeting of the Ocean Research and Resources Advisory Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Ocean Research and Resources Advisory Panel (ORRAP) will meet to discuss National Ocean Research Leadership Council (NORLC) and Interagency Committee on Ocean Science and Resource Management Integration (ICOSRMI) activities. All sessions of the meeting will remain open to the public.

DATES: The meeting will be held on Tuesday, April 15, 2008 from 8 a.m. to 5:30 p.m. and Wednesday, April 16, 2008 from 8 a.m. to 1:30 p.m. In order to maintain the meeting time schedule, members of the public will be limited in their time to speak to the Panel. Members of the public should submit their comments one week in advance of the meeting to the meeting Point of Contact.

ADDRESSES: The meeting will be held at the Consortium for Ocean Leadership, 1201 New York Ave., NW., Suite 420, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Dr. Charles L. Vincent, Office of Naval Research, 875 North Randolph Street Suite 1425, Arlington, VA 22203–1995, *telephone:* 703–696–4118.

SUPPLEMENTARY INFORMATION: This notice of open meeting is provided in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on ocean research to applications, ocean observing, professional certification programs, and other current issues in the ocean science and resource management communities.

Dated: August 19, 2008.

L. R. Almand,

Office of the Judge Advocate General, Administrative Law Division, Federal Register Liaison Officer.

[FR Doc. E8–19725 Filed 8–25–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management 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 September 25, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name,'' e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: August 20, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: Federal Family Education Loan (FFEL) Program, William D. Ford Federal Direct Loan (Direct Loan) Program, and Federal Perkins Loan (Perkins Loan) Program Loan Discharge Applications.

Frequency: On Occasion.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 29,543.

Burden Hours: 14,774.

Abstract: These forms serve as the means by which eligible borrowers in the FFEL, Direct Loan, and Perkins Loan programs apply for discharge of their loans based on school closure (FFEL, Direct Loan, and Perkins Loan program loans), or false certification of student eligibility (FFEL and Direct Loan program loans only). The holders of FFEL, Direct Loan, and Perkins Loan program loans use the information collected on these forms to determine whether a borrower meets the eligibility requirements for a closed school or false certification loan discharge.

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 3743. 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., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–19700 Filed 8–25–08; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission (EAC).

* * * * *

ACTION: Notice of Virtual Public Forum for EAC Board of Advisors.

DATE AND TIME: Thursday, September 11, 2008, 9 a.m. EDT through Monday, September 15, 2008, 5 p.m. EDT.

PLACE: EAC Board of Advisors Virtual Meeting Room at *http://www.eac.gov.* Once at the main page of EAC's Web site, viewers should click the link to the Board of Advisors Virtual Meeting Room. The virtual meeting room will open on Thursday, September 11, 2008 at 9 a.m. EDT and will close on Monday, September 15, 2008, at 5 p.m. EDT. The site will be available 24 hours per day during that 5-day period.

PURPOSE: The EAC Board of Advisors will review and provide comment on a draft of the independent evaluation plan. The draft contains a plan for evaluating the EAC's $10M Election Data Collection Grant Program.

The EAC Board of Advisors Virtual Meeting Room was established to enable the Board of Advisors to conduct business in an efficient manner in a public forum, including being able to review and discuss draft documents, when it is not feasible for an in-person board meeting. The Board of Advisors will not take any votes or propose any resolutions during the 5-day forum of September 11–September 15, 2008. Members will post comments about the draft evaluation plan.

This activity is open to the public. The public may view the Proceedings of this special forum by visiting the EAC Board of Advisors virtual meeting room at *http://www.eac.gov.* At any time between Thursday, September 11, 2008, 9 a.m. EDT and Monday, September 15, 2008, 5 p.m. EDT. The public may file written statements to the EAC Board of Advisors at *boardofadvisors@eac.gov.* Data on EAC's Web site is accessible to visitors with disabilities and meets the requirements of Section 508 of the Rehabilitation Act.

FOR FURTHER INFORMATION CONTACT: Bryan Whitener, *Telephone:* (202) 566–3100.

* * * * *

Alice Miller,

Chief Operating Officer, U.S. Election Assistance Commission.

[FR Doc. E8–19855 Filed 8–22–08; 4:15 pm]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 8118–034]

Lake George Hydro, LLC; Notice of Application for Surrender of License and Soliciting Comments, Motions To Intervene, and Protests

August 19, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type*: Surrender of License.

b. *Project No.*: 8118–034.

c. *Date Filed*: August 6, 2008.

d. *Applicant*: Lake George Hydro, LLC.

e. *Name of Project*: Jerry Buckley.

f. *Location*: The project is located on Clear Creek, in Clear Creek County, Colorado, and occupies 0.8 acre of U.S. Bureau of Land Management lands.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact*: Mr. Dennis W. Pungitore, Lake George Hydro, LLC, 9748 Clairtone Lane, Littleton, CO 80126. Telephone: (303) 475–6149.

i. *FERC Contact:* Mr. Vedula Sarma, Telephone (202) 502–6190, and e-mail *vedula.sarma@ferc.gov*.

j. Deadline for filing comments and/or motions: September 19, 2008.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings. Please include the project number P–8118–034 on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of those documents on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of those documents on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request*: The licensee filed an application to surrender its license. The licensee agreed to sell the project to the City of Black Hawk, Colorado, (City) and the surrender of license is a condition precedent to the purchase and sale of the project. The City intends to purchase the assets of the project and remove the penstock and generating equipment and sell the property as a real estate transaction.

l. *Locations of the Application*: A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene*: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments*: Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19692 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 459–230]

Ameren/UE; Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene, and Protests

August 19, 2008.

a. *Type of Application:* Non-project use of project lands and waters.

b. *Project Number:* 459–230.

c. *Date Filed:* July 14, 2008. Supplemented August 12, 2008.

d. *Applicant:* Ameren/UE.

e. *Name of Project:* Osage Hydroelectric Project.

f. *Location:* The project is located at the Mission Bay development near mile marker 32.1 of the main channel of the Lake of the Ozarks, in Camden County, Missouri.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a) 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. Jeff Green, Shoreline Supervisor, Ameren/UE, P.O. Box 993, Lake Ozark, MO 65049, (573) 365–9214.

i. *FERC Contact:* Any questions on this notice should be addressed to Christopher Yeakel at (202) 502–8132, or e-mail address: *christopher.yeakel@ferc.gov.*

j. *Deadline for filing comments and or motions:* September 19, 2008.

k. *Description of Request:* Ameren/UE requests approval to permit EC Development, LLC, to construct 8 new multi-slip boat docks at the Mission Bay development. The docks would have a total of 104 boat slips ranging from 12 feet long and 12 feet wide to 56 feet long and 14 feet wide and would include central walkways 4 feet wide. The docks would be available to the residents of the Mission Bay development. The shoreline within the project boundary is currently occupied by a new seawall but is otherwise undeveloped. No dredging, fuel dispensing, or sewage pumping facilities are proposed.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (p-459) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (p-459–230). All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See 18 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19690 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13190–000]

Ceresco Power and Light; Notice of Application for Preliminary Permit Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

August 19, 2008.

On April 18, 2008, Ceresco Power and Light filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), to study the feasibility of Ceresco Hydroelectric Project. The proposed project would be located on the Kalamazoo River in Calhoun County, Michigan. The existing Ceresco Dam is owned by the applicant. No lands of the United States are within the proposed project boundary.

The proposed project using the existing Ceresco Dam would consist of: (1) A proposed powerhouse, containing four turbine-generator units, switchgears, circuit breakers, transformers, and a control panel; (2) a proposed service building; and (3) appurtenant facilities. The proposed project would have a total installed capacity of 800 kilowatts and an average annual generation of 2.6 gigawatt-hours, to be sold to a local utility, Consumers Energy, or the City of Battle Creek, MI.

Applicant Contact: William Morris, 544 West Columbia Avenue, Suite B,

Battle Creek, MI 49015, (269) 968–4242 ext. 105.

FERC Contact: Jake Tung, (202) 502–8757.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13190) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19685 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2576–083]

FirstLight Hydro Generating Company; Notice of Application Soliciting Comments, Motions To Intervene, and Protests

August 19, 2008.

Take notice that Commission staff is providing an opportunity for public input regarding additional information that has been filed regarding a pending proceeding before the Commission on the following application:

a. *Application Type:* Supplement(s) to Shoreline Management Plan.

b. *Project No:* 2576–083.

c. *Date Filed:* July 27, 2006, supplemented January 18, and June 27, 2008.

d. *Applicant:* FirstLight Power Hydro Generating Company.

e. *Name of Project:* Housatonic River Hydroelectric Project.

f. *Location:* The project is located on the Housatonic River, in Fairfield, Litchfield and New Haven Counties, Connecticut.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Robert Gates, Station Manager-Connecticut Hydro, 143 West St., Ext. Suite E , New Milford, CT 06776, (860) 350–3617.

i. *FERC Contact:* Any questions on this notice should be addressed to Isis Johnson at (202) 502–6346, or by e-mail: *Isis.Johnson@ferc.gov.*

j. *Deadline for filing comments and/or motions:* September 19, 2008.

By letter dated December 12, 2007, and April 30, 2008, the Commission requested that the applicant file additional information regarding the shoreline management plan for the Housatonic Project. This notice is intended to grant members of the public the opportunity to provide comments on this supplemental information. Any entity that has previously intervened with regard to this proceeding is a party and not required to submit additional motions. Likewise, all comments that have been filed with the Commission in this proceeding are still applicable; as such, re-filing of comments is not necessary.

All documents (original and eight copies) should be filed with: Ms. Kimberley D. Bose, Secretary, Federal Energy Regulatory Commission, DHAC, PJ–12.1, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2576–083) on any comments or motions filed. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

k. *Description of Proposal:* The shoreline management plan (SMP) was filed with the Commission as required by the project license. The proposed SMP provides for the maintenance of safe public access to lake shorelines and riverfront lands and waters, as well as for the stewardship and development of shoreline/riverfront areas. The SMP also contains provisions to promote the conservation of land and water-related resources, in addition to promoting education and public awareness of resource protection and management programs. The SMP also includes guidelines for permitting new and existing structures on project lands, and a fee schedule to recover the administrative costs of implementing the permitting program.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call toll-free 1–866–208–3372, or for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 211, 214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19689 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–345]

Grand River Dam Authority; Notice of Application To Amend License and Soliciting Comments, Motions To Intervene, and Protests

August 19, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Non-project use of project lands and waters.

b. *Project Number:* P–1494–345.

c. *Date Filed:* July 16, 2008.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Pensacola Project.

f. *Location:* The project is located on the Grand (Neosho) River in Craig County, Delaware, Mayes, and Ottawa Counties, Oklahoma. The project does not occupy federal or tribal lands. The proposed non-project use would be situated in Craig County and located in Ketchum Cove on Grand Lake.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ms. Tamara E. Jahnke, Assistant General Counsel, Grand River Dam Authority, P.O. Box 409, Vinita, OK 74301, (918) 256–5545.

i. *FERC Contact:* Any questions on this notice should be addressed to Emily Pugliese at (202) 502–6608, or by e-mail: *emily.pugliese@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* September 19, 20008.

k. *Description of Request:* The Grand River Dam Authority requests Commission authorization to lease of 1.05 acres of project property to Allied Marine, Inc. for the installation of an eight-slip boat dock. Allied Marine, Inc. intends to use the leased property, and dock, in conjunction with its adjacent dock-construction business.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (p–1494) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (P–1494–345). All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19688 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12107–003]

Granite County; Notice of Application Tendered for Filing With the Commission, and Soliciting Additional Study Requests

August 19, 2008,

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application*: A New License. (Major Project).

b. *Project No*: 12107–003.

c. *Date Filed*: August 8, 2008.

d. *Applicant*: Granite County.

e. *Name of Project*: Flint Creek Hydroelectric Project.

f. *Location*: The proposed project would be located on Flint Creek at the Georgetown Lake Dam, near Philipsburg, in Granite County and Deer Lodge County, Montana. The proposed project would affect about 1266.33 acres of federal lands within the Beaverhead-Deer Lodge National Forest.

g. *Filed Pursuant to*: Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact*: Granite County, Maureen Connor, Chairman, Board of County Commissioners, P.O. Box 925, Philipsburg, Montana 59858–0925; (406) 859–3817, or Roger Kirk, Agent, P.O. Box 1136, Bozeman, Montana 59771; (406) 587–5086.

i. *FERC Contact*: Gaylord Hoisington, (202) 502-6032 or *gaylord.hoisington@FERC.gov*.

j. *Cooperating agencies*: We are asking Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See*, 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from

the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing additional study requests and requests for cooperating agency status: October 14, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Additional study requests and requests for cooperating agency status may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

m. This application is not ready for environmental analysis at this time.

n. The Flint Creek project consists of: (1) An existing 2,850 acre reservoir with 31,034 acre-feet of storage at elevation 6,378 feet above mean sea level; (2) an existing 330-foot-long and 44-foot-high earth with masonry-core dam; (3) a new 36-inch-diameter by 6,282-foot-long polymer and/or steel pipeline; (4) a surge tank; (5) a new 36-inch-diameter by approximately 1,463-foot-long buried penstock connecting the surge tank to the new powerhouse; (6) a new approximately 30-foot by 40-foot powerhouse containing one Pelton turbine-generator unit rated at 2 megawatts; (7) a new approximately 95-foot-long buried tailrace; (8) a new approximately 10-foot by 10-foot fenced substation located next to the powerhouse; and (9) all appurtenant structures. The average annual generation of the project is approximately 10 gigawatthours.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. Procedural schedule and final amendments: The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter	October 2008
Issue Acceptance letter	November 2008
Issue Scoping Document 1 for comments.	January 2009
Request Additional Information.	March 2009
Issue Scoping Document 2	May 2009
Notice of application is ready for environmental analysis.	June 2009
Notice of the availability of the environmental analysis.	August 2009
Ready for Commission's decision on the application.	September 2009

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19683 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13144–000]

Mananook Associates; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

August 19, 2008.

On March 19, 2008, and supplemented on August 4, 2008, Mananook Associates filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Grand Manan Channel Project, located in the Grand Manan Channel in Washington County, Lubec, Maine. The project uses no dam or impoundment.

The proposed project would consist of: (1) 1,377 proposed tidal current generating units, with a total installed capacity of 72-megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The project is estimated to have an annual generation of 158-gigawatt-hours, which would be sold to a local utility.

Applicant Contact: Mr. Fred J. Moore, III, Mananook Associates, P.O. Box 69, Perry, Maine 04667, phone 207–733–5513.

FERC Contact: Patricia W. Gillis (202) 502–8735.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13144) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19684 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13257–000]

Modern Hydro; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene and Competing Applications

August 19, 2008.

On July 17, 2008, Modern Hydro filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Delhi Project to be located on the south fork of the Maquoketa River in Delaware County, Iowa. Existing facilities are owned by the Lake Delhi Recreation Association Board.

The proposed project would utilize the existing Delhi Dam and would consist of: (1) A powerhouse containing two turbine generator units with a total installed capacity of 1.5 MW; (2) a 75 foot long transmission line and; (3) appurtenant facilities. The annual

production would be 3 GWh which would be sold to a local utility.

Applicant Contact: Mr. Dwight Shanak, N3311 Sunrise Lane, Waupaca, WI 54981, (715) 258–5720.

FERC Contact: Steven Sachs (202) 502–8666.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice.

Comments, motions to intervene, notices of intent and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the

Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13257) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19687 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 637–051]

Public Utility District No. 1 of Chelan County; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

August 19, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of license to replace turbine generator units.

b. *Project No:* 637–051.

c. *Date Filed:* July 7, 2008.

d. *Applicant:* Public Utility District No. 1 of Chelan County.

e. *Name of Project:* Lake Chelan Hydroelectric Project.

f. *Location:* The project is located on the Chelan River, near the City of Chelan, in Chelan County, Washington. The project occupies federal lands administered by the U.S. Forest Service and U.S. Department of the Interior, National Park Service.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Michelle Smith, Licensing and Compliance Manager, Public Utility District No. 1 of Chelan County, 327 North Wenatchee Avenue, P.O. Box 1231, Wenatchee, WA 98807; telephone (509) 661–4180.

i. *FERC Contact:* Linda Stewart, telephone (202) 502–6680, and e-mail address *linda.stewart@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protest:* September 19, 2008.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–637–051) on any comments or motions filed.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper, see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Public Utility District No. 1 of Chelan County proposes to replace two existing 24–MW turbine generator units with two new 29.6–MW turbine generator units, thereby increasing the total installed generating capacity at the Lake Chelan Project from 48 MW to 59.2 MW. The total hydraulic capacity of the project would increase from 2,308 cubic feet per second to 2,500 cubic feet per second.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See 18 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19691 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10359–036]

Snoqualmie River Hydro/Public Utility, District No. 1 of Snohomish County; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

August 19, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Transfer of License.

b. *Project No.:* 10359–036.

c. *Date Filed:* August 6, 2008.

d. *Applicants:* Snoqualmie River Hydro (Transferor) and Public Utility District No. 1 of Snohomish County (Transferee).

e. *Name and Location of Project:* Youngs Creek Project is located on Youngs Creek in Snohomish County, Washington.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

g. *Applicant Contacts:* For the transferor: Arch Ford, President, Snoqualmie River Hydro, Inc., PO Box 1432, Lewiston, ID 83501, (360) 588–6954, *archford@westfordenergy.com.*

For the transferee: Kim Moore, Assistant General Manager, Water Resources, E–1, Snohomish County PUD, 2320 California Street, PO Box 1107, Everett, WA 98206–1107, (425) 783–1000, *kdmoore@snopud.com;* Eric Christensen, Assistant General Counsel, E–4, Snohomish County PUD, 2320 California Street, P.O. Box 1107, Everett, WA 98206–1107, (425) 783–1000, *elchristensen@snopud.com.*

h. *FERC Contact:* Diane M. Murray at (202) 502–8838.

i. *Deadline for filing comments, protests, and motions to intervene:* September 15, 2008.

All documents (original and eight copies) should be filed with: Kimberly Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the Project Number (P–10359) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing a document with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* Applicants seek Commission approval to transfer the license for the Youngs Creek Hydroelectric Project from Snoqualmie River Hydro, to Public Utility District No. 1 of Snohomish County.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number (P–10359) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item g. above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicants specified in the particular application.

o. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicants. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicants' representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19682 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13256–000]

Whitman River Dam, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene and Competing Applications

August 19, 2008.

On July 18, 2008, Whitman River Dam, Inc. filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Snows Mill Pond Project to be located on the Whitman River in Worcester County, Massachusetts. Existing facilities are owned by the Newark America Paper Company, Inc.

The proposed project would utilize the existing Snows Mill Pond Dam and would consist of: (1) A new 42 inch diameter, 1,100 foot long penstock; (2) a powerhouse containing one turbine generator unit with a total installed capacity of 0.25 MW; (3) a 500 foot long, 0.6 kV transmission line and; (4) appurtenant facilities. The annual production would be 1.5 GWh which would be sold to a local utility.

Applicant Contact: Mr. Robert T. Francis, P.O. Box 145, 10 Tommy Francis Road, Westminster, MA 01473 (978) 874–1010.

FERC Contact: Steven Sachs (202) 502–8666.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of

intent to file competing applications: 60 days from the issuance of this notice.

Comments, motions to intervene, notices of intent and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13256) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19686 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP03–33–004]

Wyckoff Gas Storage Company LLC.; Notice of Application

August 19, 2008.

On August 14, 2008, Wyckoff Gas Storage Company, LLC (''Wyckoff''), Two Warren Place, 6120 Yale Avenue, Suite 700, Tulsa, OK 74136–4216, pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) and parts 157 of the Commission's regulations, filed an abbreviated application to amend its certificates of public convenience and necessity issued on October 6, 2003 (105 FERC ¶ 61,027), and amended on April 11, 2006 (115 FERC ¶ 61,207) and June 29, 2006 (115 FERC ¶ 62,324) to (1) Convert two observation wells to injection/withdrawal (I/W) wells; (2) complete two previously approved I/W wells into the Onondaga reef zone rather that into the Oriskany sandstone zone as previously authorized; (3) convert two previously authorized I/W wells to observation wells; (4) abandon certain previously approved lateral piping that has not yet been installed and will no longer be needed for the project; and (5) extend the time limit for the construction and installation of certain of the project facilities by an additional three years. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''e-Library'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676, or for TTY, (202) 502–8659.

Any questions regarding this application should be directed to T.W. Cook, Wyckoff Gas Storage Company, LLC, Two Warren Place, 6120 Yale Avenue, Suite 700, Tulsa, OK 74136, (918) 524–8503.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: September 2, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19693 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DI08–13–000]

James and Patricia Tyrpin; Notice of Declaration of Intention and Soliciting Comments, Protests, and/or Motions To Intervene

August 19, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No.:* DI08–13–000.

c. *Date Filed:* August 7, 2008.

d. *Applicant:* James and Patricia Tyrpin.

e. *Name of Project:* Tyrpin Micro Hydro Project.

f. *Location:* The proposed Tyrpin Micro Hydro Project will be located on an unnamed Creek in West Finley Township, Washington County, Pennsylvania.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* James and Patricia Tyrpin, 2278 E. National Pike, Scenery Hill, PA 15360; *telephone:* (724) 769–1439; *Fax:* (724) 769–1439; *e-mail: http://www.James.tyrpin@us.army.mil.*

i. *FERC Contact:* Any questions on this notice should be addressed to Henry Ecton, (202) 502–8768, or e-mail address: *henry.ecton@ferc.gov.*

j. *Deadline for filing comments, protests, and/or motions:* September 19, 2008.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and/or interventions may be filed electronically via the Internet in lieu of paper. Any questions, please contact the Secretary's Office. See, 18 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.

Please include the docket number (DI08–13–000) on any comments, protests, and/or motions filed.

k. *Description of Project:* The proposed run-of-river Tyrpin Micro Hydro Project will include: (1) A 2-to-4-inch, 1,500-foot-long pipe from an intake on an unnamed stream to a proposed powerhouse, containing a <10–kW generator; (2) a short tailrace, returning the water to the unnamed stream; and (3) appurtenant facilities. Power generated will be used on-site. The project will not be connected to an interstate grid.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* Copies of this filing are on file with the Commission and are available for public inspection. This filing may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link; select ''Docket#'' and follow the instructions. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3372, or TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene*: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*: Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTESTS'', AND/OR ''MOTIONS TO INTERVENE'', as applicable, and the Docket Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*: Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19681 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP08–401–000]

Columbia Gas Transmission Corporation; Notice of Request for Permission To Withdraw Tariff Filing

August 19, 2008.

Take notice that on August 15, 2008, Columbia Gas Transmission Corporation (Columbia) filed to request permission from the Commission to withdraw Columbia's proposed tariff sheets filed in the above-captioned docket on June 5, 2008. Columbia contends that good cause exists to justify such a withdrawal and that certain Columbia shippers have agreed to withdraw, without prejudice, their Natural Gas Act section 5 compliant in Docket No. RP08–403–000 regarding issues raised by the Columbia filing.

Any person desiring to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 85.211 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. 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 the parties to the proceeding.

The Commission encourages electronic submission of protests 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 original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filing in the above proceeding is 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. For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 27, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–19680 Filed 8–25–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2008–0648; FRL–8708–7]

Board of Scientific Counselors (BOSC), Executive Committee Meeting—September 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) Executive Committee.

DATES: The meeting will be held on Thursday, September 18, 2008, from 2 p.m. to 5:15 p.m., and will continue on Friday, September 19, 2008, from 9 a.m. until 3:30 p.m. All times noted are Eastern Standard Time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to one business day before the meeting.

ADDRESSES: The meeting will be held at the Key Bridge Marriott, 401 Lee Highway, Arlington, Virginia 22209. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2008–0648, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2008–0648.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2008–0648.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC), Executive Committee Meeting—September 2008 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0648.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2008–0648. Note: this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0648. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Board of Scientific Counselors (BOSC), Executive Committee Meeting—September 2008 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Lorelei Kowalski, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–3408; via fax at: (202) 565–2911; or via e-mail at: *kowalski.lorelei@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Lorelei Kowalski, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to: ORD responses to the BOSC Science and Technology for Sustainability program review report, BOSC Human Health Risk Assessment program review report, and BOSC National Center for Environmental Research letter report; Executive Committee review of the Homeland Security Subcommittee and Land Mid-Cycle Subcommittee draft reports; update on the BOSC mid-cycle review subcommittees (Water Quality and Science and Technology for Sustainability); update on the BOSC

program review subcommittees (Human Health and Endocrine Disrupting Chemicals); update on the BOSC standing subcommittees (National Center for Environmental Research and National Exposure Research Lab); discussions on: (1) ORD efficiency measures, and (2) ORD and Value of Information; briefing on ORD's biofuels program; update on BOSC workgroups; an ORD update; an update on EPA's Science Advisory Board activities; and future issues and plans. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Lorelei Kowalski (202) 564–3408 or *kowalski.lorelei@epa.gov.* To request accommodation of a disability, please contact Lorelei Kowalski, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated August 19, 2008.

Fred Hauchman,

Director, Office of Science Policy.

[FR Doc. E8–19757 Filed 8–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8708–2]

Notice of Expert Peer Review Meeting of the Draft Demonstration of Alternative Asbestos Control Method Demolition for Two Asbestos-Containing Buildings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of external peer review meeting.

SUMMARY: EPA is announcing that Versar, Inc., an EPA contractor for external peer review, has convened a panel of experts and will conduct an independent expert peer meeting September 11–12, 2008, to review the two draft documents titled, Evaluation of the Alternative Asbestos Control Method at Site Two (AACM2) for Demolition of Asbestos-Containing Buildings, and Evaluation of the Alternative Asbestos Control Method at Site Three (AACM3) for Demolition of Asbestos-Containing Buildings. These reports were prepared by EPA's Office of Research and Development (ORD) and are available through docket ID number EPA–HQ–ORD–2008–0523 located at *http://www.regulations.gov* and through *http://www.epa.gov/region6/6xa/asbestos.* Versar, Inc. invites the public to register to attend this meeting as observers. The public release of these draft documents is solely for the purpose of seeking public comment and external peer review, and these draft reports do not represent and should not be construed to represent any EPA policy, viewpoint, or determination.

DATES: The external peer review panel meeting will be September 11–12, 2008, and begin at 9 a.m. and end by 5 p.m. each day.

ADDRESSES: The independent expert external peer review meeting will be held at the U.S. Environmental Protection Agency's National Risk Management Research Laboratory, located at 26 West Martin Luther King Drive, Cincinnati, OH. Members of the public may attend the meeting as observers and there will be a limited time set aside for comments from the public each day. Pre-registration is strongly recommended as space is limited and reservations will be accepted on a first-come-first-served basis. To attend this meeting, register by September 8, 2008, by visiting *http://epa.versar.com/aacm* or contact Ms. Kathy Coon of Versar, Inc., 6850 Versar Center, Springfield, VA, 22151, at 703–750–3000, and via e-mail at *saundkat@Versar.com.* You will be asked for your name, contact information, the organization you represent, and your title. If space allows, telephone and fax registrations will continue to be accepted after this date, including on-site registration. Please indicate if you intend to make an oral statement during the public comment period at the meeting, which will be limited to a maximum of five minutes per commenter.

SUPPLEMENTARY INFORMATION: EPA is submitting the draft reports for independent, external scientific and technical peer review. The draft reports provide the documentation and scientific evaluation of the environmental effectiveness of the draft AACM protocol as a possible alternative technology in controlling multimedia asbestos emissions during demolition of asbestos-containing buildings, as required by the existing Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP). The draft AACM demolition protocol was used on two separate buildings. One building contained NESHAP-regulated quantities of asbestos-containing transite siding and the second building contained NESHAP-regulated quantities of asbestos-containing popcorn ceiling and wall surfacing material. In addition to assessing the environmental effectiveness of the draft AACM technology, these two draft reports assess the costs and time requirements of the application of the AACM protocol in these situations, as well as document lessons learned in each instance. The public release of these draft documents is solely for the purpose of seeking public comment and peer review, and does not represent and should not be construed to represent any EPA policy, viewpoint, or determination.

Dated: August 20, 2008.

M. Dannel,

Acting Director, Office of Science Policy, Office of Research and Development.

[FR Doc. E8–19750 Filed 8–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8708–3]

National Advisory Council for Environmental Policy and Technology

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, Public Law 92463, EPA gives notice of a public teleconference of the National Advisory Council for Environmental Policy and Technology (NACEPT). NACEPT provides advice to the EPA Administrator on a broad range of environmental policy, technology, and management issues. The Council represents diverse interests from academia, industry, non-governmental organizations, and local, state, and tribal governments. The purpose of this teleconference is to discuss and approve draft NACEPT recommendations on Encouraging Regional Solutions to Sustaining Water Sector Utilities and Integrated Modeling for Integrated Environmental Decision Making. A copy of the agenda for the meeting will be posted at *http://www.epa.gov/ocem/nacept/cal-nacept.htm.*

DATES: NACEPT will hold a public teleconference on Tuesday, September 16, 2008, from 2 p.m.–4 p.m. Eastern Daylight Time.

ADDRESSES: The meeting will be held in the U.S. EPA East Building, 1201 Constitution Ave, NW., Room 1132, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Sonia Altieri, Designated FederalOfficer, *altieri.sonia@epa.gov*, (202) 564–0243, U.S. EPA, Office of Cooperative Environmental Management (1601M),

1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or to provide written comments to the Council should be sent to Sonia Altieri, Designated Federal Officer, at the contact information above by Friday, September 12, 2008. The public is welcome to attend all portions of the meeting, but seating is limited and is allocated on a first-come, first-serve basis. Members of the public wishing to gain access to the conference room on the day of the meeting must contact Sonia Altieri at (202) 564–0243 or *altieri.sonia@epa.gov* by September 12, 2008.

Meeting Access: For information on access or services for individuals with disabilities, please contact Sonia Altieri at (202) 564–0243 or *altieri.sonia@epa.gov*. To request accommodation of a disability, please contact Sonia Altieri, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: August 14, 2008.

Sonia Altieri,

Designated Federal Officer.

[FR Doc. E8–19748 Filed 8–25–08; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

[BM–14–AUG–08–03]

Equal Employment Opportunity and Diversity

AGENCY: Farm Credit Administration.

ACTION: Policy statement.

SUMMARY: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), has updated and reaffirmed at its regular August Board meeting a policy statement on equal employment opportunity and diversity. The policy statement provides guidance to management and staff on addressing affirmative employment and diversity, workplace harassment, the disabled veterans affirmative action program, and the delineation of responsibilities for implementing the Agency's equal employment opportunity and diversity programs.

DATES: *Effective Date:* August 14, 2008.

FOR FURTHER INFORMATION CONTACT: Jeff McGiboney, Equal Employment Opportunity Director, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4353, TTY (703) 883–4056; or

Jennifer Cohn, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: The text of the Board's policy statement on equal employment opportunity programs and diversity is set forth below in its entirety.

Policy Statement on Equal Employment Opportunity Programs and Diversity

BM–14–AUG–08–03

FCA–PS–62

Effective Date: August 14, 2008.

Effect on Previous Action: Updates FCA–PS–62 [BM–13–JUL–06–03] (71 FR 46481, 8/14/2006) 7–13–06.

Sources of Authority: Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*); Age Discrimination in Employment Act (29 U.S.C. 621 *et seq.*); Rehabilitation Act of 1973, as amended (29 U.S.C. 721 *et seq.*); Equal Pay Act of 1974 (29 U.S.C. 206(d)); Civil Service Reform Act of 1978 (5 U.S.C. 3112); Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (NO FEAR Act) (5 U.S.C. 2301); section 5.9 of the Farm Credit Act of 1971, as amended (12 U.S.C. 2243); Executive Order 11478 (Equal Employment Opportunity in the Federal Government), as amended by Executive Orders 13087 and 13152 to include prohibitions on discrimination based on sexual orientation and status as a parent; Executive Order 13145 (prohibits discrimination in Federal employment based on genetic information); Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency); 29 CFR part 1614; Equal Employment Opportunity Commission Management Directives.

Purpose

The Farm Credit Administration (FCA or Agency) Board reaffirms its commitment to Equal Employment Opportunity (EEO) and Diversity (EEOD) and its belief that all FCA employees should be treated with dignity and respect. The Board also provides guidance to Agency management and staff for deciding and taking action in these critical areas.

Importance

Unquestionably, the employees who comprise the FCA are its most important resource. The Board fully recognizes that the Agency draws its strength from the dedication, experience, and diversity of its employees. The Board is firmly committed to taking whatever steps are needed to protect the rights of its staff and to carrying out programs that foster the development of each employee's potential. We believe an investment in efforts that strongly promote EEOD will prevent the conflict and the high costs of correction for taking no, or inadequate, action in these areas.

The Farm Credit Administration (FCA) Board Adopts the Following Policy Statement:

It is the policy of the FCA to prohibit discrimination in Agency policies, program practices, and operations. Employees, applicants for employment, and members of the public who seek to take part in FCA programs, activities, and services will be treated fairly. FCA, under the appropriate laws and regulations, will:

- Ensure equal employment opportunity based on merit and qualification, without discrimination because of race, color, religion, sex, age, national origin, disability, sexual orientation, status as a parent, genetic information, or participation in discrimination or harassment complaint proceedings;
- Provide for the prompt and fair consideration of complaints of discrimination;
- Make reasonable accommodations for qualified applicants for employment and employees with physical or mental disabilities under law;
- Provide an environment free from harassment to all employees;
- Create and maintain an organizational culture that recognizes, values, and supports employee and public diversity and inclusion;
- Develop objectives within the Agency's operation and strategic planning process to meet the goals of EEOD and this policy;
- Implement affirmative programs to carry out this policy within the Agency; and
- To the extent practicable, seek to encourage the Farm Credit System to continue its efforts to promote and increase diversity.

Diversity and Inclusion

The FCA intends to be a model employer. That is, as far as possible, FCA will build and maintain a workforce that reflects the rich diversity of individual differences evident throughout this Nation. The Board views individual differences as complementary and believes these differences enrich our organization. When individual differences are respected, recognized, and valued, diversity becomes a powerful force that can contribute to achieving superior results. Therefore, we will create, maintain, and continuously improve on

an organizational culture that fully recognizes, values, and supports employee diversity. The Board is committed to promoting and supporting an inclusive environment that provides to all employees, individually and collectively, the chance to work to their full potential in the pursuit of the Agency's mission. We will provide everyone the opportunity to develop to his or her fullest potential. When a barrier to someone achieving this goal exists, we will strive to remove this barrier.

Affirmative Employment

The Board reaffirms its commitment to ensuring FCA conducts all of its employment practices in a nondiscriminatory manner. The Board expects full cooperation and support from everyone associated with recruitment, selection, development, and promotion to ensure such actions are free of discrimination. All employees will be evaluated on their EEOD achievements as part of their overall job performance. Though staff commitment is important, the role of supervisors is paramount to success. Agency supervisors must be coaches and are responsible for helping all employees develop their talents and give their best efforts in contributing to the mission of the FCA.

Workplace Harassment

It is the policy of the FCA to provide a work environment free from unlawful discrimination in any form, and to protect all employees from any form of harassment, either physical or verbal. The FCA will not tolerate harassment in the workplace for any reason. The FCA also will not tolerate retaliation against any employee for reporting harassment or for aiding in any inquiry about reporting harassment.

Disabled Veterans Affirmative Action Program (DVAAP)

A disabled veteran is defined as someone who is entitled to compensation under the laws administered by the Veterans Administration or someone who was discharged or released from active duty because of a service-connected disability.

The FCA is committed to increasing the representation of disabled veterans within its organization. Our Nation owes a debt to those veterans who served their country, especially those who were disabled because of service. To honor these disabled veterans, the FCA shall place emphasis on making vacancies known to and providing opportunities for employing disabled veterans.

Responsibilities

The Chairman and Chief Executive Officer (CEO) is ultimately responsible for developing and carrying out all EEOD requirements and initiatives in accordance with laws and regulations to fulfill diversity initiatives in approved program plans.

To help in fulfilling these responsibilities the CEO, or designee, will fill the following positions:

- EEO Director and, as appropriate, EEO Coordinator(s);
- Special Emphasis Program Managers required by law or regulation;
- EEO Counselors; and
- EEO Investigators.

Persons in these positions will perform their duties as specified by the CEO or designee and as required by law or regulation. The Head of each Agency office will provide to these persons on an as needed basis upon request from the EEO Director.

The CEO or EEO Director may also establish standing committees to deal with specific issues as they arise.

Adopted this 14th day of August 2008 by Order of the Board.

Dated: August 14, 2008.

Roland E. Smith,

Secretary,Farm Credit Administration Board.

[FR Doc. E8–19658 Filed 8–25–08; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Approved by the Office of Management and Budget

August 18, 2008.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Leslie Haney, *Leslie.Haney@fcc.gov,* (202) 418–1002.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1080.

OMB Approval Date: August 1, 2008.

Expiration Date: August 31, 2011.

Title: Collection for the Prevention or Elimination of Interference and for the Reconfiguration of the 800 MHz Band.

Form No.: Not applicable.

Estimated Annual Burden: 6,269 responses; 4.5104 hours per response; 28,276 hours total per year.

Obligation to Respond: Required to Obtain or Retain Benefits.

Nature and Extent of Confidentiality: The Commission will work with respondents to ensure that their concerns regarding the confidentiality of any proprietary or public safety-sensitive information are resolved in a manner consistent with the Commission's rules. See 47 CFR 0.459.

Needs and Uses: The information sought will assist 800 MHz licensees in preventing or resolving interference and enable the Commission to implement its rebanding program. Under that program, certain licensees are being relocated to new frequencies in the 800 MHz band, with all rebanding costs to be paid by Sprint Nextel Corporation (Sprint). The Commission's overarching objective in this proceeding is to eliminate interference to public safety communications. The Commission's orders provided for the 800 MHz licensees in non-border areas to complete rebanding by June 26, 2008. This collection is being revised to incorporate the waiver request information collection previously approved under OMB control number 3060–1114.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–19650 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Approved by the Office of Management and Budget

August 18, 2008.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it

displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Leslie Haney, *Leslie.Haney@fcc.gov,* (202) 418–1002.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0207.

OMB Approval Date: August 8, 2008.

Expiration Date: August 31, 2011.

Title: Part 11—Emergency Alert System.

Form No.: Not applicable.

Estimated Annual Burden: 3,533,196 responses; 0.0227035 hours per response; 80,216 hours total per year.

Obligation to Respond: Mandatory (47 CFR Part 11).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: In the Second Report and Order and Further Notice of Proposed Rulemaking in EB Docket No. 04–296, FCC 07–109, the Commission adopts rules that require states to file new EAS plans with the Commission under certain circumstances, expand the number of private entities covered by EAS, and impose new obligations on private entities. The rules require EAS participants to maintain and keep immediately-available a copy of the EAS operating handbook at normal duty positions or EAS equipment locations; requires state and local EAS plans to be reviewed and approved by the Chief, Public Safety and Homeland Security Bureau prior to implementation; requires manufacturers to include instructions and information on the proper installation, operation and programming of an EAS Encoder, EAS Decoder, or combined unit and a list of all State and county FIPS numbers with each unit sold or marketed in the U.S.; require appropriate logs be kept regarding EAS testing and EAS Decoder malfunctions; allow all EAS participants to submit a written request to the FCC asking to be a Non-Participating National source; require communications common carriers participating in the national level EAS and rendering free service to file semiannual reports on the free service; require entities wishing to voluntarily participate in the national level EAS to submit a written request to the FCC; require written agreements between broadcast stations and cable or wireless cable systems on election not to interrupt EAS messages; require a waiver request be made to the FCC if EAS sources cannot be received and alternate arrangements cannot be made; impose a disclosure requirement on SDARS licensees or DBS providers that are not able to transmit state and local EAS messages; and require logging of various events and tests.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–19656 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2008–0011]

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket OTS–2008–0006]

Joint Report: Differences in Accounting and Capital Standards Among the Federal Banking Agencies; Report to Congressional Committees

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (FRB); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Report to the Congressional Committees.

SUMMARY: The OCC, the FRB, the FDIC, and the OTS (the agencies) have prepared this report pursuant to section 37(c) of the Federal Deposit Insurance Act. Section 37(c) requires the agencies to jointly submit an annual report to the Committee on Financial Services of the United States House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the United States Senate describing differences between the capital and accounting standards used by the agencies. The report must be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

OCC: Paul Podgorski, Risk Expert, Capital Policy (202–874–4755), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

FRB: John F. Connolly, Senior Project Manager (202–452–3621) or Brendan Burke, Senior Financial Analyst (202–452–2987), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

FDIC: Robert F. Storch, Chief Accountant (202–898–8906), Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Christine A. Smith, Project Manager (202–906–5740), Supervision Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The text of the report follows:Report to the Committee on Financial Services of the United States House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the United States SenateRegarding Differences in Accounting andCapital Standards Among the Federal Banking Agencies

Introduction

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (''the federal banking agencies'' or ''the agencies'') must jointly submit an annual report to the Committee on Financial Services of the U.S. House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate describing differences between the accounting and capital standards used by the agencies. The report must be published in the **Federal Register**.

This report, which covers differences existing as of December 31, 2007, is the sixth joint annual report on differences in accounting and capital standards to be submitted pursuant to section 37(c) of the Federal Deposit Insurance Act (12 U.S.C. 1831n(c)), as amended. Prior to the agencies' first joint annual report, section 37(c) required a separate report from each agency.

Since the agencies filed their first reports on accounting and capital differences in 1990, the agencies have acted in concert to harmonize their accounting and capital standards and eliminate as many differences as possible. Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803) also directed the agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. The results of

these efforts must be ''consistent with the principles of safety and soundness, statutory law and policy, and the public interest.'' In recent years, the agencies have revised their capital standards to address changes in credit and certain other risk exposures within the banking system and to align the amount of capital institutions are required to hold more closely with the credit risks and certain other risks to which they are exposed. These revisions have been made in a uniform manner whenever possible and practicable to minimize interagency differences.

While the differences in capital standards have diminished over time, a few differences remain. Some of the remaining capital differences are statutorily mandated. Others were significant historically but now no longer affect in a measurable way, either individually or in the aggregate, institutions supervised by the federal banking agencies.

In addition to the specific differences in capital standards noted below, the agencies may have differences in how they apply certain aspects of their rules. These differences usually arise as a result of case-specific inquiries that have only been presented to one agency. Agency staffs seek to minimize these occurrences by coordinating responses to the fullest extent reasonably practicable. Furthermore, while the agencies work together to adopt and apply generally uniform capital standards, there are wording differences in various provisions of the agencies' standards that largely date back to each agency's separate initial adoption of these standards before 1990.

The federal banking agencies have substantially similar capital adequacy standards. These standards employ a common regulatory framework that establishes minimum leverage and risk-based capital ratios for all banking organizations (banks, bank holding companies, and savings associations). The agencies view the leverage and risk-based capital requirements as minimum standards, and most institutions are expected to operate with capital levels well above the minimums, particularly those institutions that are expanding or experiencing unusual or high levels of risk.

Furthermore, in December 2007, the federal banking agencies issued a new common risk-based capital adequacy framework, ''Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II'' [1]. The final rule requires some qualifying banking organizations, and permits other qualifying banking organizations, to use an advanced internal ratings-based approach to calculate regulatory credit risk capital requirements and advanced measurement approaches to calculate regulatory operational risk capital requirements. It describes the qualifying criteria for banking organizations required or seeking to operate under the new framework and the applicable risk-based capital requirements for banking organizations that operate under the framework. Because the agencies adopted a joint final rulemaking establishing a common framework, there are no differences among the agencies' Basel II rules. The risk-based capital differences described below have arisen under the agencies' Basel I-based risk-based capital standards.

The OCC, the FRB, and the FDIC, under the auspices of the Federal Financial Institutions Examination Council, have developed uniform Reports of Condition and Income (Call Reports) for all insured commercial banks and state-chartered savings banks. The OTS requires each OTS-supervised savings association to file the Thrift Financial Report (TFR). The reporting standards for recognition and measurement in the Call Reports and the TFR are consistent with U.S. generally accepted accounting principles (GAAP). Thus, there are no significant differences in regulatory accounting standards for regulatory reports filed with the federal banking agencies. Only one minor difference remains between the accounting standards of the OTS and those of the other federal banking agencies, and that difference relates to push-down accounting, as more fully explained below.

Differences in Capital Standards Among the Federal Banking Agencies

Financial Subsidiaries

The Gramm-Leach-Bliley Act (GLBA) establishes the framework for financial subsidiaries of banks.[2] GLBA amends the National Bank Act to permit national banks to conduct certain expanded financial activities through financial subsidiaries. Section 121(a) of the GLBA (12 U.S.C. 24a) imposes a number of conditions and requirements upon national banks that have financial subsidiaries, including specifying the treatment that applies for regulatory capital purposes. The statute requires that a national bank deduct from assets and tangible equity the aggregate amount of its equity investments in financial subsidiaries. The statute further requires that the financial subsidiary's assets and liabilities not be consolidated with those of the parent national bank for applicable capital purposes.

State member banks may have financial subsidiaries subject to all of the same restrictions that apply to national banks.[3] State nonmember banks may also have financial subsidiaries, but they are subject only to a subset of the statutory requirements that apply to national banks and state member banks.[4] Finally, national banks, state member banks, and state nonmember banks may not establish or acquire a financial subsidiary or commence a new activity in a financial subsidiary if the bank, or any of its insured depository institution affiliates, has received a less than satisfactory rating as of its most recent examination under the Community Reinvestment Act.[5]

The OCC, the FDIC, and the FRB adopted final rules implementing their respective provisions of Section 121 of GLBA for national banks in March 2000, for state nonmember banks in January 2001, and for state member banks in August 2001. GLBA did not provide new authority to OTS-supervised savings associations to own, hold, or

[1] 72 FR 69288, December 7, 2007.

[2] A national bank that has a financial subsidiary must satisfy a number of statutory requirements in addition to the capital deduction and deconsolidation requirements described in the text. The bank (and each of its depository institution affiliates) must be well capitalized and well managed. Asset size restrictions apply to the aggregate amount of the assets of all of the bank's financial subsidiaries. Certain debt rating requirements apply, depending on the size of the national bank. The national bank is required to maintain policies and procedures to protect the bank from financial and operational risks presented by the financial subsidiary. It is also required to have policies and procedures to preserve the corporate separateness of the financial subsidiary and the bank's limited liability. Finally, transactions between the bank and its financial subsidiary generally must comply with the Federal Reserve Act's (FRA) restrictions on affiliate transactions and the financial subsidiary is considered an affiliate of the bank for purposes of the anti-tying provisions of the Bank Holding Company Act. *See* 12 U.S.C. Section 5136A.

[3] *See* 12 U.S.C. Section 335 (state member banks subject to the ''same conditions and limitations'' that apply to national banks that hold financial subsidiaries).

[4] The applicable statutory requirements for state nonmember banks are as follows. The bank (and each of its insured depository institution affiliates) must be well capitalized. The bank must comply with the capital deduction and deconsolidation requirements. It must also satisfy the requirements for policies and procedures to protect the bank from financial and operational risks and to preserve corporate separateness and limited liability for the bank. Further, transactions between the bank and a subsidiary that would be classified as a financial subsidiary generally are subject to the affiliate transactions restrictions of the FRA. *See* 12 U.S.C. Section 1831w.

[5] *See* 12 U.S.C. Section 1841(l)(2).

operate financial subsidiaries, as defined.

Subordinate Organizations Other Than Financial Subsidiaries

Banks supervised by the OCC, the FRB, and the FDIC generally consolidate all significant majority-owned subsidiaries other than financial subsidiaries for regulatory capital purposes. For subsidiaries other than financial subsidiaries that are not consolidated on a line-for-line basis for financial reporting purposes, joint ventures, and associated companies, the parent banking organization's investment in each such subordinate organization is, for risk-based capital purposes, deducted from capital or assigned to the 100 percent risk-weight category, depending upon the circumstances. The FRB's and the FDIC's rules also permit the banking organization to consolidate the investment on a pro rata basis in appropriate circumstances.

Under the OTS's capital regulations, a statutorily mandated distinction is drawn between subsidiaries, which generally are majority-owned, that are engaged in activities that are permissible for national banks and those that are engaged in activities ''impermissible'' for national banks. Where subsidiaries engage in activities that are impermissible for national banks, the OTS requires the deduction of the parent's investment in these subsidiaries from the parent's assets and capital. If a subsidiary's activities are permissible for a national bank, that subsidiary's assets are generally consolidated with those of the parent on a line-for-line basis. If a subordinate organization, other than a subsidiary, engages in impermissible activities, the OTS will generally deduct investments in and loans to that organization.[6] If such a subordinate organization engages solely in permissible activities, the OTS may, depending upon the nature and risk of the activity, either assign investments in and loans to that organization to the 100 percent risk-weight category or require full deduction of the investments and loans.

Collateralized Transactions

The FRB and the OCC assign a zero percent risk weight to claims collateralized by cash on deposit in the institution or by securities issued or guaranteed by the U.S. Government, U.S. Government agencies, or the central governments of other countries that are members of the Organization for Economic Cooperation and Development (OECD). The OCC and the FRB rules require the collateral to be marked to market daily and a positive margin of collateral protection to be maintained daily. The FRB requires qualifying claims to be fully collateralized, while the OCC rule permits partial collateralization.

The FDIC and the OTS assign a zero percent risk weight to claims on qualifying securities firms that are collateralized by cash on deposit in the institution or by securities issued or guaranteed by the U.S. Government, U.S. Government agencies, or other OECD central governments. The FDIC and the OTS accord a 20 percent risk weight to such claims on other parties.

Noncumulative Perpetual Preferred Stock

Under the federal banking agencies' capital standards, noncumulative perpetual preferred stock is a component of Tier 1 capital. The capital standards of the OCC, the FRB, and the FDIC require noncumulative perpetual preferred stock to give the issuer the option to waive the payment of dividends and to provide that waived dividends neither accumulate to future periods nor represent a contingent claim on the issuer.

As a result of these requirements, if a bank supervised by the OCC, the FRB, or the FDIC issues perpetual preferred stock and is required to pay dividends in a form other than cash, e.g., stock, when cash dividends are not or cannot be paid, the bank does not have the option to waive or eliminate dividends, and the stock would not qualify as noncumulative. If an OTS-supervised savings association issues perpetual preferred stock that requires the payment of dividends in the form of stock when cash dividends are not paid, the stock may, subject to supervisory approval, qualify as noncumulative.

Equity Securities of Government-Sponsored Enterprises

The FRB, the FDIC, and the OTS apply a 100 percent risk weight to equity securities of government-sponsored enterprises (GSEs), other than the 20 percent risk weighting of Federal Home Loan Bank stock held by banking organizations as a condition of membership. The OCC applies a 20 percent risk weight to all GSE equity securities.

Limitation on Subordinated Debt and Limited-Life Preferred Stock

The OCC, the FRB, and the FDIC limit the amount of subordinated debt and intermediate-term preferred stock that may be treated as part of Tier 2 capital to 50 percent of Tier 1 capital. The OTS does not prescribe such a restriction. The OTS does, however, limit the amount of Tier 2 capital to 100 percent of Tier 1 capital, as do the other agencies.

In addition, for banking organizations supervised by the OCC, the FRB, and the FDIC, at the beginning of each of the last five years of the life of a subordinated debt or limited-life preferred stock instrument, the amount that is eligible for inclusion in Tier 2 capital is reduced by 20 percent of the original amount of that instrument (net of redemptions). The OTS provides thrifts the option of using either the discounting approach used by the other federal banking agencies, or an approach which, during the last seven years of the instrument's life, allows for the full inclusion of all such instruments, provided that the aggregate amount of such instruments maturing in any one year does not exceed 20 percent of the thrift's total capital.

Tangible Capital Requirement

Savings associations supervised by the OTS, by statute, must satisfy a 1.5 percent minimum tangible capital requirement. Other subsequent statutory and regulatory changes, however, imposed higher capital standards rendering it unlikely, if not impossible, for the 1.5 percent tangible capital requirement to function as a meaningful regulatory trigger. This statutory tangible capital requirement does not apply to institutions supervised by the OCC, the FRB, or the FDIC.

Market Risk Rules

In 1996, the OCC, the FRB, and the FDIC adopted rules requiring banks and bank holding companies with significant exposure to market risk to measure and maintain capital to support that risk. The OTS did not adopt a market risk rule because no OTS-supervised savings association engaged in the threshold level of trading activity addressed by the other agencies' rules. As the nature of many savings associations' activities has changed since 1996, market risk has become an increasingly more significant risk factor to consider in the capital management process. Accordingly, the OTS has joined the other agencies in proposing a revised market risk rule.[7]

Pledged Deposits, Nonwithdrawable Accounts, and Certain Certificates

The OTS's capital regulations permit mutual savings associations to include

[6] *See* 12 CFR Section 559.2 for the OTS's definition of subordinate organization.

[7] 71 FR 55958 (September 25, 2006).

in Tier 1 capital pledged deposits and nonwithdrawable accounts to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods. The OTS also permits the inclusion of net worth certificates, mutual capital certificates, and income capital certificates complying with applicable OTS regulations in savings associations' Tier 2 capital. In the aggregate, however, these deposits, accounts, and certificates are only a negligible amount, if any, of the Tier 1 or Tier 2 capital of OTS-supervised savings associations. The OCC, the FRB, and the FDIC do not expressly address these instruments in their regulatory capital standards, and they generally are not recognized as Tier 1 or Tier 2 capital components.

Covered Assets

The OCC, the FRB, and the FDIC generally place assets subject to guarantee arrangements by the FDIC or the former Federal Savings and Loan Insurance Corporation in the 20 percent risk-weight category. The OTS places these ''covered assets'' in the zero percent risk-weight category. In the aggregate, the amount of covered assets in OTS-supervised savings associations is negligible.

Differences in Accounting Standards Among the Federal Banking Agencies

Push-Down Accounting

Push-down accounting is the establishment of a new accounting basis for a depository institution in its separate financial statements as a result of the institution becoming substantially wholly owned. Under push-down accounting, when a depository institution is acquired in a purchase, yet retains its separate corporate existence, the assets and liabilities of the acquired institution are restated to their fair values as of the acquisition date. These values, including any goodwill, are reflected in the separate financial statements of the acquired institution, as well as in any consolidated financial statements of the institution's parent.

The OCC, the FRB, and the FDIC require the use of push-down accounting for regulatory reporting purposes when an institution's voting stock becomes at least 95 percent owned by an investor or a group of investors acting collaboratively. This approach is generally consistent with accounting interpretations issued by the staff of the Securities and Exchange Commission. The OTS requires the use of push-down accounting when an institution's voting stock becomes at least 90 percent owned by an investor or investor group.

Dated: July 31, 2008.

John C. Dugan,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System. August 20, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

Dated at Washington, DC, this 18th day of August, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: July 24, 2008.

By the Office of Thrift Supervision.

John M. Reich,

Director.

[FR Doc. E8–19676 Filed 8–25–08; 8:45 am]

BILLING CODES 4810–33–P (25%), 6210–01–P (25%), 6714–01–P (25%), 6720–01–P (25%)

FEDERAL RESERVE SYSTEM

Government in the Sunshine; Meeting Notice

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Tuesday, September 2, 2008.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: August 22, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–19908 Filed 8–22–08; 4:15 pm]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

Multiple Award Schedule Advisory Panel; Notification of Public Advisory Panel Meetings

AGENCY: U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The U.S. General Services Administration (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, will hold public meetings on the following dates: Friday, September 19, 2008; Monday, September 22, 2008; Monday, October 6, 2008; and Monday, October 27, 2008. GSA utilizes the MAS program to establish long-term Governmentwide contracts with responsible firms to provide Federal, State, and local government customers with access to a wide variety of commercial supplies (products) and services.

The MAS Panel was established to develop advice and recommendations on MAS program pricing policies, provisions, and procedures in the context of current commercial pricing practices. For the next 3 to 4 meetings, the Panel plans to focus on developing recommendations for MAS program pricing provisions for the acquisition of (1) professional services; (2) products; (3) total solutions which consist of professional services and products; and (4) non professional services. In developing the recommendations, the Panel will, at a minimum, address these 5 questions for each of the 4 types of acquisitions envisioned above: (1) Where does competition take place?; (2) If competition takes place primarily at the task/delivery order level, does a fair and reasonable price determination at the MAS contract level really matter?; (3) If the Panel consensus is that competition is at the task order level, are the methods that GSA uses to determine fair and reasonable prices and maintain the price/discount relationship with the basis of award customer(s) adequate?; (4) If the current policy is not adequate, what are the recommendations to improve the policy/guidance; and (5) If fair and reasonable price determination at the MAS contract level is not beneficial and the fair and reasonable price determination is to be determined only

at the task/delivery order level, then what is the GSA role?

To that end, the Panel would like to hear from the many stakeholders of the MAS program. The MAS program stakeholders include, but not limited to, ordering agency contracting officers, GSA contracting officers, schedule contract holders, Congress, program managers, General Accountability Office, and federal agency Inspector General Offices. The panel is particularly interested in stakeholder views as to how the issues discussed above may relate differently to the purchase of goods, services, or goods and services that are configured to propose an integrated solution to an agency's needs. September 19, 2008, is the last date that the Panel will entertain oral comments. Written comments may be submitted at any time in accordance with the guidance below.

I. Acquisition of Services and Solutions Discussion and Recommendations

Discussions will take place on Friday, September 19, 2008, and Monday, September 22, 2008. The meetings will be held at the American Institute of Architects (AIA) Building, 2nd Floor, 1725 New York Avenue, NW, Washington, DC. The building is located at the corner of 18th Street and New York Avenue, NW. Entrance to the building is on either 18th Street, or New York Avenue. The AIA is within walking distance of the Farragut North and Farragut West metro stops. The meeting start time for each day is 8:00 a.m., and it will adjourn no later than 5:00 p.m.

II. Acquisition of Products Discussion and Recommendations

Discussions will take place on Monday, October 6, 2008, and Monday, October 20, 2008.

Monday, October 6, 2008, Location & Address: The meeting will be held at the Jury's Washington Hotel, 1500 New Hampshire Avenue, NW, Washington, DC. The hotel is within walking distance from the Dupont Circle metro stop. The meeting start time is 9:00 a.m., and it will adjourn no later than 5:00 p.m.

Monday, October 27, 2008, Location and Address: The meeting will be held at the American Institute of Architects (AIA) Building, 2nd Floor, 1725 New York Avenue, NW., Washington, DC. The building is located at the corner of 18th Street and New York Avenue, NW. Entrance to the building is on either 18th Street or New York Avenue. The AIA is within walking distance of the Farragut North and Farragut West metro stops. The meeting start time is 9:00 a.m., and it will adjourn no later than 5:00 p.m.

For presentations before the Panel, the following guidance is provided:

Oral comments: September 19, 2008 is the last meeting date for oral comments. Requests to present oral comments at this meeting must be in writing (e-mail or fax) and received by the Designated Federal Official, Pat Brooks, at the below address ten (10) business days prior to the meeting date. Each individual or group requesting an oral presentation will be limited to a total time of five minutes. Speakers should bring at least 50 copies of their comments for distribution to the reviewers and public at the meeting.

Written Comments: Written comments must be received ten (10) business days prior to the meeting date so that the comments may be provided to the Panel for their consideration prior to the meeting. Comments should be supplied to Ms. Brooks at the address/contact information noted below in the following format: one hard copy with original signature and one electronic copy via email in Microsoft Word.

Subsequent meeting dates, locations, and times will be published at least 15 days prior to the meeting date.

FOR FURTHER INFORMATION CONTACT: Information on the Panel meetings, agendas, and other information can be obtained at *www.gsa.gov/masadvisorypanel* or you may contact Ms. Pat Brooks, Designated Federal Officer, Multiple Award Schedule Advisory Panel, U.S. General Services Administration, 2011 Crystal Drive, Suite 911, Arlington, VA 22205; telephone 703 605–3406, Fax 703 605–3454; or via e-mail at *mas.advisorypanel@gsa.gov*.

AVAILABILITY OF MATERIALS:

All meeting materials, including meeting agendas, handouts, public comments, and meeting minutes will be posted on the MAS Panel website at *www.gsa.gov/masadvisorypanel* or *www.gsa.gov/masap*.

MEETING ACCESS:

Individuals requiring special accommodations at any of these meetings should contact Ms. Brooks at least ten (10) business days prior to the meeting date so that appropriate arrangements can be made.

Dated: August 21, 2008.

David A. Drabkin,

Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

[FR Doc. E8–19772 Filed 8–25–08; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Determination Concerning a Petition to Add a Class of Employees to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice of a determination concerning a petition to add a class of employees at the Sandia National Laboratory—Livermore, Livermore, California, to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384q. On July 29, 2008, the Secretary of HHS determined that the following employees do not meet the statutory criteria for addition to the SEC as authorized under EEOICPA:

Department of Energy employees or its contractor or subcontractor employees who worked as x-ray technologists and materials scientists at Sandia National Laboratory—Livermore in the X-ray Diffraction and Fluorescence Laboratory, Building 913—Room 113 and Building 913—Room 128 from December 1, 1967 through December 31, 1990.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 1–800–CDC–INFO (1–800–232–4636) or directly at 1–513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

Dated: August 5, 2008.

Christine M. Branche,

Acting Director, National Institute for Occupational Safety and Health.

[FR Doc. E8–19732 Filed 8–25–08; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–08–08BM]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

An Examination of the Implementation of the Safe Dates Program Under Naturalistic Conditions—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The specific aims of this study are to conduct a survey that will allow for a greater understanding of the implementation of the Safe Dates program in a real-world context among parties that purchase the curriculum directly from the publisher (Hazelden Foundation), to describe circumstances leading up to the purchase decision, to examine the extent to which the program is implemented as designed and tested (i.e., with fidelity), and to identify circumstances that support or hinder high-fidelity implementation of this evidence-based dating violence prevention program. The proposed study presents a unique opportunity to directly gather information from curriculum purchasers and program implementers who typically are not involved in implementation research but who are likely to represent real-world implementers of evidence-based curricula.

There is an increasing trend for publishing houses to buy the rights to evidence-based curricula directly from the developer. However, little information exists to determine whether or not those who purchase the curricula implement it as intended. If not, then program benefits may not be achieved. This project will allow CDC to determine whether or not one evidence-based program, Safe Dates, is implemented as intended, and will inform CDC's efforts to facilitate the widespread but effective implementation of evidence-based curricula.

With support from the publishing company, the investigation will seek participation from an estimated 1,000 organizations and/or individuals who purchased the curriculum and who know about how it was implemented. A particular focus will be placed on investigating the extent to which the program, which includes 9 classroom sessions, a play, and a poster contest, was implemented with fidelity. This is important given that there is no evidence of program effectiveness if less than the full curriculum is delivered.

All data will be collected through Web-based questionnaires. The design of these questionnaires is informed by a theoretical model grounded in the organizational behavior, psychology and healthcare planning literatures that illuminates factors and processes expected to impact the decision to implement evidence-based programs and, also, the extent to which these programs are implemented with fidelity. Consequently, items included in the Web questionnaires are adapted from existing scales with known reliability. The questionnaires will include a section on characteristics of the purchasing organization, factors that lead to the decision to purchase the curriculum, and questions related to whether the program was implemented as intended.

A snowball sampling technique will be used to recruit survey respondents. First, an initial letter on CDC letterhead will be sent by the publisher to roughly 1,000 individuals known to have purchased the curriculum. This information is available from a mailing list kept by the publisher. Second, individuals on the mailing list will be asked to complete the survey and to provide contact information for other individuals known to have implemented the curriculum. And third, these individuals will be asked to complete the survey and provide other relevant contacts. The survey and lead letter will state on the opening screen that participation in the study is voluntary. Informed consent will be obtained from all participants prior to completing the surveys.

Roughly 1,000 lead letters will be mailed and it is expected 500 surveys will be completed.

There are no costs to respondents except their time to complete surveys.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Estimated number of respondents	Number of responses per respondent	Average burden per response (in hours)	Estimated total burden (in hours)
Web-survey	500	1	27/60	225
Total				225

Dated: August 18, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–19728 Filed 8–25–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–08BN]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information 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. Written comments should be received within 60 days of this notice.

Proposed Project

Voluntary Product Satisfaction and Usability Assessment—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Executive Order 12862 directs Federal agencies that provide services directly to the public to survey customers to determine the kind and quality of services they need and their level of satisfaction with existing services.

CDC releases a number of new products each year to its customers, a diverse group that includes health care providers, researchers, public health practitioners, policymakers, and the general public. The term product is broadly defined to include publications, Web pages, podcasts, e-cards, CD–ROMs, and videos. At present, there is no mechanism for evaluating whether these products are meeting customer needs.

CDC is requesting a 3-year generic clearance in order to better evaluate its products. Obtaining feedback from customers on a regular, on-going basis will help ensure that customers find CDC products to be useful. This type of evaluation will allow CDC to maximize the impact of its products which will ultimately benefit the public's health.

Methodology

The target audience will be limited to customers who request and receive CDC products. Customer participation in the evaluation is completely voluntary. Names of customers will not be collected. The only personal information collected will relate to professional discipline, job duties, and experience working with public health topics. No sensitive data (e.g., age, race, or gender) will be collected. The evaluation data will be collected using a combination of methodologies including:

1. *Response cards via mail:* Each product that is sent out will include a one page response card along with a self-addressed and stamped envelope. Customers can then voluntarily choose whether to return the response card.

2. *E-mail announcements:* Products are released to customers via an e-mail announcement that includes a link to the electronic version of the product plus a link to a Web-based evaluation. Customers can then voluntarily choose whether to complete the evaluation.

3. *Web-based assessments:* Products are available on-line in an electronic format. Each product Web page will include a link to a Web-based evaluation. Customers can then voluntarily choose whether to complete the evaluation.

The information being collected will not impose a cost burden on the respondents beyond that associated with their time to provide the required data.

ESTIMATED ANNUALIZED BURDEN HOURS

Evaluation method	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Response cards	50,000	1	1/60	8,333
E-mail Assessments	60,000	1	1/60	10,000
Web-Based Assessments	432,000	1	1/60	72,000
Total	542,000			90,333

Dated: August 18, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–19729 Filed 8–25–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request Proposed Projects

Title: Regional Partnership Grant (RPG) Program Data Collection.

OMB No.: New Collection.

Description: On September 30, 2007, the Administration for Children and Families (ACF), Children's Bureau, awarded multi-year grants to 53 regional partnership grantees (RPG5) to improve the safety, permanency and well-being of children affected by methamphetamine or other substance abuse who have been removed or are at-risk of removal from their homes. The Child and Family Services Improvement Act of 2006, the authorizing legislation for the RPG program, required that a set of performance indicators be established to periodically assess the grantees' progress on achieving outcomes. The legislation mandated that these performance indicators be developed through a consultative process involving ACS, the Substance Abuse and Mental Health Services Administration (SAMHSA), and representatives of the State or Tribal agencies who are members of the regional partnerships.

The final set of RPG performance indicators was approved by ACS and disseminated to the funded grantees in January 2008. It includes a total of 23 indicators across four outcome domains: Child/youth (9 indicators), adult (7 indicators), family/relationship (5 indicators), and regional partnership/service capacity (2 indicators). It also includes a core set of child and adult demographic elements that will provide important context needed to properly analyze, explain and understand the outcomes. No other national data collection measures these critical child, adult, family, and RPG outcomes specifically for these children and families. The data also will have significant implications for policy and program development for child well-being programs nationwide.

To minimize reporting burden, many of the data elements are already being collected by counties and States in order to report Federally mandated data for the Adoption and Foster Care Analysis and Reporting System (AFCARS), the Treatment Episode Data Set (TEDS) and the National Outcome Measures (NOMs); in addition, all States voluntarily submit data for the Federal National Child Abuse and Neglect Data System (NCANDS). Therefore, most child welfare data elements included in the RPG performance measures can be found in a State's automated case management system, which is often a Federally funded Statewide Automated Child Welfare Information System (SACWIS). If the State elects to implement a SACWIS, the system is expected to be a comprehensive automated case management tool that meets the needs of all staff involved in foster care and adoption case management. A SACWIS is required to support reporting of data to AFCARS semi-annually, and annually to NCANDS. AFCARS reports information on all children in foster care, while NCANDS reports information on State child maltreatment reports. TEDS admission and discharge data are collected by State substance abuse agencies according to their own information systems for monitoring substance abuse treatment admissions and transmitted monthly or quarterly to the SAMHSA contractor.

As a result of prior Federal government reporting requirements, States are already collecting several data elements needed by the RPGs. The RPGs can download information from these existing systems to obtain data to monitor their program outcomes, thereby reducing the amount of primary data collection needed.

Beginning in year two, grantees will submit a data file with their required indicator data, according to their final set of indicators, every six months.

Respondents: RPG Grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State, local, or Tribal Government	31	2	175.50	10,881
Private Sector	22	2	175.50	7,722

Estimated Total Annual Burden Hours: 18,603.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn*: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: August 18, 2008.

Janean Chambers,

Reports Clearance, Officer.

[FR Doc. E8–19562 Filed 8–25–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentored Clinical Scientist Development and Independent Scientist Awards.

Date: September 18–19, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Crystal City, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Rina Das, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892–7924, 301–435–0297, *dasr2@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: August 19, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–19671 Filed 8–25–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Heart, Lung, and Blood Advisory Council, September 9, 2008, 1 p.m. to 3 p.m., National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD, 20892 which was published in the **Federal Register** on July 31, 2008, FRE8–17517.

The meeting is open to the public from 1–1:30 p.m. and closed to the public from 1:30–3 p.m. The rest of the information remains the same.

Dated: August 19, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–19672 Filed 8–25–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health SciencesSpecial Emphasis Panel; Superfund Basic Research and Training Program Administrative Meeting.

Date: September 24, 2008.

Time: 2:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709 (telephone conference call).

Contact Person: Linda K Bass, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Natl Institute Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: Aug 19, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–19670 Filed 8–25–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer at (240) 276–1243.

Project: Drug Abuse Warning Network (OMB No. 0930–0078)—Revision

The Drug Abuse Warning Network (DAWN) is an ongoing data system that collects information on drug-related medical emergencies as reported from about 350 hospitals nationwide, and drug-related deaths as reported from 11 states with centralized Medical Examiner offices and 125 medical examiners/coroner jurisdictions (ME/C) in 32 metropolitan areas. DAWN provides national and metropolitan estimates of substances involved with drug-related emergency department (ED) visits; disseminates information about substances involved in deaths investigated by participating medical examiners and coroners (ME/Cs); tracks drug abuse patterns, trends, and the emergence of new substances; monitors post-market adverse drug incidents; assesses health hazards associated with the use of illicit, prescription, and over-the-counter drugs; and generates information for national and local drug abuse policy and program planning. DAWN data are used by Federal, State, and local agencies, as well as universities, pharmaceutical companies, and the media.

From 2009 to 2011, DAWN will continue to recruit hospitals in the 13 oversampled metropolitan areas and in the remainder of the U.S. in order to improve the precision of estimates, adding approximately 43 sampled hospitals that are currently not

participating. This additional recruitment is possible as the transition to the new sample is finalized. When hospitals from the old sample are phased out, they can be replaced with hospitals from the new sample. In 2009 and 2010, DAWN plans to recruit 2 States with centralized ME/C systems. To achieve full participation by ME/Cs in the metropolitan areas currently covered, DAWN plans to recruit approximately 20 more ME/Cs from the 13 metropolitan areas, and approximately 20 ME/Cs from metropolitan areas in the rest of the country. DAWN data are submitted electronically, using eHERS (electronic Hospital Emergency Reporting System) and eMERS (electronic Medical Examiner Reporting System). In most of the facilities participating in DAWN (83 percent of the EDs and 58 percent of the ME/C offices), data are collected by government contractor staff; these facilities are not included in the burden statement because the facility staff are not involved in data collection. The annual burden estimates for those EDs and ME/C offices that collect the data using their own staff are shown below. There will be minor editorial changes to both the ED and ME/C reporting forms to simplify reporting. On the ME/C reporting form, a data element for case narrative will be added. These changes are not anticipated to impact the overall burden.

ANNUALIZED REPORTING BURDEN FOR DAWN: 2009–2011

Activity	Number of respondents [1]	Estimated number of responses per respondent	Total responses	Estimated time per response (in minutes)	Total hour burden [2]
Emergency Departments					
ED Chart review	61	24,551	1,497,611	2.5	62,400
Case data entry	61	556	33,916	3	1,696
ED activity report	61	52	3,172	2	106
Subtotal	61				64,202
State Medical Examiners [1]					
Death investigation records review	6	3,099	18,594	4	1,240
Case data entry	6	338	2,028	3	101
ME/C activity report	6	104	624	2	21
Subtotal	6				1,362
Individual Medical Examiners/Coroners [1]					
Death investigation records review	84	1,097	92,148	4	6,143
Case data entry	84	89	7,476	3	374
ME/C activity report	84	52	4,368	2	146
Subtotal	84				6,663
TOTAL	151				72,227

[1] State MEs and some other ME/C offices report for multiple jurisdictions. For this reason, the number of respondents is smaller than the number of ME/C jurisdictions participating in DAWN.
[2] Row and column totals may differ due to rounding.

Written comments and recommendations concerning the proposed information collection should be sent by September 25, 2008 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: August 15, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–19483 Filed 8–25–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–290B, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–290B, Notice of Appeal to the Office of Administrative Appeals (AAO). OMB Control No. 1615–0095.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on May 21, 2008, at 73 FR 29527 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until September 25, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Information

and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *oira_submission@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0095 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, 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, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection*: Extension of an existing information collection.

(2) *Title of the Form/Collection*: Notice of Appeal to the Office of Administrative Appeals (AAO).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection*: Form I–290B. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract*: Primary: Individuals or households. The information collection required on the Form I–290B is necessary in order for USCIS to make a determination that the appeal or motion to reopen or reconsider meets eligibility requirements, and for the Administrative Appeals Office to adjudicate the merits of the appeal or motion to reopen or reconsider.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 30,000 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 15,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: August 20, 2008.

Sunday Aigbe,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–19698 Filed 8–25–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2453–08; DHS Docket No. USCIS–2008–0030]

RIN 1615–ZA70

Direct Mail Program for Submitting Form I–800A, Application for Determination of Suitability To Adopt a Child From a Convention Country, and Form I–800, Petition To Classify Convention Adoptee as an Immediate Relative

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) is expanding its Direct Mail Program to include Form I–800, Petition to Classify Convention Adoptee as an Immediate Relative, and Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country. Applicants must submit Forms I–800, I–800A, and all related supplements and forms to the USCIS Chicago Lockbox facility located in Illinois, for initial processing. Applicants were previously required to file at a USCIS field office with jurisdiction over their place of current residence. The Direct Mail Program allows USCIS to process applications more efficiently by eliminating duplicative work, maximizing staff productivity, and introducing better information management tools.

DATES: *Effective* September 25, 2008.

FOR FURTHER INFORMATION CONTACT: Lissette Kvortek, HQ Adjudications Officer, Office of Field Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, Telephone (202) 272–1001.

I. Background

A. What is The Hague Adoption Convention?

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) signed at The Hague, The Netherlands, on May 29, 1993, is a treaty that strengthens protections for children, birth parents, and prospective adoptive parent(s). It establishes internationally agreed upon rules and procedures for adoptions between countries that have a treaty relationship under the Hague Adoption Convention. It provides a framework for member countries to work together to ensure that children are provided with permanent, loving homes, that adoptions take place in the best interests of a child, and that the abduction, sale and trafficking in children is prevented. The President signed the instrument of ratification for the Hague Adoption Convention on November 16, 2007, and the Hague Adoption Convention entered into force for the United States on April 1, 2008. 72 FR 71730.

B. What is the Direct Mail Program?

Under the Direct Mail program, applicants for certain immigration benefits mail the designated application or petition directly to a U.S. Citizenship and Immigration Services (USCIS) Service Center or Lockbox facility instead of submitting it to their local USCIS office. USCIS has discussed the purpose and strategy of the Direct Mail program in detail in previous rules and notices. (See 59 FR 33903, 59 FR 33985, 60 FR 22408, 61 FR 2266, 61 FR 56060, 62 FR 16607, 63 FR 891, 63 FR 892, 63 FR 13434, 63 FR 13878, 63 FR 16828, 63 FR 50584, 63 FR 8688, 63 FR 8689, 64 FR 67323, 69 FR 3380, 69 FR 4210, 70 FR 30768, 72 FR 3402).

C. Which Hague Adoption Convention forms are affected by the Direct Mail Program?

You must now submit the following forms through the Direct Mail Program

to our Chicago Lockbox facility for initial processing:

- Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country.
- Form I–800A Supplement 1, Listing of Adult Member of the Household.
- Form I–800A Supplement 2, Consent to Disclose Information.
- Form I–800A Supplement 3, Request for Action on Approved Form I–800A.
- Form I–800, Petition to Classify Convention Adoptee as an Immediate Relative.
- Form I–800 Supplement 1, Consent to Disclose Information.

Interested individuals may find detailed information and eligibility requirements for Form I–800A and I–800 and their supplements and forms at the USCIS Web site: *http://www.uscis.gov.*

D. Does this notice affect any other Hague related forms that I may submit along with those listed above?

Yes, it affects Form I–601, Application for Waiver of Grounds of Inadmissibility, Form I–864 and Form I–864EZ, Affidavit of Support under section 213A of the Act, or Form I–864W, Intending Immigrant's Affidavit of Support Exemption, when filed in connection with a Hague Adoption Convention case. When submitted with a Form I–800 these forms must be filed beginning on September 25, 2008 with the USCIS Chicago Lockbox facility address listed below.

II. Explanation of Changes

A. Does this notice make any changes relating to the eligibility of a prospective adoptive parent's suitability to adopt a child from a convention country or changes to the eligibility of a convention adoptee to be classified as an immediate relative?

No. This Notice only changes the filing location for these applications. These forms, previously filed at USCIS offices world-wide, will now be filed under the Direct Mail Program at the USCIS Chicago Lockbox facility for initial processing.

B. Should I file Forms I–600A and/or I–600 under the new Direct Mail Program?

No. If you reside in the United States continue to file Form I–600A, Application for Advance Processing of Orphan Petition and Form I–600, Petition to Classify Orphan as an Immediate Relative, with the local USCIS office with jurisdiction over your place of residence. If you live outside the United States, you should consult the nearest American consulate or embassy for the overseas or stateside USCIS office designated to act on the application.

C. Will USCIS change the form instructions to Forms I–800A and I–800?

Yes. USCIS is currently amending the filing locations on the instructions to Forms I–800A and I–800, as well as the procedures listed on the USCIS Web site to reflect the new filing address.

D. If I live outside of the United States, can I file the Forms I–800A or I–800 at a USCIS overseas office, or an American consulate or embassy?

No. You must file Forms I–800A and I–800 at the USCIS Chicago Lockbox facility. Although 8 CFR 204.308(b) provides that Form I–800 may be filed at the visa-issuing post when permitted in the form's instructions, centralized processing affords more efficiency for both USCIS and prospective adoptive parents. Accordingly, you will need to file the Form I–800 at the USCIS Chicago Lockbox facility for centralized processing. USCIS will no longer permit filing the form elsewhere.

E. To what address should I mail Forms I–800A, I–800, and related supplements and forms?

Beginning on September 25, 2008, you must file Forms I–800A, I–800 and their supplements with all supporting documentation to the following address:

U.S. Citizenship and Immigration Services,
P.O. Box 805695,
Chicago, IL 60680–4118.

If you are also filing Hague related Forms I–601, I–864, I–864EZ, or I–864W with Form I–800, you must also send these forms to the above Lockbox address.

F. What will happen to incorrectly filed Forms I–800A, I–800, and related supplements and forms covered by this notice?

USCIS will forward forms filed incorrectly to the USCIS Chicago Lockbox facility address ONLY for the first 30 days following the effective date of this notice, including the filing of Hague related Forms I–601, I–864, I–864EZ, or I–864W, which are covered by this notice.

After the 30-day transition period, USCIS will return any Form I–800 or I–800A, and related supplements and forms, mailed to a USCIS office other than the USCIS Chicago Lockbox facility address to the applicant with an explanation directing the applicant to mail the application directly to the USCIS Chicago Lockbox facility address for processing.

G. Will the fees change with this notice?

No. The application fees will remain the same as provided on the form instructions for Forms I–800A and I–800.

H. Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements. The Office of Management and Budget (OMB) previously approved the use of these information collections. The OMB control numbers for Forms I–800 and I–800A are contained in 8 CFR 299.5, Display of control numbers. USCIS will provide the Office of Management and Budget (OMB) with a copy of the amended form and OMB 83C (Correction Worksheet) through the automated Regulatory Office Combined Information System (ROCIS).

Dated: July 21, 2008.

Jonathan R. Scharfen,

Acting Director, U.S. Citizenship and Immigration Services.

[FR Doc. E8–19723 Filed 8–25–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

National Customs Automation Program Test Concerning Automated Commercial Environment (ACE) Entry Summary, Accounts and Revenue

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces Customs and Border Protection's (CBP's) plan to conduct a National Customs Automation Program (NCAP) test concerning Automated Commercial Environment (ACE) Entry Summary, Accounts and Revenue (ESAR) capabilities. These new capabilities will include functionality specific to the filing and processing of formal consumption entries and informal entries. This entry summary processing will include Automated Broker Interface (ABI) Census Warning Overrides and issuance of certain CBP forms through the ACE Portal. Other new functionality will enhance Portal Account Management and allow for ACE Secure Data Portal reporting. In addition to announcing new functionality, this notice invites public comment concerning any aspect of the planned test, describes the eligibility, procedural, and documentation

requirements for voluntary participation in the test, and outlines the development and evaluation methodology to be used in the test. This notice will be referred to as the ESAR II Notice.

DATES: Comments on this notice and interest in participation in this planned test are requested by October 27, 2008.

ADDRESSES: Comments concerning this notice and indication of interest in participation in ESAR II should be submitted via e-mail to Janet Pence at *ESARinfoinbox@dhs.gov*. Please indicate ''ESAR II **Federal Register** Notice'' in the subject line of your e-mail.

FOR FURTHER INFORMATION CONTACT: For policy-related questions, please contact Cynthia Whittenburg at *cynthia.whittenburg@dhs.gov*. For technical questions that are non-ABI related, please contact Valarie Neuhart at (703) 650–3370. For technical questions related to ABI transmissions, please contact your assigned client representative. Interested parties without an assigned client representative should direct their questions to the Client Representative Branch at (703) 650–3500.

SUPPLEMENTARY INFORMATION:

Background

I. ACE Test Programs

A. ACE Portal Accounts

On May 1, 2002, the former U.S. Customs Service, now U.S. Customs and Border Protection (CBP), published a General Notice in the **Federal Register** (67 FR 21800) announcing a plan to conduct a National Customs Automation Program (NCAP) test of the first phase of the Automated Commercial Environment (ACE). The test was described as the first step toward the full electronic processing of commercial importations with a focus on defining and establishing an importer's account structure. The notice announced that importers and authorized parties would be allowed to access their customs data via a Web-based Account Portal. The notice set forth eligibility criteria for companies interested in establishing Account Portals accessible through ACE.

Subsequent General Notices revised the eligibility criteria (*see* General Notice published in the **Federal Register** on February 1, 2005 (67 FR 5199)) and expanded the universe of eligible participants in the ACE test and the types of ACE Portal Accounts. On February 4, 2004, CBP published two General Notices in the **Federal Register**, establishing ACE Truck Carrier Accounts and opening the application period for authorized importers and their designated brokers to participate in the NCAP test implementing the Periodic Monthly Statement (PMS) process (*see* 69 FR 5360 and 69 FR 5362, respectively). Brokers were invited to establish Broker Accounts in ACE in order to participate in the NCAP test to implement PMS. In both of the February 4, 2004 General Notices, CBP advised participants that they could designate only one person as the Account Owner for the company's ACE Portal Account. The Account Owner was identified as the party responsible for safeguarding the company's ACE Portal Account information, controlling all disclosures of that information to authorized persons, authorizing user access to the ACE Portal Account information, and ensuring the strict control of access by authorized persons to the ACE Portal information.

On September 8, 2004, CBP published a General Notice in the **Federal Register** (69 FR 54302) inviting customs brokers to participate in the ACE Portal test generally and informing interested parties that once they had been notified by CBP that their request to participate in the ACE Portal test had been accepted, they would be asked to sign and submit a Terms and Conditions document. CBP subsequently contacted those participants and asked them to also sign and submit an ACE Power of Attorney form and an Additional Account/Account Owner Information form.

B. Terms and Conditions for Access to the ACE Portal

On May 16, 2007, CBP published a General Notice in the **Federal Register** (72 FR 27632) announcing a revision of the terms and conditions that must be followed as a condition for access to the ACE Portal. These terms and conditions superseded and replaced the Terms and Conditions document previously signed and submitted to CBP by ACE Portal Trade Account Owners. The notice specified that no further action would be required by ACE Portal Trade Account Owners for those ACE Portal Accounts already established with CBP with the proper Account Owner listed. The principal changes to the ACE Terms and Conditions included a revised definition of ''Account Owner'' to permit either an individual or a legal entity to serve in this capacity, new requirements relating to providing notice to CBP when there has been a material change in the status of the Account and/or Trade Account Owner, and explanatory provisions as to how the information from a particular account may be accessed through the ACE Portal when that account is transferred to a new owner.

On July 7, 2008, CBP published a General Notice in the **Federal Register** (73 FR 38464) which revised the terms and conditions set forth in the May 16, 2007, notice regarding the period of Portal inactivity which will result in termination of access to the ACE Portal. The July 7, 2008, notice provided that if forty-five (45) consecutive days elapse without an Account Owner, Proxy Account Owner, or an Account user accessing the ACE Portal, access to the Portal will be terminated. The time period for allowable Portal inactivity previously was ninety (90) days.

C. ACE Non-Portal Accounts

CBP has also permitted certain parties to participate in specified ACE tests without establishing ACE Portal Accounts (''Non-Portal Accounts''). On October 24, 2005, CBP published a General Notice in the **Federal Register** (70 FR 61466) announcing that importers could establish ACE Non-Portal Accounts and participate in the PMS test under certain conditions. On March 29, 2006, CBP published another General Notice in the **Federal Register** (71 FR 15756) announcing that truck carriers that do not have ACE Truck Carrier Accounts may use third parties to transmit truck manifest information on their behalf electronically in the ACE Truck Manifest system via Electronic Data Interface (EDI) messaging.

D. New ACE Entry Summary, Accounts and Revenue (ESAR I) Capabilities

On October 18, 2007, CBP published a General Notice in the **Federal Register** (see 72 FR 59105) announcing CBP's plan to conduct a new test concerning ACE Entry Summary, Accounts and Revenue (ESAR) capabilities, providing enhanced account management functions for ACE Portal Accounts and expanding the universe of ACE account types. This General Notice is commonly referred to as ESAR I.

As stated in that notice, ACE is now the lead system for CBP-required master data elements (*e.g.*, company name, address, and point of contact) as well as related reference files (*e.g.*, country code, port code, manufacturer ID, and gold currency exchange rate and conversion calculator). *See* ACE Systems of Record Notice, published in the **Federal Register** on January 19, 2006 (71 FR 3109). This means that the creation and maintenance of specified master data elements will originate in ACE and will be distributed to other CBP systems such as the Automated Commercial System (ACS).

In addition to announcing that importer Portal Accounts are capable of creating and maintaining specified importer data via the ACE Portal, the notice stated that filers have the ability to create a new CBP Form 5106 (Importer ID Input Record) via the ACE Portal or the Automated Broker Interface (ABI), and view applicable Participating Government Agency (PGA) licenses, permits and certificates via the ACE Portal. Through this notice, Broker Portal Accounts were provided the capability through the ACE Portal of maintaining organizational demographic data (*e.g.*, addresses, points of contact, etc.), license and permit qualifiers, data on managing officials, employee lists, information on relationships to individual licensed brokers, points of contact and address information (at filer code level for each local broker permit and each port covered by the local permit, and for the national broker permit). Truck Carrier Portal Accounts were provided the capability through the ACE Portal to view any applicable PGA licenses, permits and certificates, and to maintain through the ACE Portal addresses and points of contact and pre-registered truck conveyance information, including equipment, shipper, and consignee data. Truck Carrier Portal Accounts were also provided with the ability to create and maintain driver accounts and search for and correlate existing driver accounts to their Carrier Account. Finally, the notice also announced the expansion of Portal Account Types to now include: Carriers (all modes: air, rail, sea); cartman; lighterman; driver/crew; facility operator; filer; foreign trade zone (FTZ) operator; service provider; and surety.

II. Test Concerning New ACE Entry Summary, Accounts and Revenue (ESAR II) Capabilities

A. In General

This document announces CBP's plan to conduct a new test concerning ACE Entry Summary, Accounts and Revenue (ESAR II) capabilities that will provide new Portal and EDI capabilities specific to Entry Summary filing and processing of consumption and informal entries. Functionality will include ABI Census Warning Overrides and issuance of CBP requests for information and notices of action through the ACE Portal. New functionality will enhance Portal Account Management and allow for ACE Secure Data Portal reporting.

Initially, this release of ESAR II will be limited only to formal entries, commonly referred to in the Automated Commercial System (ACS) as type 01 entries, and informal entries, commonly referred to in ACS as type 11 entries. Functionality for other entry types will be implemented as it becomes available and will be announced via subsequent publication in the **Federal Register**. Interested ABI participants wishing to submit type 01 and 11 entries for this test are asked to provide CBP with the number of expected ACE entry summaries that will be submitted to the ports listed in this notice within 60 days of publication of this notice (*see* Part IV below).

B. Portal Capability

1. Forms and Documents

CBP Forms 28, 29, and 4647 issued for ACE entry summaries will be posted to a participating importer's ACE Portal Account. Participating importer and broker ACE Portal Accounts may select a preferred method of communication with CBP with regard to the receipt of CBP Form 28, Request for Information, CBP Form 29, Notice of Action Taken, and CBP Form 4647, Notice to Mark and/or Notices to Redeliver, that are issued for ACE entry summaries. Communication may be done electronically through the Portal or by paper or via both methods. Additionally, an importer Portal Account whose entry summaries will be filed by an ACE test participant may respond to CBP forms through the ACE Secure Data Portal by interactively completing the form and uploading additional supporting documentation or images, as needed. Importers and/or participating test filers should also note that forms may be saved in draft form prior to submission to CBP. However, once sent, the document cannot be changed. A print option will also be available for those participants choosing to print the form and then mail it to CBP.

2. Declarations

Participating importer, broker, and carrier Portal Account types will be able to maintain certain declarations in the ACE Secure Data Portal. Those declarations may be communicated to CBP through that Portal. The system will not yet allow submission of these declarations for particular entry summaries, but will allow communication in response to CBP requests. Declarations that will be supported via the Portal include the following: Affidavits of manufacturers; North American Free Trade Agreement (NAFTA) Certificates of Origin; Non-Reimbursement Blanket Statements (Anti-Dumping/Countervailing Duty (AD/CVD)); certain marking rulings; and importer certifying statements.

3. Reports

ACE Secure Data Portal Reports will be enhanced to include ACE Entry Summary Data.

C. EDI Capability

1. Entry Summary

Approved trade participants may begin to file entry summaries electronically in ACE for entry types 01 and 11 using a better organized, more descriptive ACE ABI CATAIR (Customs and Trade Automated Interface Requirements) document. CATAIR documentation provides complete information describing how importers and/or their agents provide electronic import information to ABI, and receive transmissions from ABI once they have become a participant.

2. Cargo Release

Filers may also initiate cargo release from a certified entry summary filed in ACE.

3. Census Warnings

Census warnings may be electronically overridden for ACE entry summaries prior to or after receiving a Census warning message through ABI. There will also be an ACE Census Warning ABI Query for unresolved warnings. Interested parties should go to CBP.gov for more detailed information regarding these new ACE ABI CATAIR formats.

4. Automated Invoice Interface (AII) and Reconciliation

ACE entry summaries may be flagged for AII and reconciliation.

5. ABI Status Messages

The ACE Entry Summary Status Notification message will contain the following status information regarding an action CBP has manually executed for an ACE entry summary:

- Request for Electronic Invoice Data.
- Entry Summary Documentation.
- Entry Summary Reject.
- Entry Summary Inactivated.
- Entry Summary Canceled.

Interested parties should go to *CBP.gov* for more detailed information regarding these new ACE ABI CATAIR formats.

The ABI Status message will contain an Action Identification Number that is a unique number assigned by ACE to identify the specific action or request to correlate trade responses to the initial CBP request.

6. Reporting of the Ultimate Consignee Number

The ultimate consignee number must be reported for each entry summary *line*. When the importer of record and the ultimate consignee number are the same, the number must appear on each line; the word ''SAME'' may not be used.

III. Eligibility Requirements

Importer and broker volunteers wishing to benefit from Portal functionality available in this test must have an ACE Portal Account (*see* notices referenced above relating to the establishment of ACE Portal Accounts). Volunteers may also participate as Non-Portal Accounts, but they will not be able to avail themselves of all functionality offered.

ABI volunteers wishing to participate in this test must:

- File entries on a Statement, i.e., no non-statement, single pay entry summaries will be allowed.
- Use a software package that has completed ABI certification testing for ACE (NOTE: software providers need not reply to this Notice but should contact their client representative if they are interested in ABI certification testing for ACE).

All data submitted and entered into the ACE Portal is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except to the extent as otherwise provided by law (*see* 19 U.S.C. 1431(c)).

As stated in previous notices, participation in this or any of the previous ACE tests is not confidential and upon a written Freedom of Information Act request, a name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

If necessary, CBP will reserve the right to limit the number of participants and locations during the initial stages of the test.

IV. Implementation of the Test

This test of ESAR II capabilities will be conducted in a phased approach, with initial deployment scheduled for no earlier than January 23, 2009. In order to properly conduct this test, CBP invites interested trade ABI volunteers to provide comments to CBP with regard to the number of expected ACE entry summaries that will be submitted to each of the ports listed below. Interested ABI trade volunteers are to provide their comments to CBP within 60 days of publication of this notice. Based on comments received in response to this notice, CBP will publish a subsequent **Federal Register** notice setting forth the deployment schedule at dates to be announced for specified ports.

ABI trade volunteers interested in submitting type 01 and 11 entries for this test are asked to provide CBP with the number of expected ACE entry summaries that will be submitted to each of the locations listed below:

- Miami, Florida.
- New Orleans, Louisiana.
- Houston, Texas.
- Long Beach, California.
- Laredo, Texas.
- San Francisco, California.
- Seattle, Washington.
- Chicago, Illinois.
- El Paso, Texas.
- Boston, Massachusetts.
- San Diego, California.
- Newark, New Jersey.
- J.F.K. Airport, New York.
- Baltimore, Maryland.
- Philadelphia, Pennsylvania.
- Cleveland, Ohio.
- Tucson, Arizona.
- Tampa, Florida.
- Buffalo, New York.
- Detroit, Michigan.
- Atlanta, Georgia.

V. Waiver of Affected Regulations

Any provision in the CBP Regulations (title 19, Code of Federal Regulations), including but not limited to provisions found in parts 141, 142, 143 and 151, relating to entry/entry summary processing, invoicing, examination and redelivery of merchandise, that are inconsistent with the requirements set forth in this ESAR II Notice are waived for the duration of the test.

VI. Misconduct Under the Test

An ACE test participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages, and/or suspension from this test for any of the following:

- Failure to follow the terms and conditions of this test.
- Failure to exercise reasonable care in the execution of participant obligations.
- Failure to abide by applicable laws and regulations.
- Failure to deposit duties or fees in a timely manner.
- Misuse of the ACE Portal.
- Engagement in any unauthorized disclosure or access to the ACE Portal.
- Engagement in any activity which interferes with the successful evaluation of the new technology.

Suspensions for misconduct will be administered by the Executive Director, Commercial Targeting and Enforcement, Office of International Trade, CBP Headquarters. A notice proposing suspension will be provided in writing to the participant. Such notice will apprise the participant of the facts or conduct warranting suspension and will inform the participant of the date that the suspension will begin.

Any decision proposing suspension of a participant may be appealed in writing to the Assistant Commissioner, Office of International Trade, within 15 calendar days of the notification date. Should the participant appeal the notice of proposed suspension, the participant must address the facts or conduct charges contained in the notice and state how compliance will be achieved. In cases of non-payment, late payment, willful misconduct or where public health interests or safety is concerned, the suspension may be effective immediately.

VII. Test Evaluation Criteria

To ensure adequate feedback, participants are required to participate in an evaluation of this test. CBP also invites all interested parties to comment on the design, implementation and conduct of the test at any time during the test period. CBP will publish the final results in the **Federal Register** and the Customs Bulletin as required by 19 CFR 101.9(b).

The following evaluation methods and criteria have been suggested:

1. Baseline measurements to be established through data analysis.

2. Questionnaires from both trade participants and CBP addressing such issues as:

- Workload impact (workload shifts/volume, cycle times, etc.).
- Cost savings (staff, interest, reduction in mailing costs, etc.).
- Policy and procedure accommodation.
- Trade compliance impact.
- Problem resolution.
- System efficiency.
- Operational efficiency.
- Other issues identified by the participant group.

Dated: August 19, 2008.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. E8–19780 Filed 8–25–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Customs and Border Protection Trade Symposium 2008: ''Global Trade: Continuity Through Transition''

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of Trade Symposium.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will convene its annual trade symposium, featuring panel discussions involving department personnel, members of the trade community and other government agencies, on the agency's role in international trade initiatives and programs. Members of the international trade and transportation communities and other interested parties are encouraged to attend.

DATES: Wednesday, October 29, 2008 (opening remarks and panel discussions beginning at 1 p.m. and open forum with senior management (6 p.m.–8 p.m.)). Thursday, October 30, 2008 (panel discussions—8 a.m.–5 p.m.). Friday, October 31, 2008 (panel discussions ending by 1 p.m.).

ADDRESSES: The CBP Trade Symposium will be held at the JW Marriott, 1331 Pennsylvania Avenue, NW., Washington, DC. Upon entry into the building, take elevators downstairs to the ballroom level.

FOR FURTHER INFORMATION CONTACT: The Office of International Affairs and Trade Relations at (202) 344–1440, or at *traderelations@dhs.gov.* To obtain the latest information on the Symposium and to register on-line, visit the CBP Web site at *http://www.cbp.gov.* Requests for special needs should be sent to the Office of International Affairs and Trade Relations at *traderelations@dhs.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the Trade Symposium and the keynote speaker will be announced at a later date on the CBP Web site. The cost is $250.00 per person, and includes all Symposium activities. Interested parties are requested to register early, as space is limited. Registration will open to the public on or about September 2, 2008. All registrations must be made on-line at the CBP Web site (*http://www.cbp.gov*) and will be confirmed with payment by credit card only.

Consideration will be given, in a first come, first served order, based on space availability. Due to the overwhelming interest to attend the Symposium, each company is requested to limit their company's registrations to three participants, in order to afford equal representation from all members of the international trade community. If a company exceeds the limitation, any additional names submitted for registration will automatically be placed on the waiting list.

Hotel accommodations have been reserved at two hotels in downtown Washington, DC. The JW Marriott Hotel, 1331 Pennsylvania Avenue, NW., Washington, DC, has reserved a block of rooms for Wednesday through Friday, October 29–31, 2008, at the rate of U.S. $319.00 per night. Reservations must be made directly with the hotel by September 29th at 1–800–393–2503 or 202–393–2000, referencing ''CBP Trade Symposium,'' or on-line at *http://www.marriott.com/hotels/travel/wasjw?groupCode=USGUSGA&app=resvlink&fromDate=10/29/08&toDate=11/1/08.* The Hyatt Regency Washington on Capitol Hill, 400 New Jersey Avenue, NW., Washington, DC has reserved a block of rooms for Wednesday through Friday, October 29—31, 2008, at the rate of U.S. $201.00 per night. Reservations must be made directly with the hotel by September 30, 2008 at 1–800–421–1442, referencing ''CBP Trade Symposium,'' or on-line at *https://resweb.passkey.com/Resweb.do?mode=welcome_ei_new&eventID=70111&fromResdesk=true.*

Michael C. Mullen,

Assistant Commissioner, Office of International Affairs and Trade Relations.

[FR Doc. E8–19781 Filed 8–25–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

Agency Information Collection: Comment Request

AGENCY: United States Geological Survey (USGS), Interior.

ACTION: Notice of a new collection.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we will submit to OMB a new Information Collection Request (ICR) for approval of the paperwork requirements for the National Cooperative Geologic Mapping Program—EDMAP (NCGMP–EDMAP). This notice provides the public an opportunity to comment on the paperwork burden of this collection.

DATES: You must submit comment on or before October 27, 2008.

ADDRESSES: Send your comments to the IC to Phadrea Ponds, Information Collections Clearance Officer, U.S. Geological Survey, 2150–C Center Avenue, Fort Collins, CO 80525 (mail); (970) 226–9230 (fax); or *pponds@usgs.gov* (e-mail). Please reference Information Collection 1028—NEW, NCGMP–EDMAP.

FOR FURTHER INFORMATION CONTACT: Randall Orndorff, Associate Program Coordinator (STATEMAP and EDMAP), National Cooperative Geological Mapping Program, USGS Geological Survey, 12201 Sunrise Valley Drive, MS 908 (mail); at 703–648–4316 (telephone); or *rorndorff@usgs.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Title: National Cooperative Geologic Mapping Program—EDMAP (NCGMP–EDMAP).

OMB Control Number: 1028—NEW.

Correction: This notice was originally published on August 19, 2008, Volume 73, number 161, pages 48388–48389. The corrections are as follows: the day to submit comments was incorrect and should have given the public 60 instead of 30 days to respond to this notice. The second correction further justified the estimate burden for the project added the estimated number of grant recipients and that the overall burden would not be increased because the recipients will not prepare final reports as a requirement of this award.

Abstract:

EDMAP is the component of the NCGMP that trains the next generation of geologic mappers. The NCGMP allocates funds to colleges and universities in the United States and Puerto Rico through an annual competitive grant process. Every Federal dollar that is awarded is matched with university funds. Geology professors, who are skilled in geologic mapping, request EDMAP funding to support undergraduate and graduate students at their college or university in a one-year mentored geologic mapping project that focuses on a specific geographic area.

Since 1996, more than $4 million from the NCGMP have supported geologic mapping efforts of more than 600 students working with more than 214 professors at 131 universities in 44 states, the District of Columbia, and Puerto Rico. Funds for graduate projects are limited to $15,000 with undergraduate project funds limited to $7,500. These funds are used to cover field expenses and map production, but not faculty salaries. The college or university matches the EDMAP funding. The authority for the program is listed

in the National Geologic Mapping Act (Pub. L. 106–148).

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2), and under regulations at 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection.'' Responses are voluntary. No questions of a ''sensitive'' nature are asked.

Frequency of Collection: Annually.

Respondent's Obligation: Voluntary (necessary to receive benefits).

Estimated Number and Description of Respondents; Approximately 60 University/College Professors or faculty advisors annually.

Annual Burden Hours: 1,100 hours.

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: We expected to receive approximately 55 applications taking each applicant approximately 20 hours to complete, totaling 1,100 hours. This includes the time for project conception and development, proposal writing and reviewing, and submitting project narrative through *Grants.gov.* We expect to issue 40 grants per year. The grant recipients are not required to submit final technical reports; therefore there are no additional burden hours for the grant recipient.

Estimated Annual Reporting and Recordkeeping ''Non-Hour Cost'': We have not identified any ''non-hour cost'' burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c) (2) (A) (44 U.S.C. 3501, *et seq.*) requires each agency '' * * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *'' Agencies must specifically solicit comments. We invite comments concerning this information collection on:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done. To comply with the public process, we publish this **Federal Register** notice announcing that we will submit this ICR to OMB for approval. The notice provided the required 60 day public comment period.

USGS Information Collection Clearance Officer: Phadrea D. Ponds, 970–226–9445.

Dated: August 19, 2008.

Randall Orndorff,

Assistant Program Coordinator, National Cooperative Geographic Program.

[FR Doc. E8–19730 Filed 8–25–08; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

National Earthquake Prediction Evaluation Council

AGENCY: U.S. Geological Survey.

ACTION: Notice of Meeting.

SUMMARY: Pursuant to Public Law 96–472, the National Earthquake Prediction Evaluation Council (NEPEC) will hold a meeting. The meeting location is the Hilton Palm Springs Resort, 400 East Tahquitz Canyon Way, Palm Springs, California 92262–6605. The Committee is comprised of members from academia and the Federal Government. The Committee shall advise the Director of the U.S. Geological Survey (USGS) on proposed earthquake predictions, on the completeness and scientific validity of the available data related to earthquake predictions, and on related matters as assigned by the Director.

The Council will receive a briefing on the Colaboratory for Study of Earthquake Predictability (CSEP), a report on a workshop on Episodic Tremor and Slip held last winter, and short reports and updates on several other topics. The Council will also discuss the potential need to provide advisory reports on short notice if natural observations suggest an increased earthquake risk, and the form and content of such reports.

Meetings of the National Earthquake Prediction Evaluation Council are open to the public.

DATES: September 10, 2008, commencing at 1 p.m. and adjourning at 4 p.m. on September 11, 2008.

Contact: Dr. William Leith, U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive, Reston, Virginia 20192, (703) 648–6786, *wleith@usgs.gov.*

Dated: August 20, 2008.

Suzette M. Kimball,

Associate Director for Geology.

[FR Doc. E8–19727 Filed 8–25–08; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–210–1430–ES; NMNM 118070]

Notice of Realty Action—Recreation and Public Purpose (R&PP) Act Classification, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of R&PP lease and or patent of public land in San Juan County; New Mexico.

SUMMARY: The following described public land is determined suitable for classification for leasing and subsequent conveyance to City of Farmington for the Farmington Regional Animal Shelter, under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended, 43 U.S.C. 869 *et seq.,* and under Sec. 7 of the Taylor Grazing Act, 43 U.S.C. 315(f), and Executive Order No. 6910.

New Mexico Principal Meridian

T. 29 N., R. 12 W.,

Sec. 18: SW¼SW¼NE¼.

The area described contains 10 acres more or less.

Comment Dates: Submit comments on or before October 10, 2008. Interested parties may submit comments regarding the proposed leasing/conveyance or classification of the lands to the Bureau of Land Management at the following address. Any adverse comments will be reviewed by the Bureau of Land Management, Farmington District Manager, 1235 La Plata Highway, Farmington, NM 87401, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action becomes

the final determination of the Department of the Interior.

FURTHER INFORMATION: Contact Mary Jo Albin, Realty Specialist, at the Bureau of Land Management, Farmington Field Office, at (505) 599–6332. Information related to this action, including the environmental assessment, is available for review at 1235 La Plata Highway,Farmington, NM 87401.

SUPPLEMENTARY INFORMATION:

Publication of this notice segregates the public land described above from all other forms of appropriation under the public land laws, including the general mining laws, except for leasing and conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws.

The lease, when issued, will be subject to the following terms:

1. The Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.

2. The Resource Conservation and Recovery Act of 1976 (RCRA) as amended, 42 U.S.C. 6901–6987 and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) as amended, 42 U.S.C. 9601 and all applicable regulations.

3. Provisions of Title VI of the Civil Rights Act of 1964.

4. Provisions that the lease be operated in compliance with the approved Development Plan.

The patent document, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior and will contain the following terms, conditions, and reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals, together with the right to prospect for, mine, and remove such deposits from the lands under applicable law and such regulations as the Secretary of the Interior may prescribe.

3. All valid existing rights, e.g., rights-of-way and leases of record.

Provisions that if the patentee or its successor attempts to transfer title to or control over the land to another or the land is devoted to a use other than that for which the land was conveyed, without the consent of the Secretary of the Interior or his delegate, or prohibits or restricts, directly or indirectly, or permits it agents, employees, contractors, or subcontractors, including without limitation, lessees, sublessees and permittees, to prohibit or restrict, directly or indirectly, the use of any part of the patented lands or any of the facilities whereon by any person because of such person's race, creed, sex, color, or national origin, title shall revert to the United States.

The lands are not needed for Federal purposes. Leasing and later patenting is consistent with current Bureau of Land Management policies and land use planning. The proposal serves the public interest since it would provide the animal shelter building with attached outdoor kennels, an employee's courtyard and a public ''get acquainted'' courtyard and any other facilities and related buildings that would meet the needs of the animal shelter. Associated parking would be constructed for the clinic building.

Upon publication of this notice in the **Federal Register**, the above described public lands will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for patent under the R&PP Act and leasing under the mineral leasing laws.

Classification Comments: Interested parties may submit comments involving the suitability of the land for conveyance. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with state and Federal programs.

Conveyance Comments: Interested parties may submit comments regarding the patent and the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for R&PP use.

Confidentiality of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Any adverse comments will be reviewed by the Farmington Field Manager, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification of the land described in this notice will become effective on October 27, 2008. The land will not be offered for patent until after the classification becomes effective.

(Authority: 43 CFR 2741.5)

Dated: August 18, 2008.

Joel Farrell,

Assistant Field Manager for Resources.

[FR Doc. E8–19678 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–VB–P

DEPARTMENT OF THE INTERIOR

National Park Service

Draft General Management Plan, Draft Environmental Impact Statement, Fort Stanwix National Monument, NY

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Availability of the Draft Environmental Impact Statement for the Draft General Management Plan, Fort Stanwix National Monument, New York.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(c) the National Park Service (NPS) announces the availability of a Draft Environmental Impact Statement (DEIS) for the Draft General Management Plan (GMP) for Fort Stanwix National Monument, located in the city of Rome, New York. Consistent with National Park Service rules, regulations, and policies, and the park's mission, the Draft GMP/EIS describes and analyzes two alternatives to guide the management and development of Fort Stanwix National Monument over the next 15 to 20 years. The alternatives incorporate various management prescriptions to ensure protection and enjoyment of the park's resources. The Draft GMP/EIS evaluates potential environmental consequences of implementing the alternatives. Impact topics include cultural and natural resources, visitor experience, park operations, and the socioeconomic environment.

NPS regional planning staff and staff at Fort Stanwix NM collaborated in the development of the Draft GMP/EIS. The main issues that the Draft GMP/EIS has focused on have included protection of cultural resources, visitor services, partnership opportunities, carrying capacity, and the lack of a properly defined boundary. Alternative 1: No Action focuses on basically maintaining current management, protection, and interpretive practices and interpreting the siege of Fort Stanwix in the Revolutionary War. Alternative 2: Action Alternative seeks to broaden interpretation of Fort Stanwix in the

context of the Northern Frontier, the Mohawk Valley, and American Indian history; forge new partnerships; upgrade exhibits and waysides; expand the interpretive role of the Marinus Willett Center; and develop an 18th-century cultural landscape treatment plan for the site. After public review of the Draft GMP/EIS, the National Park Service will consider public comments, and a Final GMP/EIS will be prepared. The Final GMP/EIS is scheduled for completion in 2008.

DATES: The National Park Service will accept comments on the Environmental Impact Statement from the public for 60 days from the date the Environmental Protection Agency (EPA) notices the availability of the Draft EIS in its regular Friday **Federal Register** listing. The National Park Service will hold a public meeting during the public review period to receive comments. Meeting date, time, and location will be announced in local media in advance of the meeting date. Comments on the Draft GMP/EIS must be received no later than 60 days from the date of publication of the EPA listing in the **Federal Register**.

FURTHER INFORMATION AND ADDRESSES:

The Draft General Management Plan/Environmental Impact Statement for Fort Stanwix National Monument will be available for public review and comment online at *http://parkplanning.nps.gov.* Hard copies may be obtained by contacting Superintendent Debbie Conway, Fort Stanwix National Monument, 112 East Park Street, Rome, NY 13440; phone 315-338–7730. The public is encouraged to comment on the plan via the Internet at *http://parkplanning.nps.gov* or by mailing comments to Superintendent Debbie Conway, Fort Stanwix National Monument. Before including your address, phone number, e-mail address, or other personal identifying information, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Dated: February 25, 2008.

Dennis R. Reidenbach,

Regional Director Northeast Region, National Park Service.

Editorial Note: This document was received at the Office of the Federal Register on August 20, 2008.

[FR Doc. E8–19622 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–653]

In the Matter of Certain Base Stations and Wireless Microphones; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on July 22, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of L–3 Communications Mobile-Vision, Inc. of Boonton, New Jersey. A supplement to the complaint was filed on August 13, 2008. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain base stations and wireless microphones that infringe certain claims of U.S. Patent No. 7,119,832. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Thomas S. Fusco, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2571.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on August 20, 2008, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain base stations and wireless microphones that infringe one or more of claims 1–11 of U.S. Patent No. 7,119,832, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

L–3 Communications Mobile-Vision, Inc., 90 Fanny Road, Boonton, New Jersey 07005,

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Enforcement Video, LP d.b.a. WatchGuard Video, 3001 Summit Avenue, Suite 400, Plano, Texas 75074,

Trinus Korea, Inc., Unitech-Ville 8f, #1141–2 Beakseok-Dong, Ilsan-Donggu, Goyang-City, Gyeonggi-Do, Republic of Korea,

Trinus Systems, Inc. USA, 14707 Carmenita Road, Norwalk, California 90650,

Telex Communications, Inc. 8601 East Cornhusker Highway, Lincoln, Nebraska 68507–9702,

Safety Vision, LP, 6100 West Sam Houston Parkway North, Houston, Texas 77041–5113,

KCi Communications, Inc., 1050 Ensell Road, Suite 100, Lake Zurich, Illinois 60047,

International Science Ventures, Co. Ltd., 102–705 Pucheon Technopark 364, Samsjung-Dong, Ojung-Gu, Pucheon City, Kyuggi-Do, Republic of Korea,

ICOP Digital, Inc., 16801 W. 116th Street, Lenexa, Kansas 66219,

Digital Ally, Inc., 7311 W. 130th Street, Suite 170, Overland Park, Kansas 66213,

TriSquare Communications (Hong Kong), RM 502 5/F China MinMetals TWR,79 Chatham Road S., Tsim Sha Tsui, Kowloon, Hong Kong, China,

TriSquare Communications USA, 1420 NW Vivion Road, Suite 113, Kansas City, Missouri 64118.

(c) The Commission investigative attorney, party to this investigation, is Thomas S. Fusco, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: August 21, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–19759 Filed 8–25–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–453 (Final) and 731–TA–1136–1137 (Final)]

Sodium Nitrite From China and Germany

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b), 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China and Germany of sodium nitrite, provided for in subheading 2834.10.10 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV) and by imports from China of sodium nitrite found by Commerce to be subsidized by the Government of China.

Background

The Commission instituted these investigations effective November 8, 2007, following receipt of a petition filed with the Commission and Commerce by General Chemical LLC of Parsippany, NJ. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of sodium nitrite from China were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of sodium nitrite from China and Germany were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of May 5, 2008 (73 FR 24610). The hearing was held in Washington, DC, on July 2, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on August 20, 2008. The views of the Commission are contained in USITC Publication 4029 (August 2008), *Sodium Nitrite from China and Germany, Investigation Nos. 701–TA–453 and 731–TA–1136–1137 (Final).*

By order of the Commission.

Issued: August 20, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–19764 Filed 8–25–08; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

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 August 19, 2008 a Consent Decree in *United States and the State of Louisiana* v. *Calcasieu Refining Company, Inc.*, Civil Action No. 2:08–cv–01215–PM–KK was lodged with the United States District Court for the Western 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 Calcasieu Refining Company, Inc. (''Calcasieu'') pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), for alleged Clean Air Act violations and violations of the corollary provisions in state law at a petroleum refinery in Lake Charles, Louisiana owned by Calcasieu.

Under the settlement, Calcasieu will implement air pollution control technologies to reduce emissions of nitrogen oxides from refinery process units. Calcasieu also will adopt facility-wide enhanced benzene waste monitoring and fugitive emission control programs, as well as a program to minimize flaring events. In addition, Calcasieu will pay a $612,500 civil penalty.

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, or submitted via e-mail to *pubcomment-ees.enrd@usdoj.gov*, and should refer to *United States and the State of Louisiana* v. *Calcasieu Refining Company, Inc.*, D.J. Ref. No. 90–5–2–1–08556.

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/Consent_Decrees.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax 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 $26.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen M. Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–19704 Filed 8–25–08; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent DecreeUnder the Clean Air Act and Other Environmental Statutes

Notice is hereby given that on August 19, 2008, a proposed Consent Decree in *United States* v. *Burlington Resins, Inc., d/b/a Colorite Specialty Resins, Inc.,* Civil Action No. 08–01432 (RBK), was lodged with the United States District Court for the District of New Jersey.

In this action, the United States sought a civil penalty and injunctive relief for violations of the Clean Air Act, 42 U.S.C. 7401, *et seq.,* the Clean Water Act, 33 U.S.C. 1251, *et seq.,* the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.,* the Toxic Substances Control Act, 15 U.S.C. 2601, *et seq.,* and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001, *et seq.,* as well as regulations promulgated under those statutes, including the National Emission Standard for Vinyl Chloride at 40 CFR Part 61, Subpart F, in connection with the polyvinyl chloride manufacturing facility that the settling defendant, Colorite Specialty Resins, Inc. (Colorite), operates at 116 Beverly Road, Burlington, New Jersey. The Consent Decree requires Colorite to implement injunctive relief to bring its facility into compliance, including reducing vinyl chloride emissions, implementing a comprehensive leak detection and repair program, and instituting better hazardous waste handling practices. The Decree also requires Colorite to pay a $1.3 million civil penalty to the United States and the State of New Jersey and to perform supplemental environmental projects worth $1.1 million.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Burlington Resins, Inc., d/b/a Colorite Specialty Resins, Inc.,* D.J. Ref. No. 90–5–2–1–08682.

The Consent Decree may be examined at the Office of the United States Attorney, 970 Broad Street, Suite 700, Newark, N.J. 07102, and at U.S. EPA Region 2, 290 Broadway, New York, N.Y. 10007. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood *(tonia.fleetwood@usdoj.gov),* fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $21.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–19779 Filed 8–25–08; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Membership of the Senior Executive Service Standing Performance Review Boards

AGENCY: Department of Justice.

ACTION: Notice of Department of Justice's standing members of the Senior Executive Service Performance Review Boards.

SUMMARY: Pursuant to the requirements of 5 U.S.C. 4314(c)(4), the Department of Justice announces the membership of its 2008 Senior Executive Service (SES) Standing Performance Review Boards (PRBs). The purpose of a PRB is to provide fair and impartial review of SES performance appraisals, bonus recommendations and pay adjustments. The PRBs will make recommendations regarding the final performance ratings to be assigned, SES bonuses and/or pay adjustments to be awarded.

FOR FURTHER INFORMATION CONTACT: Rod Markham, Director, Human Resources, Justice Management Division, Department of Justice, Washington, DC 20530; (202) 514–4350.

Lee J. Lofthus,

Assistant Attorney General for Administration.

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Office of the Attorney General—AG	
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Hunt, Joseph H	Branch Director (Federal Programs).
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Rivera, Jennifer D	Branch Director (Federal Programs).
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Name	Position title
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Keeney, John C	Deputy Assistant Attorney General.
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Oosterbaan, Andrew	Chief, Child Exploitation and Obscenity Section.
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BILLING CODE 4410–AR–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–1]

Elmer P. Manalo, M.D.; Dismissal of Proceeding

On August 30, 2007, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Elmer P. Manalo, M.D. (Respondent), of Greensburg, Indiana. The immediate suspension of Respondent's registration was based on my preliminary finding that Respondent posed an ''imminent danger to public health or safety'' because he prescribed schedule II and IV controlled substances to undercover law enforcement personnel on numerous occasions without a legitimate medical purpose and outside the scope of his professional practice. Show Cause Order at 1. The Show Cause Order further alleged that Respondent continued to prescribe controlled substances to certain persons notwithstanding that he had been specifically informed that these persons ''were illegitimate drug seekers and addicts,'' and that several of his patients had ''died due to mixed drug intoxication or accidental drug overdose.'' *Id.* at 2.

Following service of the Show Cause Order, Respondent, through his attorney, requested a hearing on the allegations and the ALJ proceeded to conduct pre-hearing procedures. Meanwhile, on October 2, 2007, the Medical Licensing Board of Indiana summarily suspended Respondent's registration for ninety days effective September 27, 2007. The State Board subsequently extended the suspension an additional ninety days.

Thereafter, the Government moved for summary disposition on the ground that because Respondent lacked authority under state law to handle controlled substances, he was not entitled to maintain his DEA registration. Gov. Mot. for Summ. Disp. at 1 (citing 21 U.S.C. 801(21); 823(f); & 824(a)(3)). Responding to the Government's motion, Respondent did not dispute that his state license had been suspended. Respondent's Reply to DEA's Motion, at 1. Respondent, however, sought a stay of the issuance of the final order in this matter pending the resolution of the state proceedings.

Based on the undisputed fact that Respondent lacked authority to practice medicine in Indiana, and that it was reasonable to infer that he was also without authority to handle controlled substances under state law, the ALJ granted the Government's motion, noting the settled rule that ''DEA does not have statutory authority under the [CSA] to maintain a registration if the registrant is without state authority to dispense controlled substances in the State in which he practices medicine.'' ALJ Dec. at 3 (citing 21 U.S.C. 823(f) & 824(a)(3)). The ALJ further denied Respondent's request to stay the proceeding. The ALJ then ordered that the hearing be cancelled, recommended that Respondent's registration be revoked and any pending renewal applications be denied, and forwarded the record to me for final agency action.

In reviewing the record, I noted that neither the Show Cause Order nor any other document establishes the status of Respondent's registration or whether Respondent has filed a timely renewal application. I therefore took official notice of the Agency's record pertaining to Respondent's registration. That record indicated that Respondent's registration expired on January 31, 2008, and that Respondent had not filed a renewal application. *See* 5 U.S.C. 558(c). Accordingly, I found that Respondent is not currently registered with the Agency.

Under DEA precedent, ''if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke.'' *Ronald J. Riegel*, 63 FR 67132, 67133 (1998). In other words, under ordinary circumstances the case is moot.

This case commenced, however, with the issuance of an Order of Immediate Suspension, and this Order was based on allegations that Respondent committed acts which rendered ''his registration * * * inconsistent with the public interest.'' 21 U.S.C. 824(a)(4); *see also* Show Cause Order at 1–2. DEA has recognized a limited exception to the mootness rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of such a suspension. *See William R. Lockridge*, 71 FR 77791, 77797 (2006).

I also noted that in moving for summary disposition, the Government did not seek to litigate the allegations of the Order to Show Cause and Immediate Suspension. Rather, it relied on the different ground that Respondent no longer had authority under state law to handle controlled substances and thus was not entitled to be registered. *See* 21 U.S.C. 824(a)(3). I further observed that because Respondent did not file a renewal application, it is unclear whether he intended to remain in professional practice.

Accordingly, on May 6, 2008, I ordered that the parties brief the issue of whether this proceeding remains a live controversy. The Order further directed that if Respondent contended

that the case was not moot, he should specifically address why he failed to file a renewal application and what collateral consequences attach as a result of the suspension order.

On June 5, the Government filed its brief. As relevant here, the Government maintains that this proceeding is now moot and that the matter should now be dismissed. *See* Brief in Response to the Order of the Deputy Administrator at 10. As of this date, Respondent has not filed a brief.

In light of Respondent's failure to comply with the briefing order, his failure to file a renewal application, and his failure to provide any evidence of his intent to remain in professional practice or of other collateral consequences that attached with the issuance of the suspension order, I conclude that this case is now moot. Accordingly, the Order to Show Cause will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 21 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to Elmer P. Manalo, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: August 18, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–19773 Filed 8–25–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Janet L. Thornton, D.O.; Dismissal of Proceeding

On December 17, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Janet L. Thornton, D.O. (Respondent), of Monument, Colorado. The Show Cause Order sought the revocation of Respondent's DEA Certificate of Registration, AT2730984, as a practitioner, and the denial of any pending applications to renew or modify her registration, on two separate grounds.

First, it alleged that Respondent had entered into a series of stipulations with the Colorado Board of Medical Examiners under which she agreed that she ''will not practice medicine in the State of Colorado.'' Show Cause Order at 2. Relatedly, the Show Cause Order alleged that Respondent's ''Colorado medical license expired on May 31, 2007, and has not been renewed,'' and that therefore Respondent lacks state authority to handle controlled substances, which is a prerequisite for holding a DEA registration. *Id.*

Second, the Show Cause Order alleged that on December 3, 2005, the Colorado Board suspended Respondent's state medical license thus resulting in her lacking authority to handle controlled substances. *Id.* at 1. The Show Cause Order alleged that while her state license was suspended, Respondent issued two prescriptions to her neighbors: one in January 2006, for Tussionex, a schedule III controlled substance, and one in June 2006, for a schedule III drug containing hydrocodone. *Id.* at 1–2. Relatedly, the Show Cause Order also alleged that in 2005, Respondent issued a prescription for morphine to B.V., and that B.V. had ''later informed investigators that he had no knowledge of the * * * prescription and was never dispensed the drug.'' *Id.* at 2.

On February 12, 2008, the Show Cause Order was served on Respondent by First Class Mail at her registered location. On March 3, 2008, Respondent filed a written statement in lieu of a request for a hearing and expressly waived her right to a hearing. *See* 21 CFR 1301.43(c). Thereafter, the investigative file was forwarded to me for final agency action.

Having considered the entire record in this matter, including Respondent's statement, I hereby issue this Decision and Final Order. I conclude that the Government has not proved by substantial evidence the allegations regarding the prescriptions to B.V. or that Respondent currently lacks state authority to handle controlled substances. While I find that Respondent violated the Controlled Substances Act by issuing prescriptions for controlled substances following the suspension of her Colorado license, I further conclude that because the violations were limited to two instances and there is no evidence establishing that Respondent had not previously entered into a doctor-patient relationship with the two persons who received the prescriptions, the Government's proposed sanction of revocation would be excessive. Because the Government has not proposed an alternative sanction, the Show Cause Order will be dismissed.

Findings of Fact

Respondent holds DEA Certificate of Registration, AT2730984, which authorizes her to handle controlled substances as a practitioner at her registered location in Monument, Colorado. Respondent's registration was last renewed on October 18, 2005, and does not expire until November 30, 2008.

In May 2005, an Inquiry Panel of the Colorado State Board of Medical Examiners ordered that Respondent be evaluated by the Colorado Physician Health Program. *In re Janet L. Thornton,* Stipulation and Final Agency Order (Col. St. Bd. Med. Exam'rs 2007). Thereafter, on December 15, 2005, the Board suspended Respondent's state medical license. Respondent's state license remained suspended until May 17, 2007, the date when Respondent entered into a stipulation for the interim cessation of practice, under which she agreed to cease the practice of medicine. Respondent subsequently agreed to two additional amendments of the stipulation which extended the initial stipulation.

On October 25, 2007, Respondent and the Board entered into a Stipulation and Final Agency Order, which became effective on November 16, 2007, upon the Board's approval. *Id.* at 7. According to the Board's Final Order, Respondent has ''continuously'' held her state license since April 10, 1986. *Id.* at 1.

In the Order, the Board imposed certain practice restrictions on Respondent. The first of these was that ''Respondent shall not engage in any act constituting the practice of medicine in the state of Colorado unless such practice occurs within a clinical setting approved in advance by the Panel or unless such practice occurs in a hospital.'' *Id.* at 5. The second restriction was that ''Respondent shall order, dispense, administer or prescribe any controlled substance or other prescription medications only for persons with whom Respondent has a bona fide physician-patient relationship and only within the context of Respondent's practice in a clinical setting approved in advance by the Panel or a hospital.'' *Id.* Based on the above, I find that contrary to the Government's contention, Respondent retains authority to handle controlled substances in Colorado.

As relevant to the Show Cause Order's allegations regarding her improper prescribing, Respondent admitted in the stipulation that she:

> issued prescriptions and ordered medications while her license was suspended. Respondent had consulted with an out-of-state attorney who stated that he consulted Colorado attorneys and advised her that she was authorized to issue prescriptions and order medications in the state of Colorado while her Colorado license was suspended under the authority of out-of-state licenses. The Panel finds that the out-

of-state attorney's interpretation of Colorado's Medical Practice Act was erroneous.

Id. at 3.

The record establishes that on January 23, 2006, while her Colorado license was suspended, Respondent issued a prescription with one refill to D.V., her neighbor in Colorado, for Tussionex Extended Release, a schedule III controlled substance which contains hydrocodone. On June 6, 2006, Respondent issued an additional prescription to B.V., who was also her neighbor, for thirty tablets of hydrocodone/apap (10/500mg.) which was to last five days.[1] At the time she issued both prescriptions, Respondent was practicing in Texas, where she also holds a medical license. While DEA Investigators interviewed both D.V. and B.V., there is no evidence establishing that Respondent had not previously entered into a legitimate doctor-patient relationship with either person or that the prescriptions were issued for other than a legitimate medical purpose.

In support of her Response to the Show Cause Order, Respondent submitted a copy of a February 20, 2007 letter from Jeff Martin, a lawyer in Tulsa, Oklahoma. This letter states that Respondent:

> asked me about writing occasional prescriptions infrequently for Colorado residents who were her neighbors using her Texas and/or Oklahoma license even though her Colorado license was summarily suspended. I told her, as long as her Texas and/or Oklahoma licenses were still valid that she could still occasionally consult with her neighbors and prescribe medicine. I still believe this is accurate.
>
> Later when I tried to help her find a lawyer in Colorado, I asked two Colorado lawyers who are knowledgeable in this area about this and they believed she could continue occasionally prescribing medicine also. I'm sorry, but I no longer have the names and phone numbers of the lawyers I spoke to.

Exhibit C to Respondent's Response To Order To Show Cause.

Respondent also attached to her Response a copy of Col. Stat. § 12–36–106, which defines the practice of medicine under Colorado law and provides for certain exemptions from the licensing requirements. This statute states that:

> Nothing in this section shall be construed to prohibit, or to require a license * * * under this article with respect to, any of the following acts:
>
> * * *
>
> (b) The rendering of services in this state by a physician lawfully practicing medicine in another state or territory, whether or not such physician is in Colorado, but if any such physician does not limit such services to an occasional consultation or cases * * * such physician shall possess a license to practice medicine in this state.

Colo. Stat. § 12–36–106(3)(b).

The Government also alleged that Respondent had issued a prescription to B.V. for morphine, but that B.V. denied ever receiving the prescription. This allegation is not, however, supported by substantial evidence as there is no evidence that Respondent ever issued a morphine prescription to an individual with these initials.[2]

Discussion

Under Section 304(a) of the Controlled Substances Act (CSA), the Attorney General may revoke or suspend a registration to dispense a controlled substance ''upon a finding that the registrant * * * has had [her] State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances.'' 21 U.S.C. 824(a)(3). Section 304(a) further authorizes the Attorney General to suspend or revoke a registration ''upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' *Id.* § 824(a)(4).

In section 303(f) of the CSA, Congress directed that the Attorney General consider five factors ''[i]n determining the public interest.'' 21 U.S.C. 823(f). The factors are:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005). Having set forth the applicable law, I address each of the Government's contentions.

The Lack of State Authority

As found above, Respondent's Colorado medical license was suspended on December 15, 2005. Effective November 16, 2007—one month before the Show Cause Order was issued—the Colorado Board restored Respondent's license to practice medicine and her authority to prescribe controlled substances. While Respondent's authority to handle controlled substances limits her practice to a board-approved clinical setting or a hospital, the Board's Order make plain that Respondent currently has authority to handle controlled substances in Colorado. The Government's contention to the contrary is therefore rejected.

The Public Interest Allegations

In *United Prescription Services, Inc.*, 72 FR 50397, 50407 (2007), I held that ''a physician who engages in the unauthorized practice of medicine under state laws is not a ''practitioner acting in the usual course of * * * professional practice'' under the CSA. 21 CFR 1306.04(a).[3] As explained therein, this rule is supported by the plain meaning of the Act, which defines the ''[t]he term 'practitioner' [to] mean[] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance,'' 21 U.S.C. 802(21), and ''[t]he term 'dispense' [to] mean[] to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner.'' *Id.* § 802(10). *See also id.* § 823(f) (''The Attorney General shall register practitioners * * * to dispense * * * if the applicant is authorized to dispense * * *

[1] While the record shows that Respondent issued several other prescriptions to B.V. and D.V., none of these were for controlled substances. These prescribings are not the concern of DEA.

[2] While there is evidence that Respondent issued a morphine prescription to D.H., even if this incident had been properly alleged, I would still reject it as unsupported by substantial evidence. While the record contains a summary of an interview in which D.H. stated that he did not recall receiving the morphine prescriptions, D.H. subsequently prepared a letter in which he retracted his earlier statement and acknowledged he ''had completely forgotten about the lower back and hip pain that prompted me to ask for pain medication.'' Exh. E to Respondent's Resp. to Order to Show Cause. The Government, which has the burden of proof even when a case does not go to a hearing, has not pointed to any additional evidence to support the conclusion that D.H.'s initial story to investigators is the more accurate version.

[3] Under 21 CFR 1306.04(a), ''[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.''

controlled substances under the laws of the State in which he practices.'').

As I noted in *United Prescription Services*, shortly after the CSA's enactment, the Supreme Court explained that ''[i]n the case of a physician [the Act] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'' *United States* v. *Moore,* 423 U.S. 122, 140–41 (1975) (emphasis added) (quoted at 72 FR 50407). A controlled-substance prescription issued by a physician who lacks the license or other authority required to practice medicine within a State is therefore unlawful under the CSA. *See* 21 CFR 1306.04(a) (''An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning an intent of'' the CSA); *Cf.* 21 CFR 1306.03(a)(1) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession[.]'').

In the Stipulation and Final Agency Order, Respondent admitted that the prescribings to B.V. and D.V. constituted ''prescribing * * * other than in the course of legitimate professional practice'' under Colorado law. *See In re Thornton*, Stipulation and Final Agency Order, at 3. Accordingly, I conclude that the prescriptions Respondent issued to D.V. and B.V. were issued outside of the course of professional practice and thus also violated Federal law. *See* 21 CFR 1306.04(a); *Moore*, 423 U.S. at 140–41; *United Prescription Services*, 72 FR at 50407. The prescribings thus constituted acts which render her registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4); *see also id.* § 823(f)(2) & (4) (directing consideration of registrant's ''experience in dispensing controlled substances'' and compliance with applicable federal and state laws).

I nonetheless conclude that it would be inappropriate to revoke Respondent's registration. With respect to the allegations, the record establishes only two instances in which Respondent unlawfully prescribed controlled substances. Moreover, while ordinarily a practitioner cannot credibly claim ignorance of state laws prohibiting the unlicensed practice of medicine, *United Prescription Services*, 72 FR at 50407; the Colorado Board's interpretation that Respondent was not within the exemption provided in Colo. Stat. § 12–36–106(b)(3), and that she thus violated the State's Medical Practice Act, appears to have been a case of first impression.[4]

Moreover, the Government has failed to show the absence of a legitimate doctor-patient relationship between Respondent and either person. Relatedly, there is no evidence that the prescriptions were written for other than a legitimate medical purpose. In short, the evidence does not remotely suggest that Respondent was using her prescription writing authority to deal drugs. *See Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006).

Furthermore, the Colorado Board has considered Respondent's state law violations and concluded that they do not warrant the revocation of her medical license. Under agency precedent, I am not bound by the State Board's recommendation. Nonetheless, because the only proven violations of the CSA are based on her having violated the Colorado Medical Practice Act's licensing provision and were limited to two instances, I conclude that Respondent's violations do not warrant the revocation or suspension of her registration.

While in some instances, this Agency has placed restrictions on a practitioner's registration, such restrictions must be related to what the Government has alleged and proved in any case. Notably, in this matter the Government has proposed no alternative sanction to revocation. Accordingly, the Order to Show Cause will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to Janet L. Thornton, D.O., be, and it hereby is, dismissed.

Dated: August 18, 2008.

Michele M. Leonhart,

Deputy Administrator.

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[4] While the Colorado Board found that Respondent's attorney's interpretation of the Medical Practice Act ''was erroneous,'' the Board's Order did not cite any prior decision holding that Respondent's conduct was illegal.

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 31, 2008 to August 13, 2008. The last biweekly notice was published on August 12, 2008 (73 FR 46926).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-

day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D44, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.*

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp* , unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dominion Energy Kewaunee, Inc. Docket No. 50–305, Kewaunee Power Station (KPS), Kewaunee County, Wisconsin

Date of amendment request: July 7, 2008.

Description of amendment request: The proposed amendment would allow the use of a methodology to determine the seismic loads on the recently upgraded Auxiliary Building crane. The upgrade was to make the crane single-failure-proof through replacement of the crane trolley, and modification of the existing crane bridge. The proposed seismic analysis methodology has not been approved for use at KPS, and is thus not currently in the KPS Updated Safety Analysis Report. The proposed methodology recognizes the inherent propensity for structures not fixed to one another (*e.g.*, steel wheels on steel rails) to roll if sufficient lateral force is applied. The licensee proposed this seismic analysis methodology for use solely on the Auxiliary Building crane upgrade. The licensee stated that recognition of wheel rolling between the crane trolley and bridge and their respective rails reflects the true nature of the installed equipment and its response to horizontal forces generated by a seismic event.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff reviewed the licensee's analysis and has prepared its own as follows:

(1) Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This proposed amendment pertains solely to a nonlinear seismic analysis method supporting the upgrade of the KPS Auxiliary Building crane from a non-single-failure-proof design to a single-failure proof design. Specifically, the existing crane trolley has been replaced with a state-of-the-art design that is single-failure-proof. The crane does not interface with operating plant equipment, and will continue to be able to withstand a design-basis seismic event without an uncontrolled lowering of the load. Thus, the probability and consequences of a load drop are not increased by the upgrade and proposed change in seismic analysis methodology. Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This proposed amendment pertains to an analysis method supporting the upgrade of an existing plant component. This seismic analysis methodology is proposed for use solely on the crane upgrade and not for any other plant structures, systems, or components. The design-rated load of the crane main hoist remains the same (*i.e.*, 125

tons). This load bounds the design and supporting analysis. The auxiliary hook design rated load has been increased from 10 tons to 15 tons. The proposed amendment does not change the previously evaluated and currently acceptable heavy load handling practices in use at KPS. The number and types of lifts made using this crane in support of KPS plant operations will not significantly change from those contemplated during original plant licensing. Furthermore, the basic operations of the crane (*i.e.*, hoisting and horizontal travel) will remain the same. Therefore, the proposed amendment does not create a new or different kind of accident from any previously evaluated.

(3) Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The purpose of the proposed methodology is to determine the design loads (forces and moments), accelerations, and displacements on the crane and building support structure. These loads will subsequently be used to perform the structural analysis of these components to confirm that the design meets all applicable acceptance criteria using previously approved industry codes and standards for such analyses. If the stresses computed in the structural components as a result of a seismic event are less than the limits contained in these codes, the structural integrity of the crane is maintained, and a suspended load will remain suspended during a seismic event. Meeting these code limits maintains an acceptable margin of safety for the individual components and the crane as a whole. Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on its own analysis, proposes that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Counsel for Dominion Energy Kewaunee, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Branch Chief: Lois M. James.

Dominion Energy Kewaunee, Inc. Docket No. 50–305, Kewaunee Power Station (KPS), Kewaunee County, Wisconsin

Date of amendment request: July 16, 2008.

Description of amendment request: The proposed amendment would align the Technical Specifications (TS) with the results of an evaluation performed according to Westinghouse Nuclear Safety Advisory Letter NSAL–07–7, ''Short-Term Recriticality During a PWR [pressurized-water reactor] Large-Break LOCA [loss-of-coolant accident].'' NSAL–07–7 advised that the potential exists for recriticality to occur during a large-break LOCA in the reflood stage after a LOCA. Westinghouse determined that Kewaunee is not susceptible to the subject issue based on the current KPS practice of maintaining safety injection (SI) accumulator boron concentration at or above 2500 ppm. However, to ensure that the KPS TS are conservative with respect to the results of NSAL–07–7, the licensee proposed to raise the minimum required boron concentration for the SI accumulators specified by the TS from the current 1900 parts-per-million (ppm) to 2400 ppm.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is reproduced below:

(1) Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Increasing the minimum required boron concentration in the SI accumulators does not add, delete, or modify any Kewaunee systems, structures, or components (SSCs). The SI accumulators and their contents are not accident initiators. Rather, they are designed for accident mitigation. The effects of an increase in the minimum SI accumulator boron concentration from 1900 ppm to 2400 ppm are bounded by previous evaluations and determined to be acceptable. Thus, the proposed increase in minimum SI accumulator boron concentration has no adverse effect on the ability of the plant to mitigate the effects of design[-]basis accidents.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Increasing the minimum required boron concentration in the SI accumulators does not change the design function of the SI accumulators or the SSCs designed to deliver borated water from the SI accumulators to the core. Increasing the minimum required boron concentration in the SI accumulators does not create any credible new failure mechanisms or malfunctions for plant equipment or the nuclear fuel. The reactivity control function of the borated water in the SI accumulators is not being changed.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

(3) Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

An evaluation has been performed that shows that maintaining boron concentration at a minimum of 2400 ppm is sufficient to assure that acceptable results for design[-]basis accident analyses will be maintained considering the reactivity of the core. Increasing the minimum boron concentration in the Sl accumulator from 1900 ppm to a minimum of 2400 ppm increases the margin of safety in the Kewaunee safety analyses, since additional post-accident negative reactivity will be available to the core. This additional negative reactivity compensates for the potential for recriticality occurring during the short-term reflood period during the large[-]break loss-of-coolant accident. Additionally, the proposed new minimum boron concentration of 2400 ppm is within the range required by current safety analyses (i.e., 1900 ppm to 2625 ppm), and well below the currently acceptable maximum boron concentration of 2625 ppm.

The proposed amendment does not result in altering or exceeding a design basis or safety limit for the plant. All current fuel design criteria will continue to be satisfied, and the safety analysis of record, including evaluations of the radiological consequences of design[-]basis accidents, will remain applicable.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and determines that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Counsel for Dominion Energy Kewaunee, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Branch Chief: Lois M. James.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: June 30, 2008.

Description of amendment request: The proposed amendment would: (1) Revise the Technical Specification (TS) surveillance requirement (SR 3.1.3.2) frequency in TS 3.1.3, ''Control Rod OPERABILITY,'' (2) clarify the requirement to fully insert all insertable control rods for the limiting condition for operation (LCO) in TS 3.3.1.2, Required Action E.2, ''Source Range Monitoring Instrumentation,'' and (3) revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension. The licensee is proposing to adopt the approved Technical Specification Task Force (TSTF) change traveler TSTF–475, Revision 1, ''Control Rod Notch Testing Frequency.''

The NRC staff issued a ''Notice of Availability of Model Application Concerning Technical Specification Improvement To Revise Control Rod Notch Surveillance Frequency, Clarify SRM Insert Control Rod Action, and Clarify Frequency Example'' associated with TSTF–275, Revision 1, in the **Federal Register** on November 13, 2007 (72 FR 63935). The notice included a model safety evaluation, a model no significant hazards consideration (NSHC) determination and a model license amendment request, using the consolidated line item improvement process. In its application dated June 30, 2008, the licensee affirmed the applicability of the model NSHC determination which is presented below:

Basis for proposed NSHC determination: As required by 10 CFR 50.91(a), an analysis of the issue of NSHC determination is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change generically implements TSTF–475, Revision 1, ''Control Rod Notch Testing Frequency and SRM Insert Control Rod Action.'' TSTF–475, Revision 1 modifies NUREG–1433 (BWR/4) and NUREG–1434 (BWR/6) STS [(Standard Technical Specifications)]. The changes: (1) Revise TS testing frequency for surveillance requirement (SR) 3.1.3.2 in TS 3.1.3, ''Control Rod OPERABILITY,'' (2) clarify the requirement to fully insert all insertable control rods for the limiting condition for operation (LCO) in TS 3.3.1.2, Required Action E.2, ''Source Range Monitoring Instrumentation'' (NUREG–1434 only), and (3) revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension. The consequences [and probability] of an accident after adopting TSTF–475, Revision 1 are no different than the consequences [and probability] of an accident prior to adoption. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously analyzed. Thus, this change does not create the possibility of a new or different kind of accident from any accident.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

TSTF–475, Revision 1 will: (1) [revise the TS SR 3.1.3.2 frequency in TS 3.1.3, ''Control Rod OPERABILITY,'' (2) clarify the requirement to fully insert all insertable control rods for the limiting condition for operation (LCO) in TS 3.3.1.2, ''Source Range Monitoring Instrumentation,'' and (3)] revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension. [The GE Nuclear Energy Report, ''CRD Notching Surveillance Testing for Limerick Generating Station,'' dated November 2006, concludes that extending the control rod notch test interval from weekly to monthly is not expected to impact the reliability of the scram system and that the analysis supports the decision to change the surveillance frequency.] Therefore, the proposed changes in TSTF–475, Revision 1 [* * *] do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis adopted by the licensee and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: Terence A. Burke, Associate General Counsel—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213.

NRC Acting Branch Chief: Mohan C. Thadani.

Exelon Generation Company, LLC, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Units 1 and 2, Will County, Illinois

Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois

Date of amendment request: June 26, 2008.

Description of amendment request: The proposed amendments would revise technical specification (TS) surveillance requirements (SRs) 3.8.1.7, 3.8.1.12, 3.8.1.15, and 3.8.1.20, to clarify the requirements for the start time test performed by these SRs. The current requirement is to have the diesel generator (DG) within the voltage and frequency limits less than or equal to 10 seconds after the start signal. The proposed change is to have the DG above the minimum voltage and frequency within 10 seconds and verified to be within the voltage and frequency limits at steady state conditions. The change is consistent with TS Task Force (TSTF) Standard TS Change Traveler, TSTF–163, ''Minimum vs. Steady State Voltage and Frequency,'' Revision 2.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises surveillance requirements to clarify what voltage and frequency limits are applicable during the transient and steady state portions of the DG start testing.

The revised requirements do not affect the function of the DGs. The DGs and their associated emergency loads are accident mitigating features whose failure modes could not act as accident initiators or precursors. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, or inspected. The proposed change does not impact the initiators or assumptions of analyzed events, nor does it impact the mitigation of accidents or transient events.

The proposed change does not affect the design of the DGs, the operational characteristics of the DGs, the interfaces between the DGs and other plant systems, the function, or the reliability of the DGs. Thus, the DGs will be capable of performing their accident mitigation function and there is no impact to the radiological consequences of any accident analysis.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change revises surveillance requirements to clarify what voltage and frequency limits are applicable during the transient and steady state portions of DG testing.

The function of the DGs is not altered by this change. The proposed change does not involve a modification to the physical configuration of the plant (i.e., no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change will not introduce a

new accident initiator, accident precursor, or malfunction mechanism.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change revises surveillance requirements to clarify what voltage and frequency limits are applicable during the transient and steady state portions of DG testing.

The margin of safety is related to the confidence in the ability of the fission product barriers to perform their design functions during and following an accident situation. These barriers include the fuel cladding, the reactor coolant system, and the containment system. The proposed change does not directly affect these barriers, nor does it involve any adverse impact on the DGs which serve to support these barriers in the event of an accident concurrent with a loss of offsite power. The proposed change doesn't affect the DG's capabilities to provide emergency power to plant equipment that mitigate the consequences of the accident.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Russell Gibbs.

FPL Energy Seabrook LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: February 8, 2008.

Description of amendment request: The amendment proposes to change the Technical Specifications to delete Surveillance Requirement 4.6.3.1, which specifies post-maintenance testing requirements for containment isolation valves (CIVs).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment to the technical specifications, which is consistent with NUREG–1431, ''Standard Technical Specifications, Westinghouse Plants,'' removes the surveillance requirement related to post-maintenance testing of containment isolation valves (CIVs). Surveillance requirements are not initiators of accidents; consequently, the proposed change does not significantly increase the probability of an accident previously evaluated. The proposed change does not alter the requirements regarding operability of CIVs, and appropriate testing will continue to confirm the operability of these valves following maintenance activities. The CIVs will continue to be tested in a manner and at a frequency that demonstrates they remain capable of performing their intended safety function. As a result, the proposed amendment does not significantly affect the consequences of an accident previously evaluated. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed change does not introduce any new accident scenarios, failure mechanisms, or single failures. The change does not add new equipment to the plant, does not modify or remove existing equipment, and does not significantly change the operation of the plant. The ability of any operable equipment to perform its specified safety function is unaffected by this change. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed changes do not involve a significant reduction in the margin of safety.

The proposed change does not alter the initial conditions or results of any accident analyses. The operability requirements, performance, and design of the CIVs are unchanged with this proposed change. The CIVs will continue to meet the design bases for the containment isolation system as described in the Seabrook Station [updated final safety analysis report]. The proposed amendment will minimize unnecessary testing of CIVs. Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis, and based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. S. Ross, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Branch Chief: H. Chernoff.

GPU Nuclear, Inc., Docket No. 50–320, Three Mile Island Nuclear Station, Unit 2, Dauphin County, Pennsylvania

Date of amendment request: June 11, 2008.

Description of amendment request: The amendment application proposes to delete Technical Specification (TS) 6.5, ''Review and Audit.'' Specifically, the proposed change would delete TS 6.5.1, ''Technical Review and Control'' and TS 6.5.3, ''Audits,'' which will be implemented by the current and proposed changes to the GPU Nuclear Post-Defueling Monitored Storage Quality Assurance Plan for Three Mile Island Unit 2 (PDMS QAP). The proposed change would also delete TS 6.5.2, ''Independent Safety Review Function,'' with no replacement.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated? No.

No physical changes to the TMI–2 Facility will occur as a result of this proposed amendment. The proposed changes will not alter the physical design or operational procedures associated with any plant structure, system, or component. As such, the change is administrative in nature and does not affect initiators of analyzed events or assumed mitigation of accidents.

The proposed changes involve the deletion of several administrative requirements from the Technical Specifications (TS). The TS requirements involve Technical Review and Control and Audits that are now controlled under the TMI–2 Post Defueling Monitored Storage Quality Assurance Plan (PDMS QAP).

In accordance with the guidance provided in NRC Administrative Letter 95–06, ''Relocation of Technical Specification Administrative Controls related to Quality Assurance,'' the proposed changes are an acceptable method for removing technical specification quality assurance requirements.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated? No.

The proposed changes are administrative in nature. The proposed changes do not alter the physical design, safety limits, or safety analysis assumptions associated with the operation of the plant. Accordingly, the changes do not introduce any new accident initiators, nor do they reduce or adversely affect the capabilities of any plant structure, system, or component to perform their safety function.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety? No.

The proposed changes conform to NRC regulatory guidance regarding the content of plant Technical Specifications. The guidance is presented in Administrative Letter 95–06 and NUREG–1430. The relocation of these administrative requirements to the PDMS QAP will not reduce the quality assurance commitments as accepted by the NRC, nor reduce administrative controls essential to the safe operation of the plant. Future changes to these administrative requirements will be performed in accordance with NRC regulation 10 CFR 50.54(a), consistent with the guidance identified above. Accordingly, the replacement of TS requirements by existing proposed TMI–2 PDMS QAP requirements results in an equivalent level of regulatory control.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

NRC Branch Chief: Andrew Persinko.

Tennessee Valley Authority, Docket Nos. 50–259, 50–260, and 50–296, Browns Ferry Nuclear Plant, Units 1, 2, and 3, Limestone County, Alabama

Date of amendment request: March 27, 2008.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) requirements related to control building envelope habitability in TS Section 3.7.3 Control Room Emergency Ventilation (CREV) System, and add TS Section 5.5.13, Control Building Envelope Habitability Program, to the Administrative Section of the TSs. The licensee has included conforming technical changes to the TS Bases. The proposed revision to the Bases also includes editorial and administrative changes to reflect applicable changes to the corresponding TS Bases, which were made to improve clarity, conform with the latest information and references, correct factual errors, and achieve more consistency with the standard TS NUREGs. The proposed revision to the TSs and associated Bases is similar to TS Task Force Traveler No. TSTF–448, Revision 3. However the references to chemical and smoke hazards are not included in the proposed revision to TS Section 3.7.3, TS Section 5.5.13 and TS Bases 3.7.3, as the CREV System was not designed to protect the control room envelope (CRE) occupants from these hazards and no toxic gas detectors are provided to initiate a CRE isolation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC) through incorporation by reference of the NSHC determination published in the **Federal Register** Notice dated January 17, 2007 (73 FR 2022), which is presented below:

1. Does the proposed Technical Specification change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change revises the TS for the CRE emergency ventilation system, which is a mitigation system designed to minimize unfiltered air leakage into the CRE and to filter the CRE atmosphere to protect the CRE occupants in the event of accidents previously analyzed. An important part of the CRE emergency ventilation system is the CRE boundary. The CRE emergency ventilation system is not an initiator or precursor to any accident previously evaluated. Therefore, the probability of any accident previously evaluated is not increased. Performing tests to verify the operability of the CRE boundary and implementing a program to assess and maintain CRE habitability ensure that the CRE emergency ventilation system is capable of adequately mitigating radiological consequences to CRE occupants during accident conditions, and that the CRE emergency ventilation system will perform as assumed in the consequence analyses of design basis accidents. Thus, the consequences of any accident previously evaluated are not increased. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed Technical Specification change create the possibility of a new or different kind of accident from any accident previously evaluated?

No. The proposed change does not impact the accident analysis. The proposed change does not alter the required mitigation capability of the CRE emergency ventilation system, or its functioning during accident conditions as assumed in the licensing basis analyses of design basis accident radiological consequences to CRE occupants. No new or different accidents result from performing the new surveillance or following the new program. The proposed change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The proposed change does not alter any safety analysis assumptions and is consistent with current plant operating practice. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed Technical Specification change involve a significant reduction in a margin of safety?

The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The proposed change does not affect safety analysis acceptance criteria. The proposed change will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without compensatory measures. The proposed change does not adversely affect systems that respond to safely shut down the plant and to maintain the plant in a safe shutdown condition. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Branch Chief: Thomas H. Boyce.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 10, 2008.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) requirements consistent with the Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler, TSTF–419, Revision 0, ''Revise PTLR [Pressure and Temperature Limits Report] Definition and References in ISTS [Improved Standard TS] 5.6.6, RCS [Reactor Coolant System] PTLR.'' The proposed change would reference only the Topical Report (TR) number and title in TS 5.6.6, ''Reactor Coolant System (RCS) PRESSURE AND TEMPERATURE LIMITS REPORT (PTLR).'' This would allow the use of currently approved TRs to determine the pressure and temperature limits in the PTLR without having to submit an amendment to the Operating License. The change would not alter (1) the U.S. Nuclear Regulatory Commission (NRC) reviewed and approved analytical methods used to determine the pressure and temperature limits or Low Temperature Overpressure Protection (LTOP) System setpoints, or (2) the requirement to use NRC-approved analytical methods to determine the limits or setpoints.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC), which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes to reference the Topical Report number and title do not alter the use of the analytical methods used to determine the P/T [pressure/temperature] limits or LTOP System setpoints that have been reviewed and approved by the NRC. This method of referencing Topical Reports would allow the use of current [NRC-approved] Topical Reports to support limits in the PTLR without having to submit an amendment to the Operating License. Implementation of revisions to Topical Reports would still receive regulatory reviews and where required receive NRC review and approval. The proposed changes to add ''LTOP arming'' into TS 5.6.6a. as a RCS pressure and temperature limit established and documented in the PTLR and deletion of ''and Cold Overpressure Mitigation System'' from TS 5.6.6b are administrative changes for consistency. The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed changes do not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed changes are consistent with safety analysis assumptions and resultant consequences. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to reference the Topical Report number and title do not alter the use of the analytical methods used to determine the P/T limits or LTOP System setpoints that have been reviewed and approved by the NRC. This method of referencing Topical Reports would allow the use of current [NRC-approved] Topical Reports to support limits in the PTLR without having to submit an amendment to the Operating License. Implementation of revisions to Topical Reports would still receive regulatory reviews and where required receive NRC review and approval. The proposed changes to add ''LTOP arming'' into TS 5.6.6a. as a RCS pressure and temperature limit established and documented in the PTLR and deletion of ''and Cold Overpressure Mitigation System'' from TS 5.6.6b are administrative changes for consistency. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements or eliminate any existing requirements [except that NRC-approved TRs can be used without an amendment]. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

The proposed changes to reference the Topical Report number and title do not alter the use of the analytical methods used to determine the P/T limits or LTOP System setpoints that have been reviewed and approved by the NRC. This method of referencing Topical Reports would allow the use of current Topical Reports to support limits in the PTLR without having to submit an amendment to the Operating License. Implementation of revisions to Topical Reports would still receive regulatory reviews and where required receive NRC review and approval. The proposed changes to add ''LTOP arming'' into TS 5.6.6a. as a RCS pressure and temperature limit established and documented in the PTLR and deletion of ''and Cold Overpressure Mitigation System'' from TS 5.6.6b are administrative changes for consistency. The proposed changes do not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The setpoints at which protective actions are initiated are not altered by the proposed changes. Sufficient equipment remains available to actuate upon demand for the purpose of mitigating an analyzed event. Therefore, it is concluded that this change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: Jay Silberg, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW., Washington, DC 20037.

NRC Branch Chief (Acting): Jack N. Donohew.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of application for amendments: June 29, 2007, as supplemented by letters dated March 12 and June 11, 2008.

Brief description of amendments: The amendments modify Technical Specification (TS) 3.7.8, ''Control Room Emergency Ventilation System (CREVS),'' and introduce TS 5.5.17, ''Control Room Envelope Habitability Program,'' consistent with Technical Specification Task Force-448, Revision 3, ''Control Room Habitability.''

Date of issuance: July 29, 2008.

Effective date: These license amendments are effective as of the date of its issuance and shall be implemented within 60 days following completion of the installation and testing of the plant modifications described in Amendment Nos. 281 and 258 issued on August 29, 2007.

Amendment Nos.: 287, 264.

Renewed Facility Operating License Nos. DPR–53 and DPR–69: Amendments revised the License and Technical Specifications.

Date of initial notice in ***Federal Register***: August 14, 2007 (72 FR 45456)

The letters dated March 12 and June 11, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of these amendments is contained in a Safety Evaluation dated July 29, 2008.

No significant hazards consideration comments received: No.

Carolina Power & Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of application for amendments: July 17, 2007, as supplemented by letters February 27 and July 9, 2008.

Brief Description of amendments: The amendments revise Brunswick Steam Electric Plant (BSEP), Units 1 and 2 technical specifications (TS) to adopt NRC-approved industry Technical Specifications Task Force (TSTF) standard TS change traveler, TSTF–448, Revision 3, ''Control Room Habitability.'' This technical specification change was made available by the U.S. Nuclear Regulatory Commission on January 17, 2007 (72 FR 2022) as part of the consolidated line item improvement process. The amendments modify the BSEP technical specification requirements regarding control room envelope habitability in TS 3.7.3, ''Control Room Emergency Ventilation (CREV) System,'' and TS Section 5.5, ''Programs and Manuals.''

Date of issuance: July 25, 2008.

Effective date: Date of issuance, to be implemented within 180 days.

Amendment Nos. 248 and 276.

Facility Operating License Nos. DPR–71 and DPR–62: Amendments change the technical specifications and add a license condition.

Date of initial notice in ***Federal Register***: (73 FR 29161). The supplemental letters dated February 27 and July 9, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 25, 2008.

No significant hazards consideration comments received: No.

Dominion Nuclear Connecticut, Inc., Docket Nos. 50–336 and 50–423, Millstone Power Station, Unit Nos. 2 and 3, New London County, Connecticut

Date of application for amendment: July 2, 2007, as supplemented on May 5, 2008.

Brief description of amendment: The amendment modifies the Technical Specification (TS) 4.0.5 to reference the American Society of Mechanical Engineers (ASME) *Code of Operation and Maintenance of Nuclear Power Plants* (OM Code) instead of Section XI of the ASME Boiler and Pressure Vessel Code. Specifically the amendment updates the inservice testing (IST) of ASME Code Class 1, 2, and 3 pumps and valves to reflect the requirements in the ASME OM Code. The amendment also extends the TS Surveillance Requirement 4.0.2 25 percent time extension to other normal and accelerated frequencies specified as 2 years or less in the IST program. In addition, the ISI requirement in TS 4.0.5 is being removed and the reference to the ISI requirement is being updated in the snubbers' TS surveillance frequency.

Date of issuance: July 31, 2008.

Effective date: As of the date of issuance and shall be implemented within 180 days from the date of issuance.

Amendment No.: 304 and 241.

Renewed Facility Operating License Nos. DPR–65 and NPF–49: Amendment revised the License and Technical Specifications.

Date of initial notice in ***Federal Register***: December 4, 2007 (72 FR 68210) The supplement dated May 5, 2008, clarified the application, did not expand the scope of the application as originally noticed, and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 31, 2008.

No significant hazards consideration comments received: No.

Duke Power Company LLC, *et al.*, Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of application for amendments: July 30, 2007, as supplement May 27, 2008, and June 23, 2008.

Brief description of amendments: The amendments revised the Technical Specifications to allow single supply header operation of the buried nuclear service water (RN) system piping for up to 30 days only during preplanned maintenance of the buried RN system piping.

Date of issuance: July 30, 2008.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 243 and 237.

Facility Operating License Nos. NPF–35 and NPF–52: Amendments revised the licenses and the technical specifications.

Date of initial notice in ***Federal Register***: February 26, 2008 (73 FR 10296) The supplements dated May 27, 2008, and June 23, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff(s original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 30, 2008.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: February 7, 2008.

Brief description of amendment: The amendment revises the Technical Specifications (TSs) associated with the

Surveillance Requirement frequency in TS 3.1.3, ''Control Rod OPERABILITY,'' consistent with Revision 1 to the TS Task Force (TSTF) Standard Technical Specification Change Document TSTF–475, ''Control Rod Notch Testing Frequency and SRM [source range monitor] Insert Control Rod Action'' (NUREG–1433).

Date of issuance: August 7, 2008.

Effective date: As of the date of issuance, and shall be implemented within 30 days.

Amendment No.: 291.

Facility Operating License No. DPR–59: The amendment revised the License and the Technical Specifications.

Date of initial notice in ***Federal Register***: April 2, 2008 (73 FR 18008). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 7, 2008.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: July 3, 2007.

Brief description of amendment: The change relocates the quality and quantity requirements associated with the emergency diesel generator fuel oil within the Technical Specifications (TS) through the creation of a new TS Limiting Condition for Operation and the Diesel Fuel Oil Testing Program. In addition, two surveillance requirements associated with periodic draining, cleaning and visual inspection of the fuel oil storage tanks are deleted.

Date of issuance: July 30, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 216.

Facility Operating License No. NPF–38: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register***: July 31, 2007 (72 FR 41782). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 30, 2008.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Units 1 and 2, Will County, Illinois

Exelon Generation Company, LLC, Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois

Exelon Generation Company, LLC, Docket No. 50–461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station, Units 2 and 3, Grundy County, Illinois

Exelon Generation Company, LLC,Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

AmerGen Energy Company, LLC, et al., Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Exelon Generation Company, LLC, and PSEG Nuclear LLC, Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York and Lancaster Counties, Pennsylvania

Exelon Generation Company, LLC, Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

AmerGen Energy Company, LLC, Docket No. 50–289, Three Mile Island Nuclear Station, Unit 1, Dauphin County, Pennsylvania

Date of application for amendment: July 19, 2007, as supplemented on July 7, 2008.

Brief description of amendment: The amendments will update the requirements in the Technical Specifications (TS) 5.3.1 ''Facility Staff Qualifications,'' or TS 6.3.1, ''Unit Staff Qualifications,'' that have been outdated based on licensed operator training programs accredited by the National Academy for Nuclear Training Academy Document, ACAD 00–003, Revision 1, dated April 2004, and the revised Title 10 of the *Code of Federal Regulations,* Part 55, ''Operators' Licenses.''

Date of issuance: July 25, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 152, 152, 156, 156, 180, 228, 220, 189, 176, 265, 267, 271, 240, 235, 265.

Facility Operating License Nos. NPF–72, NPF–77, NPF–37 and NPF–66, NPF–62, DPR–19, DPR–25, NPF–11, NPF–18, DPR–16, DPR–55, DPR–56, DPR–29, DPR–30 and DPR–50: The amendments revised the Technical Specifications and License.

Date of initial notice in ***Federal Register:*** December 4, 2007 (72 FR 68214). The supplemental letter contained clarifying information, did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 25, 2008.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of application for amendment: December 12, 2007, supplemented by letter dated June 11, 2008.

Brief description of amendment: The amendments consist of changes to the technical specifications of each unit regarding administrative issues involving: (1) Index corrections; (2) removing requirements or notes that are no longer applicable; (3) deleting references to previously deleted requirements; (4) changing references to the location of previously relocated information; and (5) editorial corrections.

Date of issuance: August 5, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 192 and 153.

Facility Operating License Nos. NPF–39 and NPF–85. These amendments revised the license and the technical specifications.

Date of initial notice in ***Federal Register:*** May 6, 2008 (73 FR 25040). The supplement dated June 11, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 5, 2008.

No significant hazards consideration comments received: No.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: July 12, 2007, as supplemented by letters dated June 19 and July 29, 2008.

Brief description of amendment: The amendment revises the technical specifications to adopt Technical Specifications Task Force–448, Revision 3, ''Control Room Habitability.'' This technical specifications improvement was made available by the U.S. Nuclear Regulatory Commission (Commission) on January 17, 2007 (72 FR 2022), as part of the consolidated line item improvement process. The amendment also adds a license condition regarding

initial performance of new surveillance and assessment requirements.

Date of issuance: July 30, 2008.

Effective date: Date of issuance, to be implemented within 180 days.

Amendment No.: 230.

Facility Operating License No. DPR–72: Amendment revises the technical specifications and adds a license condition.

Date of initial notice in ***Federal Register:*** May 20, 2008 (73 FR 29163). The supplements dated June 19 and July 29, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 30, 2008.

No significant hazards consideration comments received:

FPL Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: July 17, 2007, as supplemented by letters dated October 15, 2007, and February 19, 2008.

Description of amendment request: The amendment revises the Seabrook Technical Specifications related to control room envelope habitability consistent with Technical Specification Task Force (TSTF) Traveler TSTF–448, Revision 3.

Date of issuance: July 30, 2008.

Effective date: As of its date of issuance, and shall be implemented within 6 months.

Amendment No.: 119.

Facility Operating License No. NPF–86: The amendment revised the License and Technical Specifications.

Date of initial notice in ***Federal Register:*** November 6, 2007 (72 FR 62689). The supplemental letters provided clarifying information within the scope of the original application and did not change the staff's initial proposed no significant hazards consideration determination dated November 6, 2007 (72 FR 62689). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 30, 2008.

No significant hazards consideration comments receives: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of

the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If there are problems in accessing the document, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr.resource@nrc.gov.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns/issues relating to technical and/or health and safety matters discussed or referenced in the applications.

2. Environmental—primarily concerns/issues relating to matters discussed or referenced in the environmental analysis for the applications.

3. Miscellaneous—does not fall into one of the categories outlined above.

As specified in 10 CFR 2.309, if two or more petitioners/requestors seek to co-sponsor a contention, the petitioners/requestors shall jointly designate a representative who shall have the authority to act for the petitioners/requestors with respect to that contention. If a petitioner/requestor seeks to adopt the contention of another sponsoring petitioner/requestor, the petitioner/requestor who seeks to adopt the contention must either agree that the sponsoring petitioner/requestor shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner/requestor a representative who shall have the authority to act for the petitioners/requestors with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon

[1] To the extent that the applications contain attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel and discuss the need for a protective order.

receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, the Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Duke Power Company LLC, et al., Docket No. 50–413, Catawba Nuclear Station, Unit 1 York County, South Carolina

Date of amendment request: July 14, 2008 as supplemented July 14, 2008.

Description of amendment request: The amendment approved a one-time extension of the allowed outage time (AOT) for the 1B auxiliary feedwater system and the 1B containment spray system from 72 hours to a total of 9 days.

Date of issuance: July 15, 2008.

Effective date: July 15, 2008.

Amendment No.: 242.

Facility Operating License No. (NPF–35): Amendment revised the license.

Public comments requested as to proposed no significant hazards consideration (NSHC): No.

The Commission's related evaluation of the amendment, finding of emergency circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated July 15, 2008.

Attorney for licensee: Ms. Lisa F. Vaughn, Associate General Counsel and Managing Attorney, Duke Energy Carolinas, LLC, 526 South Church Street, EC07H, Charlotte, NC 28202.

NRC Branch Chief: Melanie C. Wong.

Dated at Rockville, Maryland, this 15th day of August, 2008.

For the Nuclear Regulatory Commission.

Robert A. Nelson,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–19369 Filed 8–25–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461]

Amergen Energy Company; Clinton Power Station, Unit No. 1; Notice of Consideration of Approval of Transfer of Facility Operating License, Conforming Amendment, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the direct transfer of Facility Operating License No. NPF–62 for the Clinton Power Station, Unit No. 1 (CPS), currently held by AmerGen Energy Company (AmerGen) as owner and licensed operator of CPS. The transfer would be to Exelon Generation Company, LLC (Exelon Generation). The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer.

According to an application for approval dated June 20, 2008, filed by AmerGen and Exelon Generation, Exelon Generation would acquire ownership of the facility, following approval of the proposed license transfer, and would be responsible for the operation, maintenance and eventual decommissioning of CPS.

No physical changes to the Facility or operational changes are being proposed in the application.

The proposed amendment would replace references to AmerGen in the license with Exelon Generation, to reflect the proposed transfer.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the direct transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the

license of a utilization facility, which does no more than conform the license to reflect the transfer action, involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737. Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to petitions to intervene and requests for hearing, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated June 20, 2008, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland this 14th day of August 2008.

For the Nuclear Regulatory Commission.

Christopher Gratton,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–19733 Filed 8–25–08; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket No. 50–289]

Amergen Energy Company; Three Mile Island Nuclear Station, Unit 1; Notice of Consideration of Approval of Transfer of Facility Operating License, Conforming Amendment, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the direct transfer of Facility Operating License No. DPR–50 for the Three Mile Island Nuclear Station, Unit 1 (TMI–1) currently held by AmerGen Energy Company (AmerGen) as owner and licensed operator of TMI–1. The transfer would be to Exelon Generation Company, LLC (Exelon Generation). The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer.

According to an application for approval dated June 20, 2008, filed by AmerGen and Exelon Generation, Exelon Generation would acquire ownership of the facility following approval of the proposed license transfer, and would be responsible for the operation, maintenance and eventual decommissioning of TMI–1.

No physical changes to the Facility or operational changes are being proposed in the application.

The proposed amendment would replace references to AmerGen and authorize Exelon Generation to reflect the proposed transfer.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the direct transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility, which does no more than conform the license to reflect the transfer action, involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions To Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and

is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737. Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to petitions to intervene and requests for hearing, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated June 20, 2008, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland this 14th day of August 2008.

For the Nuclear Regulatory Commission.

Christopher Gratton,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–19735 Filed 8–25–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–219]

AmerGen Energy Company, Oyster Creek Generating Station; Notice of Consideration of Approval of Transfer of Facility Operating License, Conforming Amendment, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the direct transfer of Facility Operating License No. DPR–16 for the Oyster Creek Nuclear Generating Station (Oyster Creek) currently held by AmerGen Energy Company (AmerGen) as owner and licensed operator of Oyster Creek. The transfer would be to Exelon Generation Company, LLC (Exelon Generation). The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer.

According to an application for approval dated June 20, 2008, filed by AmerGen and Exelon Generation, Exelon Generation would acquire ownership of the facility, including an

onsite independent spent fuel storage installation, following approval of the proposed license transfer, and would be responsible for the operation, maintenance, and eventual decommissioning of Oyster Creek.

No physical changes to the Facility or operational changes are being proposed in the application.

The proposed amendment would replace references to AmerGen in the license with references to Exelon Generation, to reflect the proposed transfer.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the direct transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility, which does no more than conform the license to reflect the transfer action, involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/ requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* Once a petitioner/ requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/ petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737. Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained

absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as Social Security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to petitions to intervene and requests for hearing, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated June 20, 2008, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agency wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland this 14th day of August 2008.

For The Nuclear Regulatory Commission.

Christopher Gratton,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–19736 Filed 8–25–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of August 25, September 1, 8, 15, 22, 29, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of August 25, 2008

There are no meetings scheduled for the week of August 25, 2008.

Week of September 1, 2008—Tentative

There are no meetings scheduled for the week of September 1, 2008.

Week of September 8, 2008—Tentative

There are no meetings scheduled for the week of September 8, 2008.

Week of September 15, 2008—Tentative

There are no meetings scheduled for the week of September 15, 2008.

Week of September 22, 2008—Tentative

There are no meetings scheduled for the week of September 22, 2008.

Week of September 29, 2008—Tentative

There are no meetings scheduled for the week of September 29, 2008.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

The NRC Commission Meeting Schedule can be found on the Internet at:*http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: August 20, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. E8–19826 Filed 8–22–08; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Week of August 18, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

ADDITIONAL ITEMS TO BE CONSIDERED:

Week of August 18, 2008

Friday, August 22, 2008

9:35 a.m. Affirmation Session (Public Meeting) (Tentative)

a. Concerning Petitions to Intervene related to *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), Application for Order Approving Indirect Transfer of Control of Licenses (filed July 30, 2007). (Tentative).

b. U.S. Department of Energy (High Level Waste Repository)—Petitions of the State of Nevada and Dr. Jacob Paz to Reject the Department of Energy's (DOE) Application to Construct a Geologic Repository at Yucca Mountain, Nevada (Tentative).

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

ADDITIONAL INFORMATION: By a vote of 4–0 on August 20 and 21, 2008, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Affirmation of ''Concerning Petitions to Intervene related to *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), Application for Order Approving Indirect Transfer of Control of Licenses (filed July 30, 2007)'' be held August 22, 2008, and on less than one week's notice to the public.

Affirmation of ''U.S. Department of Energy (High Level Waste Repository)—Petitions of the State of Nevada and Dr. Jacob Paz to Reject the Department of Energy's (DOE) Application to Construct a Geologic Repository at Yucca Mountain, Nevada (Tentative)'' was announced on July 15, 2008, to be held on July 23, 2008 and subsequently was postponed. On August 12, 2008, the Affirmation was rescheduled and announced to be held on August 13, 2008. This Affirmation was postponed again and has been rescheduled on Friday, August 22, 2008 at 9:35 a.m.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: August 21, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. E8–19828 Filed 8–22–08; 11:15 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24; Order No. 100]

Global Express Package Service Contracts

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing seven recently-filed Postal Service Global Express Package Service negotiated service agreements. This action is consistent with changes in a recent law governing postal operations.

DATES: Comments due September 2, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On August 14, 2008, the Postal Service filed seven identical notices, which have been assigned to Docket Nos. CP2008–18 through CP2008–24.[1] These notices announce individual negotiated service agreements, namely, specific Global Express Package Service (GEPS) contracts the Postal Service has entered into with individual mailers. The Postal Service believes that each is functionally equivalent to the Global Express Package Services 1 (GEPS 1) product established in Docket No. CP2008–5.

Docket No. CP2008–5. The Governor's Decision supporting the GEPS 1 product was filed in consolidated Docket No. CP2008–5.[2] In Order No. 86, the Commission established GEPS 1 as a product and held that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633, and if they are substantially equivalent to the initial GEPS 1 contract filed in Docket No. CP2008–5.[3] The GEPS 1 product provides volume-based incentives for mailers that send large volumes of Express Mail International (EMI) and/or Priority Mail International (PMI).

Related contracts. The Postal Service contemporaneously filed the seven contracts in this docket pursuant to 39 CFR 3015.5 and Order No. 86,[4] asserting that they are substantially equivalent to the initial GEPS 1 contract filed with the Commission. In support of each of these dockets, the Postal Service also filed the contract and supporting material under seal. The Notices contain the Postal Service's arguments that these contracts are substantially equivalent and that they exhibit similar cost and market characteristics. Notices at 3–5. The Postal Service also maintains that all seven contracts, by virtue of their terms, fit within the proposed MCS language for GEPS 1. *Id.* at 2.

While maintaining that the contracts are substantially equivalent to the initial GEPS 1 contract filed, the Postal Service notes that the contracts may differ in minor respects, for example, prices may vary due to volume commitments, signing dates of the agreements, existence of previous agreements, and other case specific and negotiation related factors. *Id.* at 4–5. The Postal Service maintains, however, that ''[i]ncidental differences to accommodate the respective mailers do nothing to detract from the conclusion that these agreements are 'functionally equivalent in all pertinent respects.' '' *Id.* at 5.

The Postal Service asks that the seven contracts be added to the existing GEPS 1 product. *Id.* at 2 and 5. It further notes that the contracts are ''set to expire one year after the Postal Service notifies the customer that all necessary approvals and reviews of the agreement have been obtained, culminating with a favorable conclusion on review by the Commission.'' *Id.* at 2.

II. Notice of Filings

The Commission establishes Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24. In keeping with recent practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which

[1] Notice of United States Postal Service of Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement, August 14, 2008, filed in Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24 (Notices).

[2] Docket No. CP2008–5, United States Postal Service Notice of Filing Redacted Copy of Governors' Decision No. 08–7, July 23, 2008.

[3] Docket No. CP2008–5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008 (Order No. 86) at 7 (''The Commission will verify whether or not any subsequent contract is in fact substantially equivalent. Contracts not having substantially the same terms and conditions as the GEPS 1 contract must be filed under 39 CFR part 3020, subpart B.'').

[4] *Id.*

issues being addressed pertain. The public portions of these filings can be accessed via the Commission's Web site(*http://www.prc.gov*).

Interested persons may express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642. Comments are due no later than September 2, 2008.

The Commission appoints Michael Ravnitzky to serve as Public Representative in the captioned filings.

III. Ordering Paragraphs

It is Ordered:

1. The Commission establishes Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24 for consideration of the matters raised in each docket.

2. Comments on issues in these proceedings are due no later than September 2, 2008.

3. The Commission appoints Michael Ravnitzky as Public Representative to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

Authority: 39 U.S.C. 3633; 39 CFR 3020.33.

By the Commission.

Dated: August 20, 2008.

Judith M. Grady,

Acting Secretary.

[FR Doc. E8–19679 Filed 8–25–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58385; File No. 4–443]

Joint Industry Plan; Notice of Filing and Order Approving on a Temporary Basis Amendment No. 2 to the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options

August 19, 2008.

I. Introduction

On August 12, 2008, August 18, 2008, August 15, 2008, August 13, 2008, August 8, 2008, August 14, 2008, August 14, 2008, and August 18, 2008, the American Stock Exchange LLC (''Amex''), the Boston Stock Exchange, Inc. (''BSE''), Chicago Board Options Exchange, Incorporated (''CBOE''), the International Securities Exchange, LLC (''ISE''), The NASDAQ Stock Market LLC (''Nasdaq''), NYSE Arca Inc. (''NYSE Arca''), the Philadelphia Stock Exchange, Inc. (''Phlx''), and the Options Clearing Corporation (''OCC''), respectively, filed with the Securities and Exchange Commission (''Commission''), pursuant to section 11A of the Securities Exchange Act [1] of 1934 (''Act'') and Rule 608 thereunder,[2] Amendment No. 2 to the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (''the Options Listing Procedures Plan'' or ''OLPP'').[3] The amendment would provide a uniform minimum volume threshold per underlying class to qualify for the introduction of a new expiration year of Long-term Equity AnticiPation Securities (''LEAPS'' or ''LEAP'') options. This order summarily puts into effect Amendment No. 2 on a temporary basis not to exceed 120 days and solicits comment on Amendment No. 2 from interested persons.[4]

II. Description of the Proposed Amendment

Amendment No. 2 proposes to apply a uniform minimum volume threshold per underlying class to qualify for the introduction of a new expiration year of LEAP options. Currently, Participant Exchanges may list a new LEAP expiration year at the appropriate time without any consideration as to the activity level of the class of options.

By agreeing to a minimum volume threshold per underlying class to qualify for an additional year of LEAP series, the Participant Exchanges intend to mitigate the number of option series available for trading. It is intended that this will in turn mitigate quote traffic, because Participants will not be submitting quotes in the not-listed series. The Plan Sponsors have agreed on a minimum volume threshold of 1,000 contracts national average daily volume in the preceding three calendar months (excluding volume in LEAP and FLEX series) to qualify for the introduction of a new LEAP expiration year.

In 2007, if this proposal had been in effect, the industry would have not added a new expiration year in 550 underlying securities, which would have reduced the overall number of listed series (LEAP and non-LEAP series) by 8%. These LEAP series generated only .43% of industry trading volume in a typical (non-expiration) sample week. The Exchanges agree that the benefit from reduced quoting levels greatly exceeds the small cost in missed business.

The Amendment does not restrict the introduction of a new LEAP expiration year in Index options, or in classes that have had options products trading at any exchange for less than six months. It also does not restrict, for a particular options class, the introduction of new LEAP series with an expiration year that has already been introduced by at least one Exchange.

The Commission directed the then-current options exchanges to act jointly to develop strategies to address overall capacity concerns in an Order dated September 8, 1999, as confirmed in a letter from the Director of the Division of Market Regulation dated September 13, 2000. This Amendment is an additional strategy to meet this goal.

III. Discussion

After careful consideration, the Commission finds that the proposed amendment to the OLPP is consistent with the requirements of the Act and the rules and regulations thereunder.[5] In particular, the Commission finds that the proposed amendment is consistent with the provisions of Section 11A of the Act [6] and Rule 608 of Regulation NMS thereunder,[7] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets. Specifically, the Commission believes that adopting a uniform minimum volume threshold per underlying class to qualify for the introduction of a new expiration year of LEAP options will reduce the number of option series available for trading, and thus may reduce increases in the options quote rate because market participants will not be submitting quotes in those series. In addition, the Commission finds that it is appropriate to put Amendment No.

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[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] On July 6, 2001, the Commission approved the OLPP, which was originally proposed by the Amex, CBOE, ISE, OCC, Phlx, and Pacific Exchange, Inc. (k/n/a NYSE Arca). *See* Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). On February 5, 2004, BSE was added as a sponsor to the OLPP. *See* Securities Exchange Act Release No. 49199, 69 FR 7030 (February 12, 2004). On March 21, 2008, Nasdaq was added as a sponsor to the OLPP. *See* Securities Exchange Act Release No. 57546 (March 21, 2008), 73 FR 16393 (March 27, 2008).

[4] A proposed amendment may be put into effect summarily upon publication of notice of such amendment, on a temporary basis not to exceed 120 days, if the Commission finds that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system or otherwise in furtherance of the purposes of the Act. *See* 17 CFR 242.608(b)(4).

[5] In approving this amendment, the Commission has considered its impact on efficiency, competition, and capital formation. *See* U.S.C. 78c(f).

[6] 15 U.S.C. 78k–1.

[7] 17 CFR 242.608(b)(4).

2 into effect summarily upon publication of this notice on a temporary basis. The Commission believes that such action is appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets because it will allow the options exchanges to implement the initiative to reduce quote message traffic beginning immediately.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether proposed Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–443 in the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–443. 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 Section, 100 F Street, NE., Washington, DC 20549–1090 on business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchanges. 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 4–443 and should be submitted on or before September 16, 2008.

V. Conclusion

It is therefore ordered, pursuant to Section 11A of the Act,[8] and Rule 608 thereunder [9] that proposed Amendment No. 2 be, and it hereby is, approved on a temporary basis until December 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19782 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78k–1.

[9] 17 CFR 242.608(b)(4).

[10] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, August 28, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, August 28, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Resolution of litigation matters; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: August 21, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19791 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 58387; File No. SR–CBOE–2008–83]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Complex Order Price Check Parameters

August 19, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 19, 2008, the Chicago Board Options Exchange, Incorporated ''Exchange'' or (''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a (''non-controversial'') proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.53C, *Complex Orders on the Hybrid System*, to codify an automated system feature that prevents complex order executions from occurring at potentially erroneous prices. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1.Purpose

Complex orders that are eligible for automatic execution through the CBOE's electronic complex order book (''COB'') may be automatically executed in accordance with the provisions of Rule 6.53C. Complex orders that are not eligible to route to COB route to PAR. The purpose of the proposed rule change is to amend Rule 6.53C to codify a description of new complex order price check parameter functionality, which is a functionality that could be activated in certain series of a given options class that would prevent an automatic execution of a complex order from occurring at a potentially erroneous price. The complex order price check parameter is designed to help maintain a fair and orderly market. The functionality would prevent executions from automatically occurring in three types of scenarios:

Market Width Scenarios

COB would not automatically execute complex orders that are market orders if (i) the width between the Exchange's best bid and best offer in any individual series leg is not within an acceptable price range, or (ii) the width between the Exchange's best net priced bid and best net priced offer in the individual series legs comprising the complex order is not within an acceptable price range. The applicable price ranges will be determined by the Exchange on an individual series leg basis for each series comprising the complex order and on a net price basis based on the sum of each individual series leg of the complex order, as applicable, and will be announced to the membership via Regulatory Circular generally at least one day in advance. For purposes of this provision, an ''acceptable price range'' shall be based on no less than 1.5 times the corresponding bid/ask differentials for the individual series legs as set forth in Rule 8.7(b)(iv)(A).[5] In addition, the Exchange is proposing that the senior official in CBOE's Control Room or two Floor Officials may grant intra-day relief by widening the acceptable price range. Any such intra-day changes will be announced to the membership when granted. Market orders (in whole or in part) that trigger the applicable complex order price check parameters and, thus, that are not eligible for automatic execution, will be routed on a class by class basis to PAR, BART, or at the order entry firm's discretion to the order entry firm's booth printer. Thus, if part of a market order may be executed within an acceptable price range, that part of the order will be executed automatically and the part of the order that would execute at a price outside the acceptable price range will be routed as described above.

For illustrative purposes, assume the Exchange determines to set a price check parameter for the series of a class that provides that complex orders would not automatically execute if they are market orders and (i) the width between the Exchange's best bid and best offer in any individual series leg is 2 × the standard bid/ask differential, or (ii) the width between the Exchange's best net bid and best net offer in the individual series legs is greater than or equal to 1.5 × the standard bid/ask differential for the individual series legs.[6]

Example 1: Assume a complex order to buy Series A and sell Series B is routed to COB. Also assume at that time the best bid and offer (''BBO'' in Series A is $1.00–$1.60 (wider than the 2 X series parameter), the BBO in Series B is $3.00–$3.10 (within the 2 X series parameter). Because the bid/ask differential in Series A ($0.60) is greater than 2 X the applicable standard bid/ask differential for the series,[7] the price check parameter will be triggered. The incoming complex order will not automatically execute in COB and will instead route to PAR, BART or the booth.

Example 2: Assume a complex order to buy Series A and sell Series B is routed to COB. Also assume at the time the BBO in Series A is $1.00–$1.40 (within the 2 X series parameter), the BBO in Series B is $2.00 –$2.60 (within the 2 X series parameter). Because the net price bid/ask differential for the two series ($1.00) is greater than 1.5 × the applicable standard bid/ask differential for the series ($0.975), the price check parameter will be triggered. The incoming complex order will not automatically execute in COB and will instead route to PAR, BART or the booth.

Example 3: Assume a complex order to buy 50 Series A contracts and sell 50 Series B contracts is routed to COB. Also assume at that time the BBO in Series A is $1.00–$1.20 (within the 2 X series parameter) for 100 contracts, the BBO in Series B is $2.00–$2.20 (within the 2 X series parameter) for 10 contracts, and the next available bid in Series B is $0.05 for 100 contracts. The incoming complex order would execute paying $1.20 for 10 Series A contracts and collecting $2.00 for 10 Series B contracts. When the market in Series B decrements to $0.05–$2.20, the price check parameter would be triggered for any one of three reasons: the width of Series B is$0.05–$2.20 (wider than the 2 X series parameter), the net price width of Series A and B is $2.35 (wider than the 2 X net price parameter of $1.30), and the net price has moved from a credit to debit (discussed below). The balance of the incoming complex order will route to PAR, BART or the booth.

Credit-to-Debit (Debit-to-Credit) Scenarios

In classes designated by the Exchange, COB would not automatically execute market orders that would be executed at a net credit (debit) price after receiving a partial execution at a net debit (credit) price. The remaining balance of any such market orders that trigger this complex order price check parameters will be routed on a class by class basis to PAR, BART, or at the order entry firm's discretion to the order entry firm's booth printer. The designated classes for which this price check parameter is activated will be announced to the membership via Regulatory Circular.

Example 3 above illustrates the operation of this parameter. In the example, the incoming order would initially receive an execution for 10 spreads at a net *credit* price of $0.80 each (*i.e.*, the net sale proceeds from Series B are larger than the net purchase cost from Series A). When the bid in Series B decrements to $0.05, the net execution price would become a net *debit* price of $1.15 each (*i.e.*, the net sale proceeds from Series B are less than the net purchase cost from Series A). Such an execution would appear to be erroneous because normally a person in

[5] Rule 8.7(b)(iv)(A) sets forth the bid/ask differentials for open outcry trading in an individual series, which are as follows: No more than $0.25 between the bid and offer for each option contract for which the bid is less than $2, no more than $0.40 where the bid is at least $2 but does not exceed $5, no more than $0.50 where the bid is more than $5 but does not exceed $10, no more than $0.80 where the bid is more than $10 but does not exceed $20, and no more than $1.00 where the bid is more than $20.

[6] Following from the example above, on an intra-day basis the senior official or two Floor Officials may determine based on market conditions to grant relief by widening the applicable individual series or net priced price check parameters (*e.g.*, the ranges for the individual series and/or net priced price check parameters might be temporarily widened to 3 X).

[7] 2 X the standard bid/ask differentials would be as follows: $0.50 between the bid and offer for each option contract for which the bid is less than $2, $0.80 where the bid is at least $2 but does not exceed $5, $1.00 where the bid is more than $5 but does not exceed $10, $1.60 where the bid is more than $10 but does not exceed $20, and $2.00 where the bid is more than $20.

this scenario would expect to execute its entire market order at a net credit price.

Vertical Scenarios

In classes designated by the Exchange, COB would not automatically execute certain vertical complex orders [8] that appear to be erroneously priced. This functionality is designed to detect and prevent executions in limited scenarios where (i) a market order would be executed at a net debit price when it clearly should be executed at a net credit price (but not vice versa),[9] and (ii) a order is entered at a net credit price when it clearly should have been entered at a net debit price (or vice versa). Specifically, a market order that would trade at a net (debit) price or a complex order priced at net credit (debit) price that consists of at least two series legs would be automatically rejected by COB if the complex order would result in an execution to:

- Buy (sell) a number of call option contracts and sell (buy) the same number or applicable ratio (as determined by the Exchange on a class by class basis) of call option contracts in a series with the same underlying security and expiration date but a higher exercise price; or
- Buy (sell) a number of put option contracts and sell (buy) the same number or applicable ratio (as determined by the Exchange on a class by class basis) of put option contracts in a series with the same underlying security and expiration date but a lower exercise price.

As with the other price check parameters, the designated classes for which this parameter is activated, as well as any applicable ratio, will be announced to the membership via Regulatory Circular. If these conditions exist when an order is routed to COB, the complex order will be rejected. To the extent the parameters are triggered once an order is resting in COB or after an incoming order receives a partial execution, such complex orders will be routed on a class by class basis to PAR, BART, or at the order entry firm's discretion to the order entry firm's booth printer. The following examples illustrate this price check parameter:

Example 1: Assume a complex order to buy 50 Jan 45 XYZ calls and sell 50 Jan 50 XYZ calls is entered at a net credit price (*i.e.*, the net sale proceeds from the Jan 50 calls are larger than the net purchase cost from the Jan 45 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that the Jan 50 calls would not cost more than the Jan 45 calls.

Example 2: Assume a butterfly spread to buy 50 Jan 45 XYZ calls, sell 100 Jan 50 XYZ calls and buy 50 Jan 55 XYZ calls is entered at a net credit price (i.e., the net sale proceeds from the Jan 50 calls are more than the net purchase cost from the Jan 45 and 55 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that selling the middle 50 strike would result in less than the cost of buying the upper 55 and lower 45 strikes.

Example 3: Assume a market order to buy 50 Jan 45 XYZ calls and sell 50 Jan 40 XYZ calls is entered. Also assume that the Jan 45 XYZ calls are quoted $4.00–$4.10 for 10 contracts and the next available offer is $4.30 for 100 contracts, and that the Jan 40 XYZ calls are quoted $4.50–$4.60 for 10 contracts and the next available bid is $4.20 for 100 contracts. The incoming market order would receive an execution for 10 spreads at a net credit price of $0.40 each (*i.e.*, the net sale proceeds from the Jan 40 Series are larger than the net purchase cost from the Jan 45 Series). When the series decrement, the net execution price would become a net *debit* price of $0.10 each (*i.e.*, the net sale proceeds from the Jan 40 Series are less than the net purchase cost from the Jan 45 Series). Such an execution would appear to be erroneous because normally a person in this scenario would expect to execute the vertical spread at a net credit price.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act [10] and the rules and regulations under the Act applicable to national securities exchanges and, in particular, the requirements of section 6(b) of the Act.[11] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [12] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will contribute to the maintenance of fair and orderly markets because it will provide an automated process for preventing potentially erroneous executions in complex orders from occurring.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–83 on the subject line.

[8] As referenced herein, a ''vertical'' complex order is one in which all the component series have the same expiration date.

[9] A vertical market order that would result in an execution at a net credit price (*i.e.,* the net sale proceeds from the series being sold are more than the net purchase cost from the series being bought) but that would normally execute at a net debit price (*i.e.,* the net sale proceeds from the series being sold are less than the net purchase cost from the series being bought) would be a favorable execution for the market order and would not trigger this price check parameter.

[10] 15 U.S.C. 78s(b)(1).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–83 and should be submitted on or before September 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19706 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58394; File No. SR–CBOE–2008–85]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Adopting a New Order Type

August 20, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 19, 2008, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 6.53 (Certain Types of Orders Defined) to allow for the submission of attributable orders. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Office of the Secretary, CBOE and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 6.53 (Certain Types of Orders Defined) to allow for the submission of attributable orders.[3] These orders allow users to voluntarily display their firm IDs on the orders. The NASDAQ Options Market, LLC (''NOM'') currently allows its participants to submit attributable orders (*See* NOM Chapter VI, Section (1)(d)(1)). As proposed, the Exchange may limit the systems/processes for which attributable orders will be available. For example, the attributable order-type may initially only be available in connection with certain Exchange auction processes like the Hybrid Agency Liaison system which ''flashes'' marketable orders for price improvement executions before those orders are routed to another market center pursuant to the Options Linkage Plan. This proposal is responsive to requests by Exchange users who believe that enhanced executions may be obtained if firm ID information is allowed on orders (on a voluntary basis).

2. Statutory Basis

Since this proposal allows for greater customization by providing users with an additional order type, the Exchange believes that the proposal is consistent with the Act[4] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposal is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade and to remove impediments to and to perfect the mechanism for a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is filed for immediate effectiveness pursuant to Section 19(b)(3)(A)[7] of the Act and Rule 19b–4(f)(6)[8] thereunder because it effects a change that (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Firm ID is a 1–4 character identification code (letters and /or numbers). Each CBOE member firm may establish its own unique Firm ID.

[4] 15 U.S.C. 78s(b)(1).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

investors and the public interest. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The proposal may assist investors by allowing participants the benefits of attributable orders. Additionally, the Exchange provided the Commission with written notice of its intent to file the proposal, along with a brief description and text of the proposal, prior to the date of the filing of the proposal.

For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–85 and should be submitted on or before September 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19785 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58386; File No. SR–NASDAQ–2007–067]

Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change as Modified by Amendment No. 1 To Establish an Imbalance Cross

August 19, 2008.

I. Introduction

On July 18, 2007, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish the ''Imbalance Cross'' on a pilot basis. The proposed rule change was published for comment in the **Federal Register** on April 8, 2008.[3] No comments were received on the proposed rule change. On August 13, 2008, Nasdaq filed Amendment No. 1 to the proposed rule change to make certain technical, non-substantive modifications to the original rule filing. This order approves the proposed rule change as amended.

II. Description of the Proposal

Nasdaq proposes to implement for a one-year pilot the Imbalance Cross, a system enhancement which will automatically suspend trading in Nasdaq-listed securities that are the subject of abrupt and significant intra-day price movements. The Imbalance Cross will be fully automated, be based on objective, quantitative criteria, and be triggered automatically when the execution price of a Nasdaq-listed security moves more than a fixed amount away from a pre-established ''triggering price'' for that security. The Triggering Price for each security will be the price of any execution by the System in that security within the previous 30 seconds. For each Nasdaq security, the System will continually compare the price of each execution against the prices of all executions in that security over the 30 seconds.

As the System compares current executions against executions occurring in the previous 30 seconds, it will determine whether the current execution price is outside of a ''threshold range'' for that security. The Threshold Range for each security will be based upon the current execution price for that security and will vary by price. Specifically, for per-share execution prices of $1.75 or less, the Threshold Range will be 15 percent; for execution prices over $1.75 and up to $25, the Threshold Range will be 10 percent; for execution prices over $25 and up to $50, the Threshold Range will be five percent; and for execution prices over $50, the Threshold Range will be three percent.

If the execution price of a trade in a Nasdaq security exceeds the Threshold Range from the Triggering Price, the System will automatically trigger the Imbalance Cross.[4] When that occurs, the System will cease executing trades in that security for a 60-second ''Display Only Period.'' During that 60-second Display Only Period, the System will maintain all current quotes and orders and continue to accept new quotes and orders in that Security. The System will disseminate an Order Imbalance Indicator every 5 seconds.

Unlike a trading halt pursuant to Nasdaq Rule 4120, the Imbalance Cross will not be considered a regulatory halt and, therefore, it will not trigger a marketwide trading halt under Section X of the Nasdaq UTP Plan. As a result, other markets will be permitted to continue trading a Nasdaq stock that is undergoing a Market Re-Opening on Nasdaq. During the Imbalance Cross, Nasdaq's quotations will be marked ''non-firm,'' signaling to other markets that quotes and orders routed to Nasdaq

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57595 (April 1, 2008), 73 FR 19118 (''Original Filing'').

[4] For example, for a security trading at $50.00, if a trade occurs at $42.50 or below or 57.50 or above it will trigger the Imbalance Cross.

will not be executed during this re-opening process.

At the conclusion of the 60-second Display Only Period, the System will automatically re-open the market by executing the Nasdaq Halt Cross as set forth in Rule 4753(b)(2)–(4) as it does today for securities subject to a trading halt pursuant to Rule 4120. Unlike securities subject to a trading halt under Nasdaq Rule 4120, securities subject to an Imbalance Cross will automatically re-open at the end of the 60-second Display Only Period; the 60-second period will not be subject to further extensions.

The Imbalance Cross price will result in a single price opening; the price will be set by the Nasdaq Halt Cross. The Nasdaq Halt Cross will operate in the same manner as the Halt Cross operates when trading resumes following a trading halt initiated pursuant to Nasdaq Rule 4120 with one exception. Quotes and orders residing on the Nasdaq book during the Imbalance Cross will be subject to the same priorities and same execution algorithm that applies during the standard Halt Cross. However, unlike the standard Halt Cross, Nasdaq proposes to ''bound'' the Imbalance Cross price as it does the Nasdaq Closing Cross.[5] As already exists for the Nasdaq Closing Cross, Nasdaq will establish a benchmark price and a threshold range beyond which the Imbalance Cross price cannot move.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[6] and, in particular, the requirements of Section 6 of the Act.[7] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposal to create the Imbalance Cross, which would systematically suspend trading in Nasdaq-listed securities that are the subject of abrupt and significant intra-day price movements, will promote fair and orderly markets and the protection of investors.

The proposed Imbalance Cross would complement existing Nasdaq rules that are designed to protect the integrity of the market. Specifically, Nasdaq Rule 4120[9] authorizes Nasdaq Regulation to halt trading in a security based upon news or an emergency in the market. In addition, Nasdaq Regulation also has the ability under Nasdaq Rule 11890 to break trades if the trades meet the definition of clearly erroneous transactions.[10] The Commission notes that the Imbalance Cross shares characteristics with trading halts initiated pursuant to Nasdaq Rule 4120 as well as with the evaluation of potential clearly erroneous trades pursuant to Nasdaq Rule 11890. The Threshold Ranges for the Imbalance Cross generally correspond to the thresholds established for clearly erroneous trades under Nasdaq IM–11890–4 with the exception of executions priced under $1.75 which will be subject to a straightforward 15 percent threshold. The Display Only Period is similar to the Display Only Period provided before the opening of a security subject to a trading halt initiated pursuant to Rule 4120. In addition, the dissemination of an Order Imbalance Indicator every 5 seconds is similar to the manner of reopening of securities that are the subject of a trading halt.

The Commission believes that, as presently constituted and under current market conditions, Nasdaq's Imbalance Cross trade qualifies for the single-priced reopening exception under Rule 611(b)(3) of Reg. NMS.[11] Nasdaq's Imbalance Cross will operate pursuant to written rules and procedures. When an Imbalance Cross is triggered in accordance with such rules, Nasdaq will call a formal trading halt during which time Nasdaq systems will be prohibited from executing orders. Members, however, may continue to enter quotes and orders, which will be queued during the 60-second Display Only Period. At the conclusion of the Display Only Period, the queued orders will be executed at a single price, pursuant to the rules governing the Imbalance Cross. Given the transparent and formalized process, the opportunity offered to all members to participate in the Imbalance Cross, and the infrequency with which Nasdaq anticipates the Imbalance Cross would be triggered,[12] the Commission believes that the exception from the Order Protection Rule for single-priced reopenings applies with regard to the Imbalance Cross process.

The Commission approves the proposal to establish the Imbalance Cross as a one-year pilot for an initial 100 Nasdaq-listed securities. Nasdaq will file a proposed rule change if it decides to expand the pilot or implement the pilot on a permanent basis.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 6 of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–NASDAQ–2007–067), as modified by Amendment No. 1, be and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19783 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Nasdaq Rule 4754(b)(2)(E) (Nasdaq Closing Cross).

[6] In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] For a detailed description of the Nasdaq Halt Cross, *see* Securities Exchange Act Release No. 53488 (March 15, 2006), 71 FR 14272 (March 21, 2006) (notice of filing of SR–NASD–2006–015).

[10] For a detailed description of the adjudication of potential clearly erroneous trades, *see* Securities Exchange Act Release No. 54854 (December 1, 2006), 71 FR 71208 (December 8, 2006) (notice of SR–NASDAQ–2006–046).

[11] 17 CFR 242.611(b)(3).

[12] Nasdaq has provided the Commission data that indicates that the Imbalance Cross should be triggered in only 0.001% of executions and, on average, in less than one percent of the securities traded on any given day. Because of the expected infrequency of occurrence, the Commission believes that there would be little opportunity to abuse the Imbalance Cross functionality simply to avoid compliance with the Order Protection Rule.

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58392; File No. SR–NASDAQ–2008–019]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 1 Thereto To Remove From the Nasdaq Rules Fee Provisions Relating to Nasdaq's Mutual Fund Quotation Service

August 20, 2008.

On March 12, 2008, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to remove from the Nasdaq rulebook references to the fees charged by Nasdaq in connection with its Mutual Fund Quotation Service (''MFQS''). On July 3, 2008, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on July 14, 2008.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

Through the MFQS, Nasdaq collects price data for mutual funds, money market funds, and unit investment trusts.[4] This price data includes information such as net asset value, offer/market price, and capital gains distributions.[5] Price data may be submitted to Nasdaq by either the fund itself, or by a third-party service facilitator, such as a pricing agent.[6] This pricing data is then transmitted to print media and/or market data vendors, depending on the level of service for which the fund qualifies.[7] The data interface for the MFQS is separate from the Nasdaq trading system interface.[8]

Nasdaq Rule 7033 (a) through (d) sets forth the fees that Nasdaq charges money market funds, mutual funds, and unit investment trusts for participating in the MFQS. Nasdaq Rules 7019(b) and 7033(e) set forth the distribution and access fees that Nasdaq charges for MFQS information, which is transmitted via the Mutual Funds Dissemination Service (''MFDS''). Nasdaq proposes to delete Rule 7033 in its entirety from its rulebook, and the portion of Rule 7019(b) that relates to MFQS fees.

The Commission has carefully reviewed the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] The Commission believes that it is reasonable for Nasdaq to delete the portion of Rule 7019(b) that relates to MFQS fees, and Rule 7033 in its entirety as, based on representations made by Nasdaq, neither the MFQS nor the MFDS appear to be facilities of a national securities exchange within the meaning of the Act. Removing these provisions is thus consistent with the requirements of Section 6(b) of the Act,[10] as the fees charged by Nasdaq in connection with the MFQS do not fall within the scope of the rules that must be filed with the Commission pursuant to Section 19(b)(1) of the Act [11] and Rule 19b–4 thereunder.[12]

If, however, Nasdaq were to propose to tie pricing for the MFQS or the MFDS to an exchange activity, or otherwise modify the MFQS or MFDS such that they fall within the definition of facility of an exchange in the Act,[13] Nasdaq would have to file a proposed rule change with the Commission.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ–2008–019), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19784 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58102 (July 3, 2008), 73 FR 40410.

[4] *See* MFQS User Guide at *www.nasdaqtrader.com.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* e-mail from Alex Kogan, Associate General Counsel, Nasdaq, to Andrew Madar, Attorney-Advisor, Commission, dated August 15, 2008.

[9] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78s(b)(1).

[12] 17 CFR 240.19b–4.

[13] *See* 15 U.S.C. 78c(a)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58395; File No. SR–NYSEArca–2008–85]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Relating to Listing and Trading of PowerShares Active U.S. Real Estate Fund

August 20, 2008.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Exchange Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 11, 2008, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca, through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities'' or the ''Corporation''), proposes to list and trade the following under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): the PowerShares Active U.S. Real Estate Fund. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the following Managed Fund Shares [4] (''Shares'') under NYSE Arca Equities Rule 8.600: The PowerShares Active U.S. Real Estate Fund (''Fund'').[5] The Shares will be offered by PowerShares Actively Managed Exchange-Traded Fund Trust (the ''Trust''), a business trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[6]

The Shares will conform to the initial and continued listing criteria under Rule 8.600. The Fund will not purchase or sell securities in markets outside the U.S. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [7] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3.

Description of the Fund

Invesco PowerShares Capital Management LLC (the ''Adviser'') is the investment adviser for the Fund and is registered as an ''investment adviser'' under the Investment Advisers Act of 1940 (the ''Advisers Act'').[8] Invesco Institutional (N.A.), Inc. (''Invesco Institutional'') is the Fund's primary investment sub-adviser and is also registered as an ''investment adviser'' under the Advisers Act. Invesco Aim Distributors, Inc. (the ''Distributor'') serves as the principal underwriter and distributor for the Fund. The Adviser is affiliated with the Distributor, a broker-dealer. As required by NYSE Arca Equities Rule 8.600, Commentary .07, the Exchange represents that the Adviser has implemented a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio.

According to the Registration Statement, the Fund has an investment objective of high total return through growth of capital and current income. It seeks to achieve its investment objective by investing, under normal market conditions, at least 80% of its assets in securities of companies that are principally engaged in the U.S. real estate industry. A company is considered to be principally engaged in the U.S. real estate industry if (i) it derives 50% of its revenues or profits from the ownership, leasing, construction, financing or sale of U.S. real estate; or (ii) it has at least 50% of the value of its assets invested in U.S. real estate. The Fund plans to invest principally in equity real estate investment trusts (''REITs''). Equity REITs pool investors'' funds for investments primarily in real estate properties or real estate-related loans (such as mortgages). The Fund may also invest in real estate operating companies (''REOCs''), as well as securities of other companies principally engaged in the U.S. real estate industry. REOCs are similar to REITs, except that REOCs reinvest their earnings into the business, rather than distributing them to unitholders like REITs. The 80% investment policy is non-fundamental and requires 60 days' prior written notice to shareholders before it can be changed.

In constructing the portfolio, the sub-advisers (as described in the Registration Statement) analyze quantitative and statistical metrics to identify attractively priced securities. The security and portfolio evaluation process is generally conducted monthly. The sub-advisers will consider selling or reducing a security position if (i) The relative attractiveness of a security falls below desired levels; (ii) a particular security's risk/return profile changes significantly; or (iii) a more attractive investment opportunity is identified.

Creations and redemptions of Shares occur in large specified blocks of Shares, referred to as ''Creation Units''. The Creation Unit size for the Fund is 50,000 Shares.

The NAV of the Fund will normally be determined as of the close of the regular trading session on the NYSE (ordinarily 4 p.m. Eastern Time) on each business day.

Availability of Information

The Fund's Web site (*http://www.powershares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the Bid/Ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[9] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission previously approved listing and trading on the Exchange of the following PowerShares actively managed funds under Rule 8.600: PowerShares Active AlphaQ Fund, the PowerShares Active Alpha Multi-Cap Fund, the PowerShares Active Mega-Cap Portfolio and the PowerShares Active Low Duration Portfolio. *See* Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25).

[6] The Trust is registered under the 1940 Act. On June 26, 2008, the Trust filed with the Commission a Registration Statement for the Fund on Form N–1A under the Securities Act of 1933, as amended, (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–147622 and 811–22148) (''Registration Statement''). The description of the operation of the Trust herein is based on the Registration Statement.

[7] 17 CFR 240.10A–3.

[8] 15 U.S.C. 80b–1. The Exchange represents that the Adviser and its related personnel, are subject to Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer (''CCO'') or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment adviser to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) Adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[9] The Bid/Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and their service providers.

Web site the Disclosed Portfolio as defined in proposed Rule 8.600(c)(2) that will form the basis for the Fund's calculation of NAV at the end of the business day.[10] The Web site information will be publicly available at no charge.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *http://www.sec.gov*.

Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be disseminated by the Exchange at least every 15 seconds during the Core Trading Session through the facilities of CTA. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of a Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

For more information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, see the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Initial and Continued Listing Criteria

The Fund will be subject to the initial and continued listing criteria of NYSE Arca Equities Rule 8.600(d). The Exchange has established that a minimum of 100,000 Shares will be required to be outstanding at the time of commencement of trading on the Exchange. In addition, the Exchange will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[11] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the Financial Instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The minimum trading increment for Shares on the Exchange will be $0.01.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of the ISG.[12] In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a),[13] which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action,

[10] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[11] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[12] For a list of the current members of ISG, see *http://www.isgportal.org*.

[13] NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation. *See* Securities Exchange Act Release No. 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR–PCX–2005–115).

and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. Eastern Time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5) [14] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of actively managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice in the **Federal Register**.[15] The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the 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–NYSEArca–2008–85 and should be submitted on or before September 10, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19707 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[14] 15 U.S.C. 78f(b)(5).

[15] E-mail from Michael Cavalier, Associate General Counsel, NYSE Euronext, to Edward Cho and Christopher Chow, Special Counsels, Commission, dated August 13, 2008.

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58396; File No. SR–NYSEArca–2008–86]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to Listing of the WisdomTree Dreyfus Emerging Markets Fund

August 20, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 11, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the following fund of the WisdomTree Trust (the ''Trust'') under NYSE Arca Equities Rule 8.600 (Managed Fund Shares): WisdomTree Dreyfus Emerging Markets Fund (''Fund''). The shares of the Fund are collectively referred to herein as the ''Shares.'' The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and www.nyse.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE Arca included statements concerning the purpose of, and basis for, the proposed rule change and discussed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the WisdomTree Dreyfus Emerging Markets Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of ''Managed Fund Shares,'' on the Exchange.[3] The Fund will be an actively managed exchange traded fund. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Trust is registered with the Commission as an investment company.[4]

Description of the Shares and the Fund

WisdomTree Asset Management, Inc. (''WisdomTree Asset Management'') is the investment adviser to the Fund.[5] WisdomTree Asset Management is not affiliated with any broker-dealer. The Bank of New York is the administrator, custodian and transfer agent for the Fund. ALPS Distributors, Inc. serves as the distributor for the Fund.[6]

The Fund seeks to earn current income reflective of money market rates in emerging market currencies available to foreign investors, as well as provide exposure to changes in the value of emerging market currencies relative to the U.S. Dollar. Since the Fund's investment objective has been adopted as a non-fundamental investment policy, the Fund's investment objective may be changed without a vote of shareholders.

The Fund seeks to achieve its investment objective by investing in short-term securities and instruments designed to provide exposure to the currencies and money market rates of a specified set of emerging market countries. The set of countries is selected and reconstituted on annual basis with similar allocations to each country being established (in U.S. Dollar terms) at the reconstitution date and consequently reset each quarter. While the fund is actively managed, it will strive to adhere to these general parameters in both currency selection and approximate allocation, unless it is believed to be to the detriment of the fund. The reconstitution and allocation is described in more detail below.

A basket of from 5 to 12 currencies is selected at least annually from a pool of eligible currencies to provide a representative and diversified proxy for developing market currencies relative to the U.S. Dollar. Countries and their capital markets are first classified as frontier, emerging, developing, and developed markets based on a number of quantitative and qualitative factors to determine eligibility. Only the currencies of countries and capital markets classified as developing or emerging markets will be deemed eligible. The selection of the constituent currencies is then driven by the liquidity and tradability of the individual currencies, a country's economic and capital market development, and optimizing regional and economic diversification. The Fund attempts to invest in instruments that provide exposure to the most liquid currencies in the geographical regions in which the Fund invests. The Fund will seek to provide an equally-weighted exposure to these currencies. The Fund will be rebalanced on a quarterly basis to maintain this equal weighting. The basket will be reconstituted each year following a similar classification and selection process. Significant events, such as the reclassification of a country's currency from developing to developed, may cause the Fund to reconstitute its portfolio more frequently than annually. At launch, the Fund initially will select a subset of the following markets: Brazil, Chile, China, the Czech Republic, Hungary, India, Malaysia, Mexico, Poland, Russia, South Africa, South Korea, Taiwan, Turkey, and Thailand.[7]

In addition to using the BIS Survey to assess liquidity, the Fund's portfolio managers also use information about transaction volume, bid-ask spreads, and average transaction size in each currency and in contracts and derivatives on such currencies to assess liquidity. This information is obtained through market observation, through subscription services and from publicly available sources.

Because the market for money market instruments in these countries generally is less liquid and accessible to foreign investors than corresponding markets in more developed economies, the Fund intends to achieve exposure to the applicable non-U.S. market(s) by investing primarily in short term U.S. money market securities and also in forward currency contracts and swaps. The combination of U.S. money market securities with forward currency contracts and currency swaps is designed to create a position economically similar to a money market instrument denominated in a non-U.S. currency. A forward currency contract is an agreement to buy or sell a specific currency at a future date at a price set at the time of the contract. A currency swap is an agreement between two parties to exchange one currency for another at a future rate.[8]

The Fund generally will maintain a weighted average portfolio maturity of

[3] The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain funds of the PowerShares Actively Managed Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008) (SR–NYSEArca–2008–25). The Commission approved listing and trading on the Exchange of twelve other actively-managed funds of the WisdomTree Trust in Securities Exchange Act Release No. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31).

[4] *See* Post-Effective Amendment No. 14 to Registration Statement on Form N–1A for the Trust (File Nos. 333–132380 and 811–21864) (the ''Registration Statement''). The descriptions of the Fund and the Shares contained herein are based on information in the Registration Statement.

[5] WisdomTree Investments, Inc. (''WisdomTree Investments'') is the parent company of WisdomTree Asset Management.

[6] The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). *See* Investment Company Act Release No. 28174 (February 27, 2008) (File No. 812–13470). In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

[7] Data for the currencies of these countries is included in the Bank for International Settlements Triennial Central Bank Survey, December 2007 (''BIS Survey''). The Fund will invest in instruments that provide exposure to currencies selected from the top 42 currencies in the chart included in the BIS Survey (''Currency distribution of foreign exchange turnover''), reflecting the percentage share of average daily turnover for the applicable month and year.

[8] The Fund may pursue its objectives through direct investments in money market instruments issued by entities in the applicable non-U.S. country and denominated in the applicable non-U.S. currency when WisdomTree Asset Management believes it is in the best interest of the Fund to do so. The decision to secure exposure directly or indirectly will be a function of, among other things, market accessibility, credit exposure, and tax ramifications for foreign investors. If the Fund pursues direct investment, eligible investments will include short-term securities issued by the applicable foreign government and its agencies or instrumentalities, bank debt obligations and time deposits, bankers' acceptances, commercial paper, short-term corporate debt obligations, mortgage-backed securities, and asset-backed securities.

90 days or less and will not purchase any money market instrument with a remaining maturity of more than 397 calendar days. The Fund will not invest in non-U.S. equity securities.

The Fund issues and redeems Shares on a continuous basis at net asset value (''NAV'')[9] only in large blocks of shares, typically 50,000 shares or more (''Creation Units''), in transactions with authorized participants. Creations of the Fund are usually in exchange for cash and redemptions are usually in exchange for a basket of U.S. money market instruments and/or a designated amount of cash. Once created, Shares of the Fund trade on the secondary market in amounts less than a Creation Unit. For more information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, see the Registration Statement.

Availability of Information

The Fund's Web site (*www.wisdomtree.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV, mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[10] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session[11] on the Exchange, the Trust will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the ''Disclosed Portfolio'') held by each Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[12] The Web site and information will be publicly available at no charge.

In addition, an estimated value, defined in Rule 8.600 as the ''Portfolio Indicative Value,'' that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. The Portfolio Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and disseminated by the Exchange at least every 15 seconds during the Core Trading Session on the Exchange through the facilities of the Consolidated Tape Association. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Information regarding market price and volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association high-speed line.

Initial and Continued Listing

The Shares will be subject to Rule 8.600(d), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. A minimum of 100,000 Shares will be required to be outstanding at the commencement of trading. The Exchange states that this minimum number of Shares required to be outstanding is comparable to requirements that have been applied to previously listed series of exchange-traded funds. The Exchange believes that the proposed minimum number of Shares outstanding at the start of trading will be sufficient to provide market liquidity. The Exchange represents that, for initial and/or continued listing, the Shares must be in compliance with Rule 10A–3[13] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3.

The Exchange represents that it will obtain a representation (prior to listing of the Fund) from the Trust that the NAV per Share will be calculated daily and made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Shares of the Funds will be halted if the ''circuit breaker'' parameters in NYSE Arca Equities Rule 7.12 are reached. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The minimum trading increment for Shares on the Exchange will be $0.01.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which includes Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting

[9] The NAV of the Fund's shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m. Eastern time (the ''NAV Calculation Time''). NAV per share is calculated by dividing the Fund's net assets by the number of Fund shares outstanding. For more information regarding the valuation of Fund investments in calculating the Fund's NAV, see the Registration Statement.

[10] The Bid/Ask Price of the Fund is determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and their service providers.

[11] The Core Trading Session is 9:30 a.m. to 4 p.m. Eastern time.

[12] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[13] *See* 17 CFR 240.10A–3.

securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of the ISG.[14]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a),[15] which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. Eastern time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[16] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in Rule 8.600 are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE Arca does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2008–86 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–86. 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 (*www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the 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–NYSEArca–2008–86 and should be submitted on or before September 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19708 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[14] For a list of the current members of ISG, see *www.isgportal.org.* The Exchange notes that not all of the components of the Disclosed Portfolio for the Fund may trade on exchanges that are members of ISG.

[15] NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation. *See* Securities Exchange Act Release No. 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR–PCX–2005–115).

[16] 15 U.S.C. 78f(b)(5).

[17] CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–58397; File No. SR–NYSEArca–2008–83]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Schedule of Fees and Charges for Exchange Services To Add a Credit That Applies to Indications of Interest That Result in Routed and Executed Orders

August 20, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on August 4, 2008, NYSE Arca, Inc. (the ''Exchange''), through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, credit, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly-owned subsidiary NYSE Arca Equities, proposes to add a new credit to the Schedule of Fees and Charges for Exchange Services (the ''Schedule'') that applies to indications of interest (''IOIs'') submitted by ETP Holders [5] that result in routed and executed orders. While changes to the Schedule pursuant to this proposal will be effective upon filing, the credit will be applied retroactively to August 1, 2008. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the Exchange's Office of the Corporate Secretary, and at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* NYSE Arca Equities Rule 1.1(n).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In an effort to enhance participation on the Exchange and to offer increased liquidity to its Users,[6] the Exchange proposes to add a new credit to the Schedule concerning orders routed and executed based on the Exchange's receipt of IOIs. The proposal establishes two volume-based tiers. Tier 1 offers ETP Holders a credit of $0.10 per 100 shares where: (1) The ETP Holder submits an IOI to the Exchange; (2) the Exchange routes an order to access the ETP Holder's un-displayed liquidity in response to the IOI; and (3) those routed orders are executed by the ETP Holder with an average daily IOI-related share volume per month greater than 5 million shares. Tier 2 offers ETP Holders a credit of $0.05 per 100 shares where: (1) The ETP Holder submits an IOI to the Exchange; (2) the Exchange routes an order to access the ETP Holder's un-displayed liquidity in response to the IOI; and (3) those routed orders are executed by the ETP Holder with an average daily IOI-related share volume per month between 2.5 million and 5 million shares. The proposed IOI tiers and credits apply to volume aggregated across Tape A, Tape B, and Tape C securities.[7]

IOIs are non-displayed indications of symbol, size and side, which do not interact with the NYSE Arca Book.[8] At their discretion, participating ETP Holders may send an IOI to the Exchange, which in turn will consider the IOI when determining potential destinations for outbound routes. IOIs offer Exchange customers access to pools of liquidity that were previously inaccessible, thereby reducing market fragmentation. By introducing this tiered credit, the Exchange is enhancing the incentive to participate in the Exchange's IOI program and provide additional liquidity to the marketplace.

While changes to the Schedule pursuant to this proposal will be effective upon filing, the credit will be applied retroactively to August 1, 2008.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of Act,[9] in general, and furthers the objectives of Section 6(b)(4),[10] in particular, in that it is intended to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposed credit is reasonable. The proposed rates are part of the Exchange's effort to attract and enhance participation on the Exchange, by offering volume-based incentives. The Exchange also believes that the proposed changes to the Schedule are equitable in that they apply uniformly to our Users.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(2) [12] thereunder

[6] *See* NYSE Arca Equities Rule 1.1(yy).

[7] Trade activity on days when the market closes early does not count toward volume tiers.

[8] Regarding IOIs, the Commission notes its previous statement that, ''the term 'order' is defined as 'any *firm* indication of a willingness to buy or sell a security. * * *' Whether or not an indication of interest is 'firm' will depend on what actually takes place between the buyer and seller. The label put on an order—'firm' or 'not firm'—is not dispositive. For example, a system claiming it displays only 'indications of interest' that are not orders, may be [displaying orders] if these indications are, in fact, firm in practice. Securities Exchange Act Release No. 40780 (December 8, 1998), 63 FR 70844, 70850 (December 22, 1998) (quoting 17 CFR 240.3b–16(c)).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 19b–4(f)(2).

because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NYSEArca–2008–83 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEArca–2008–83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca–2008–83 and should be submitted on or before September 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

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BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58399; File No. SR–NYSEArca–2008–88]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Rule Change by NYSE Arca, Inc. To Eliminate the Requirement That Orders Sent Via the InterMarket Linkage System and Broker Dealer Orders Receive the Same Billing Treatment

August 20, 2008.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 13, 2008, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise certain requirements pertaining to Broker Dealer Transaction Fees.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Presently, executions on NYSE Arca resulting from Linkage Orders are subject to the same billing treatment as other Broker Dealer orders. Assessing the same fees for both Broker Dealer orders sent directly to the Exchange and Linkage Orders stems from prior approval orders that established the pilot program for Linkage Fees.[4] The Exchange proposes to eliminate this requirement that Linkage Orders and Broker Dealer orders receive the same billing treatment. In doing so, the Exchange will have greater flexibility in designing and implementing fees within its Post/Take pricing model. By this filing, the Exchange is not otherwise amending or revising its schedule of fees. Any future amendment to the Exchange's schedule of fees will be, of course, subject to a filing with the Commission.[5]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and Section 6(b)(4) of the Act,[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

[4] *See* Securities Exchange Act Release No. 47560 (March 21, 2003), 68 FR 15257 (March 28, 2003) (notice of filing of SR–PCX–2003–08). As approved by the Commission, the Exchange's proposal to establish a pilot program for Linkage Fees noted that executions resulting from linkage orders will be subject to the same billing treatment as other broker-dealer executions. *See* Securities Exchange Act Release Nos. 47786 (May 2, 2003), 68 FR 24779 (May 8, 2003) (order approving proposal in SR–PCX–2003–08 to establish pilot program for Linkage Fees); 56133 (July 25, 2008 [sic]), 72 FR 42210 (August 1, 2007) (SR–NYSEArca–2007–66) (order approving extension of Linkage Fee pilot program through July 31, 2008); 58056 (June 30, 2008), 73 FR 38482 (July 7, 2008) (SR–NYSEArca–2008–67) (order approving extension of Linkage Fee pilot program through July 31, 2009).

[5] While changes to the Exchange's schedule of fees that apply to Exchange members may be submitted pursuant to section 19(b)(3)(A) of the Act and subparagraph (f)(2) of Rule 19b–4 thereunder, proposed changes that involve the pilot program for Linkage Fees must be submitted pursuant to section 19(b)(2) of the Act.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it pertains to a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–88 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–88. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–NYSEArca–2008–88 and should be submitted on or before September 16, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–19786 Filed 8–25–08; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SELECTIVE SERVICE SYSTEM

Forms Submitted to the Office of Management and Budget for Extension of Clearance

AGENCY: Selective Service System.

ACTION: Notice.

The following forms have been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35):

SSS Form I

Title: The Selective Service System Registration Form.

Purpose: Is used to register men and establish a data base for use in identifying manpower to the military services during a national emergency.

Respondents: All 18-year-old males who are United States citizens and those male immigrants residing in the United States at the time of their 18th birthday are required to register with the Selective Service System.

Frequency: Registration with the Selective Service System is a one-time occurrence.

Burden: A burden of two minutes or less on the individual respondent.

SSS Form 2

Title: The Selective Service System Change of Information Form.

Purpose: To insure the accuracy and completeness of the Selective Service System registration data.

Respondents: Registrants are required to report changes or corrections in data submitted on the SSS Form 1.

Frequency: When changes in a registrant's name or address occur.

Burden: A burden of two minutes or less on the individual respondent.

Copies of the above identified forms can be obtained upon written request to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 30 days of the publication of this notice to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

A copy of the comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Dated: August 8, 2008.

Ernest E. Garcia,

Deputy Director.

[FR Doc. E8–19774 Filed 8–25–08; 8:45 am]

BILLING CODE 8015–01–M

DEPARTMENT OF STATE

[Public Notice: 6335]

30-Day Notice of Proposed Information Collections: Thirteen Information Collections.

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Prior Approval for Brokering Activity.
- *OMB Control Number:* 1405–0142.

- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* None.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 40.
- *Estimated Number of Responses:* 60.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 120 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Brokering Activity Reports.
- *OMB Control Number:* 1405–0141.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* None.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 430.
- *Estimated Number of Responses:* 430.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 860 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Mandatory.

- *Title of Information Collection:* Statement of Registration.
- *OMB Control Number:* 1405–0002.
- *Type of Request:* Revision of Currently Approved Collection
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC
- *Form Number:* DS–2032.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 4,900.
- *Estimated Number of Responses:* 4,900.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 9,800 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Mandatory.

- *Title of Information Collection:* Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data.
- *OMB Control Number:* 1405–0003.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–5.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 1,960.
- *Estimated Number of Responses:* 53,000.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 53,000 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Application/License for Temporary Import of Unclassified Defense Articles.
- *OMB Control Number:* 1405–0013.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–61.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 225.
- *Estimated Number of Responses:* 1,100.
- *Average Hours per Response:* 30 minutes.
- *Total Estimated Burden:* 550 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Application/License for Temporary Export of Unclassified Defense Articles.
- *OMB Control Number:* 1405–0023.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–73.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 420.
- *Estimated Number of Responses:* 3,600.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 3,600 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Non-Transfer and Use Certificate.
- *OMB Control Number:* 1405–0021.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–83.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 2,200.
- *Estimated Number of Responses:* 7,400.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 7,400 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data.
- *OMB Control Number:* 1405–0022.
- *Type of Request:* Revision of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–85.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 40.
- *Estimated Number of Responses:* 360.
- *Average Hours per Response:* 30 minutes.
- *Total Estimated Burden:* 180 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Authority to Export Defense Articles and Services Sold under the Foreign Military Sales (FMS) Program.
- *OMB Control Number:* 1405–0051.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- *Form Number:* DSP–94.
- *Respondents:* Business and Nonprofit Organizations.
- *Estimated Number of Respondents:* 250.
- *Estimated Number of Responses:* 2,500.
- *Average Hours per Response:* 30 minutes.
- *Total Estimated Burden:* 1,250 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefits.

- *Title of Information Collection:* Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data.
- *OMB Control Number:* 1405–0092.
- *Type of Request:* Revision of Currently Approved Collection.

• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
• *Form Numbers:* DSP–6, DSP–62, DSP–74, DSP–84, DSP–119.
• *Respondents:* Business and Nonprofit Organizations.
• *Estimated Number of Respondents:* 750.
• *Estimated Number of Responses:* 9,700.
• *Average Hours per Response:* 30 minutes.
• *Total Estimated Burden:* 4,850 hours.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Required to Obtain Benefits.

• *Title of Information Collection:* Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements.
• *OMB Control Number:* 1405–0093.
• *Type of Request:* Revision of Currently Approved Collection.
• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
• *Form Number:* None.
• *Respondents:* Business and Nonprofit Organizations.
• *Estimated Number of Respondents:* 680.
• *Estimated Number of Responses:* 9,600.
• *Average Hours per Response:* 2 hours.
• *Total Estimated Burden:* 19,200 hours.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Required to Obtain Benefits.

• *Title of Information Collection:* Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services.
• *OMB Control Number:* 1405–0025.
• *Type of Request:* Revision of Currently Approved Collection.
• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
• *Form Number:* None.
• *Respondents:* Business and Nonprofit Organizations.
• *Estimated Number of Respondents:* 2,200.
• *Estimated Number of Responses:* 700.
• *Average Hours per Response:* 1 hour.
• *Total Estimated Burden:* 700 hours.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Mandatory.

• *Title of Information Collection:* Maintenance of Records by Registrants.
• *OMB Control Number:* 1405–0111.
• *Type of Request:* Revision of Currently Approved Collection.
• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
• *Form Number:* None.
• *Respondents:* Business and Nonprofit Organizations.
• *Estimated Number of Respondents:* 4,900.
• *Estimated Number of Responses:* 4,900.
• *Average Hours per Response:* 20 hours.
• *Total Estimated Burden:* 98,000 hours.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Mandatory.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from August 26, 2008.

ADDRESSES: Direct comments and questions to Katherine Astrich, the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), who may be reached at 202–395–4718. You may submit comments by any of the following methods:
• *E-mail: kastrich@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
• *Mail (paper, disk, or CD–ROM submissions):* Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.
• *Fax:* 202–395–6974
You must include the information collection title in the subject lines of your message/letter.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collections and supporting documents from Nicholas Memos, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112, who may be reached via phone at (202) 663–2804, or via e-mail at *memosni@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:
• Evaluate whether the proposed collection of information is necessary for the proper performance of our functions.
• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The export, temporary import, temporary export and brokering of defense articles, defense services and related technical data are licensed by the Directorate of Defense Trade Controls in accordance with the International Traffic in Arms Regulations (22 CFR parts 120–130) and section 38 of the Arms Export Control Act. Those of the public who manufacture or export defense articles, defense services, and related technical data, or engage in the brokering thereof, must register with the Department of State. Persons desiring to engage in export, temporary import, and brokering activities must submit an application or written request to conduct the transaction to the Department to obtain a decision whether it is in the interests of U.S. foreign policy and national security to approve the transaction. Also, registered brokers must submit annual reports regarding all brokering activity that was transacted, and registered manufacturers and exporters must maintain records of defense trade activities for five years.

Methodology: These forms/information collections may be sent to the Directorate of Defense Trade Controls via the following methods: Electronically, mail, personal delivery, and/or fax.

Dated: August 15, 2008.

Frank J. Ruggiero,

Deputy Assistant Secretary for Defense Trade and Regional Security, Bureau of Political-Military Affairs, Department of State.

[FR Doc. E8–19754 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 6334]

Culturally Significant Objects Imported for Exhibition Determinations: ''Alfred Kubin''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as

amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Alfred Kubin,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Neue Galerie New York, Museum for German and Austrian Art, New York, New York, from on or about September 24, 2008, until on or about January 26, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 19, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19768 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6329]

Culturally Significant Objects Imported for Exhibition Determinations: ''Art and Love in Renaissance Italy''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Art and Love in Renaissance Italy'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, New York, from on or about November 11, 2008, until on or about February 16, 2009; and at the Kimbell Art Museum, Forth Worth, Texas, from on or about March 15, 2009 until on or about June 14, 2009; and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 15, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19775 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6330]

Culturally Significant Objects Imported for Exhibition Determinations: ''Joan Miro: Painting and Anti-Painting 1927–1937''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Joan Miro: Painting and Anti-Painting 1927–1937'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Museum of Modern Art, New York, New York, from on or about November 2, 2008, until on or about January 12, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW. Room 700, Washington, DC 20547–0001.

Dated: August 15, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19766 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6331]

Culturally Significant Objects Imported for Exhibition Determinations: ''The Museums of Berlin and the Legacy of James Simon''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''The Museums of Berlin and the Legacy of James Simon'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Fine Arts Museums of San Francisco, Legion of Honor, San Francisco, California, from on or about October 18, 2008, until on or about January 18, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8050). The

address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 18, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19769 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6333]

Culturally Significant Objects Imported for Exhibition Determinations: ''Paintings From the Reign of Victoria: The Royal Holloway Collection, London''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Paintings from the Reign of Victoria: The Royal Holloway Collection, London,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Philbrook Museum of Art, Tulsa, Oklahoma, from on or about October 12, 2008, until on or about January 4, 2009; at the Delaware Museum of Art, Wilmington, Delaware, from on or about January 31, 2009, until on or about April 12, 2009; at the Yale Center for British Art, New Haven, Connecticut, from on or about June 11, 2009, until on or about July 26, 2009; at Brigham Young University Museum of Art, Provo, Utah, from on or about August 15, 2009, until on or October 25, 2009; at the Huntsville Museum of Art, Huntsville, Alabama, from on or about November 21, 2009, until on or about January 31, 2010; at the Society of the Four Arts, Palm Beach, Florida, from on or about March 12, 2010, until on or about April 18, 2010; and at the Iris and Gerald B. Cantor Center for the Visual Arts, Stanford University, Stanford, California, from on or about May 15, 2010, until on or about July 12, 2010; and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 19, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19770 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6332]

Culturally Significant Objects Imported for Exhibition Determinations: ''Sun, Wind, and Rain: The Art of David Cox''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Sun, Wind, and Rain: The Art of David Cox'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Yale Center of British Art, New Haven, Connecticut, from on or about October 16, 2008, until on or about January 4, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone*: 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: August 19, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–19771 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6308]

Industry Advisory Panel: Notice of Open Meeting

The Industry Advisory Panel of Overseas Buildings Operations will meet on Thursday, September 18, 2008 from 9:30 a.m. until 3:30 p.m. Eastern Standard Time. The meeting will be held in room 1107 of the U.S. Department of State, located at 2201 C Street, NW. (entrance on 23rd Street) Washington, DC. For logistical and security reasons, it is imperative that everyone enter and exit using only the 23rd Street entrance. The majority of the meeting is devoted to an exchange of ideas between the Department's Bureau of Overseas Building Operations' senior management and the panel members, on design, operations, and building maintenance. Members of the public are asked to kindly refrain from joining the discussion until Director Shinnick opens the discussion to them.

Entry to the building is controlled; to obtain preclearance for entry, members of the public planning to attend should provide, by September 10, 2008, their name, professional affiliation, date of birth, citizenship, and a valid government-issued ID number (i.e., U.S. government ID, U.S. military ID, passport, or drivers license (and state)) by e-mailing: *iapr@state.gov*. Due to limited space, please remember that only one person per company may register.

If you have any questions, please contact Andrea Walk at *walkam@state.gov* or on (703) 516–1544.

Dated: August 18, 2008.

Richard J. Shinnick,

Director, Ad Interim, Overseas Buildings Operations, Department of State.

[FR Doc. E8–19752 Filed 8–25–08; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket Number—DOT–OST–2008–0196]

Renewal of Approval of Information Collection Requirements

AGENCY: Office of the Secretary, DOT.

ACTION: Notice and request for comment.

OMB Control No.: 2100–0019.

Title: Transportation for Individuals with Disabilities; Accessibility of Over-the-Road Buses (OTRBs).

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, this notice announces the U.S. Department of Transportation, Office of the Secretary, (DOT) intention to request an extension of the information collection request (ICR) OMB No. 2100–0019, Americans with Disabilities Act (ADA): Information Collection Requirements for the ADA Rule for Over-the-Road Buses. DOT invites the general public, industry and other governmental parties to comment on the Department's request for the renewal Paperwork Reduction Act approval of the information requirements in Subpart H of 49 CFR Part 37, concerning over-the-road buses. The current request approved by OMB expires on August 31, 2008.

DATES: Written comments should be submitted by October 27, 2008.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2008–0196 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2008–0196 at the beginning of your comment. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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), which may also be found at *http://www.regulations.gov.*

You may request confidential treatment of comments or portions of comments under the procedures set forth in 49 CFR Part 105. While all comments should be sent to the FDMS, OST will consider separately and not place in the public docket those comments or portions of comments OST determines to include trade secrets, other confidential commercial information, or sensitive security information (SSI). In accordance with 49 CFR 105.30, you may ask OST to keep information confidential using the following procedures: (1) Mark ''confidential'' on each page of the original document you would like to keep confidential; (2) send FDMS both the original document and a second copy of the original document with the confidential information redacted; and (3) explain why the information is confidential (as a trade secret, other confidential commercial information, or SSI). In your explanation, you should provide enough information to enable OST to determine whether the information provided is protected by law and must be handled separately.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Acting Assistant General Counsel for Regulation and Enforcement, Office of General Counsel, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, room W94–302, 202–366–9310, or via e-mail at *bob.ashby@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Transportation for Individuals With Disabilities—Accessibility of Over-the-Road Buses (OTRBs).

OMB Control No.: 2100–0019.

Type of Request: Extension of a currently approved collection.

Abstract: The Department of Transportation (DOT), in conjunction with the U.S. Architectural and Transportation Barriers Compliance Board, issued final access regulations for privately operated over-the-road buses (OTRBs) as required by the Americans with Disability Act (ADA) of 1990. The Final Rule on Accessibility of Over-the-Road Buses has the following recordkeeping/reporting requirements: The first has to do with 48 hour advance notice and compensation. The second has to do with equivalent service and compensation. The third has to do with reporting information on ridership on accessible fixed route buses. The fourth has to do with recordkeeping for 5 years. The fifth has to do with report submission to DOT annually. The sixth has to do with reporting information on the purchase and lease of accessible and inaccessible new and used buses. When initiating the information collection as part of the rulemaking that established the requirements in question, the Department provided the estimate of burdens set forth below. We have no reason to believe that the time necessary to comply with the information collection requirements has changed in the meantime. We would note that this estimate assumes compliance by bus operators with the information collection requirements. Reporting rates, however, have been low. The purpose of the information collection requirements is to provide data that the Department can use in reviewing the provisions of its rule and to assist the Department in its oversight of compliance by bus companies. In particular, the data will be used to assist the Department in conducting the reevaluation of the requirements of the over-the-road bus rule mentioned in the regulation itself.

Respondents: Charter/tour service operators, fixed route companies, small mixed service operators.

Estimated No. of Respondents: 3,448.

Average Annual Burden per Respondent: Variable.

Estimated Total Burden on Respondents: 316,226 hours.

Burden Statement: The amount of data sought is held to the minimum amount necessary to ensure compliance with the regulation. As suggested in comments from both the bus industry and disability community commenters during the rulemaking leading to this rule, recordkeeping and reporting of this kind would be useful for the purpose of ensuring compliance. The cumulative total burden for the information collection is between 167,889 hours (low estimate) to 182,873 hours (high estimate).

Issued in Washington, DC, on August 19, 2008.

Robert C. Ashby,

Acting Assistant General Counsel for Regulation and Enforcement.

[FR Doc. E8–19740 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2008–39]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before September 15, 2008.

ADDRESSES: You may send comments identified by Docket Number FAA–2008–0714 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Annette Kovite, ANM–113, Standardization Branch, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, (425) 227–1262.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 20, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2008–0714.

Petitioner: BAE Systems (Operations) Ltd.

Section of 14 CFR Affected: §§ 26.11, 26.43, 26.45, and 26.49.

Description of Relief Sought: BAE Systems (Operations) Ltd. requests an exemption from the design approval holder requirements of §§ 26.11, 26.43, 26.45, and 26.49 for the British Aerospace ATP aircraft type. Section 26.11 requires development of instructions for continued airworthiness applicable to an airplane's electrical wiring interconnection system. Sections 26.43, 26.45, and 26.49 are requirements related to development of damage tolerance data for repairs and alterations.

[FR Doc. E8–19709 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2008–40]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before September 15, 2008.

ADDRESSES: You may send comments identified by Docket Number FAA–2008–0738 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Annette Kovite, ANM–113, Standardization Branch, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, (425) 227–1262.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 20, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2008–0738.

Petitioner: BAE Systems (Operations) Ltd.

Section of 14 CFR Affected: §§ 26.11, 26.43, 26.45, and 26.49.

Description of Relief Sought: BAE Systems (Operations) Ltd. requests an exemption from the design approval holder requirements of §§ 26.11, 26.43, 26.45, and 26.49 for the HS748 Series 2A and 2B airplane type. Section 26.11 requires development of instructions for continued airworthiness applicable to an airplane's electrical wiring interconnection system. Sections 26.43, 26.45, and 26.49 are requirements related to development of damage tolerance data for repairs and alterations.

[FR Doc. E8–19710 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Port Authority Trans-Hudson Corporation

[Docket Number FRA–2008–0085]

The Port Authority Trans-Hudson Corporation (PATH), seeks a waiver of compliance from certain provisions of Safety Appliance Standards, 49 CFR Part 231, that requires a sill step, side, and end handhold on each side and each end of a passenger car. Specifically, the PATH request is to use an alternate location of the sill step and side handhold and not install end handholds for the production of PATH's new fleet of passenger cars in passenger train service.

PATH operates on 13.8 miles of an interstate rail transit system between five major terminals and eight intermediate stations linking New Jersey and New York. The PATH system is a closed system, does not interchange and has other railroads with no highway rail crossings. Currently, PATH operates 326 vehicles of similar comparable design with relatively short headways and high platforms over a system that one-half of which is located in tunnels below ground level carrying 250,000 passengers in a 24-hour period. There is no interchange of car equipment between PATH and any rapid transit system or railroad. Because of the unique characteristics of PATH that is more representative of an inter-urban rapid transit system, PATH requests a waiver of certain provisions of FRA requirements, which they believe are not totally applicable. PATH also believes that in the past, FRA, while asserting jurisdiction over PATH, has acknowledged that PATH's operations are analogous to that of an inter-urban rapid transit system.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number 2008–0085) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and 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).

Issued in Washington, DC on August 20, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–19673 Filed 8–25–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Departmental Offices, Office of Financial Education; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The Office of Financial Education within the Department of the Treasury is soliciting comments on a proposed new collection of information concerning the *Workplace Financial Education Honor Roll Program (Honor Roll*) application. To keep America competitive in the future, it is important to continue to increase the levels of financial literacy in the U.S. The purpose of the *Honor Roll* is to recognize employers that provide successful financial education programs to their employees. The *Honor Roll* is intended to spur interest in financial education by highlighting successful initiatives that show the benefits of financial education through both private sector and public sector efforts. The *Honor Roll* is one of the initiatives that the newly created President's Advisory Council on Financial Literacy has recommended to the Department of the Treasury.

DATES: Written comments should be received on or before October 27, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Dubis Correal, Director, Office of Financial Education, Department of the Treasury, Room 1328, 1500 Pennsylvania Ave., NW., Washington, DC 20220 or *Dubis.Correal@do.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the *Honor Roll* application should be directed to Dubis Correal, Director, Office of Financial Education, Department of the Treasury, Room 1328,

1500 Pennsylvania Ave., NW., Washington, DC 20220 or *Dubis.Correal@do.treas.gov.*

SUPPLEMENTARY INFORMATION:

Title: Workplace Financial Education Honor Roll Program Application.

Abstract: Information will be collected on a voluntary basis from both private sector and public sector employers interested in being selected for the *Honor Roll.* This information is necessary to evaluate and assess the effectiveness of employer financial education programs and to determine which employers will be placed on the Treasury *Honor Roll.*

Current Actions: New collection. The Department of the Treasury will collect information on an annual basis from eligible employers who want to be recognized for providing successful financial education programs to their employees. The information to be collected will include brief narrative descriptions on the types of financial education programs offered to employees and the impact of such programs on employees. The Department of the Treasury will not collect any personally identifiable financial information.

Type of Review: New.

Affected Public: Business or other for-profit organizations, Not-for-profit institutions, and State, Local or Tribal Governments.

Estimated Number of Respondents: 60, 1 response per year.

Estimated Average Time per Respondent: Six hours per respondent per filling.

Estimated Total Annual Burden Hours: 360.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record and subject to public disclosure in their entirety. You should only submit comments that you wish to make available publicly. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, usefulness and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: August 19, 2008.

Lindsay Valdeon,

Deputy Executive Secretary, Treasury Department.

[FR Doc. E8–19694 Filed 8–25–08; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 19, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. 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 September 25, 2008 to be assured of consideration.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

OMB Number: 1513–0101.

Type of Review: Extension.

Title: Marks and Notices on Packages of Tobacco Products, TTB REC 5210/13.

Description: TTB requires that tobacco products be identified by statements of information on packages, cases, and containers of tobacco products. TTB uses this information to validate the receipt of excise tax revenue, the determination of tax liability, and the verification of claims.

Respondents: Businesses or other for-profit institutions.

Estimated Total Burden Hours: 1 hour.

OMB Number: 1513–0022.

Type of Review: Revision.

Title: TTB REC 5520/1 Annual Report of Concentrate Manufacturers and Usual and Customary Business Records-Volatile Fruit-Flavor Concentrate.

Form: TTB 5520.2.

Description: Manufacturers of volatile fruit-flavor concentrate must provide reports as necessary to ensure the protection of the revenue. The report and records accounts for all concentrates manufactured, removed, or treated so as to be unfit for beverage use. The information is required to verify that alcohol is not being diverted for beverage use which would jeopardize tax revenues.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 27 hours.

OMB Number: 1513–0094.

Type of Review: Extension.

Title: Federal Firearms and Ammunition Excise Tax Return.

Form: 5300.26.

Description: This information is needed to determine how much tax is owed for firearms and ammunition. TTB uses this information to verify that a taxpayer has correctly determined and paid tax liability on the sale or use of firearms and ammunition. Businesses, including small to large, and individuals may be required to use this form.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 27,020 hours.

OMB Number: 1513–0065.

Type of Review: Revision.

Title: Wholesale Dealers Records of Receipt of Alcoholic Beverages, Disposition of Distilled Spirits, and Monthly Summary Report, TTB REC 5170/2.

Description: An accounting tool, this record is used to show the person from whom a wholesale dealer purchased alcoholic beverages, and the person to whom the dealer sold alcoholic beverages. When required, the monthly report will provide a report of sales activities and on-hand inventory quantities.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 1,200 hours.

OMB Number: 1513–0006.

Type of Review: Extension.

Title: Applications Volatile Fruit-Flavor Concentrate Plants, TTB REC 5520 2.

Forms: TTB 5520.3.

Description: Persons who wish to establish premises to manufacture volatile fruit-flavor concentrates are required to file an application and keep records to support the manufacture of these concentrates. TTB uses the application information to identify persons responsible for such manufacture, since these products contain ethyl alcohol and have potential for use as alcoholic beverages with consequent loss of revenue. The application constitutes registry of a still, a statutory requirement. TTB uses the

records to ensure that the concentrates are manufactured properly.

Respondents: Businesses or other for-profit institutions.

Estimated Total Burden Hours: 160 hours.

OMB Number: 1513–0031.

Type of Review: Revision.

Title: Specific Transportation Bond—Distilled Spirits or Wines Withdrawn for Transportation to Manufacturing Bonded Warehouse—Class Six; and Continuing Transportation Bond—Distilled Spirits and Wines.

Forms: TTB 5100.12, TTB 5110.67.

Description: TTB F 5100.12 and TTB F 5110.67 are specific bonds that protect the tax revenue on distilled spirits and wine while in transit from one type of bonded facility to another. They identify the shipment, the parties, the date, and the amount of bond coverage.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 1 hour.

OMB Number: 1513–0055.

Type of Review: Revision.

Title: Offer in Compromise of Liability Incurred Under Federal Alcohol Administration Act, as amended.

Forms: TTB 5640.2.

Description: Persons who have committed violations of the FAA Act may submit an offer in compromise. The offer is a request by the party in violation to compromise penalties for the violations in lieu of civil or criminal action. TTB F 5640.2 identifies the violation(s) to be compromised by the person committing them, amount of offer, plus justification for acceptance.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 24 hours.

OMB Number: 1513–0102.

Type of Review: Revision.

Title: Drawback of Tax on Tobacco Products and Cigarette Papers and Tubes—Export Shipment, TTB REC 5210/2.

Description: Exporters may file claim for drawback of tax on tobacco products and cigarette papers and tubes which have been taxpaid and are to be exported. Appropriate records are needed to ensure drawback of tax is properly documented and justified.

Respondents: Business and other for profits.

Estimated Total Burden Hours: 5 hours.

Clearance Officer: Frank Foote (202) 927–9347, Alcohol and Tobacco Tax and Trade Bureau,Room 200 East,1310 G. Street, NW.,Washington, DC 20005.

OMB Reviewer: Alexander T. Hunt (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building,Washington, DC 20503.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–19696 Filed 8–25–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Financial Management Service; Senior Executive Service; Financial Management Service Performance Review Board (PRB)

AGENCY: Financial Management Service, Treasury.

ACTION: Notice.

SUMMARY: This notice announces the appointment of members to the Financial Management Service (FMS) Performance Review Board (PRB).

DATES: This notice is effective on August 26, 2008.

FOR FURTHER INFORMATION CONTACT: David A. Lebryk, Deputy Commissioner, Financial Management Service, 401 14th Street, SW., Washington, DC; telephone (202) 874–7000.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 4314(c)(4), this notice is given of the appointment of individuals to serve as members of the FMS PRB. This Board reviews the performance appraisals of career senior executives below the Assistant Commissioner level and makes recommendations regarding ratings, bonuses, and other personnel actions. Four voting members constitute a quorum. The names and titles of the FMS PRB members are as follows:

Primary Members

David A. Lebryk, Deputy Commissioner

Rita Bratcher, Assistant Commissioner, Debt Management Services

Sheryl R. Morrow, Assistant Commissioner, Federal Finance

Wanda Rogers, Assistant Commissioner, Payment Management

Charles R. Simpson, Assistant Commissioner, Information Resources

D. James Sturgill, Assistant Commissioner, Govermentwide Accounting

Alternate Member

Scott H. Johnson, Assistant Commissioner, Management (Chief Financial Officer)

David A. Lebryk,

Deputy Commissioner.

[FR Doc. E8–19767 Filed 8–25–08; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. Currently, the OCC is soliciting comment concerning its extension, without change, of an information collection titled ''Debt Cancellation Contracts and Debt Suspension Agreements—12 CFR 37.''

DATES: You should submit written comments by: October 27, 2008.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mail Stop 1–5, *Attention:* 1557–0224, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–4448, or by electronic mail to *regs.comments@occ.treas.gov*. You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0224, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Mary Gottlieb, (202) 874–5090, Legislative and Regulatory Activities Division (1557–0202), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

The OCC is proposing to extend OMB approval of the following information collection:

Title: Debt Cancellation Contracts and Debt Suspension Agreements.

OMB Number: 1557–0224.

Description: This submission covers an existing regulation and involves no change to the regulation or the information collection. The OCC requests that OMB approve its revised estimates and renew its approval of the information collection. The estimates have been revised to reflect the current number of national banks.

The regulation requires national banks to disclose information about a Debt Cancellation Contract (DCC) or Debt Suspension Agreement (DSA). The short form disclosure is usually made orally and is issued at the time the bank firsts solicits the purchase of a contract. The long form disclosure is usually made in writing and is issued before the customer completes the purchase of the contract. There are special rules for transactions by telephone, solicitations using written mail inserts or ''take one'' applications, and electronic transactions. Part 37 provides two forms of disclosure that serve as models for satisfying the requirements of the rule. Use of the forms is not mandatory. A bank may adjust the form and wording of its disclosures so long as the requirements of the regulation are met.

12 U.S.C. 24 (Seventh) authorizes national banks to enter into DCCs and DSAs. The requirements of part 37 enhance consumer protections for customers who buy DCCs and DSAs from national banks and ensure that national banks provide these products on a safe and sound basis by requiring them to effectively manage their risk exposure.

Section 37.6

Section 37.6 requires a bank to provide the following disclosures, as appropriate:

- Anti-tying—A bank must inform the customer that purchase of the product is optional and neither its decision whether to approve the loan nor the terms and conditions of the loan are conditioned on the purchase of a DCC or DSA.
- Explanation of debt suspension agreement—A bank must disclose that if a customer activates the agreement, the customer's duty to pay the loan principal and interest is only suspended and the customer must fully repay the loan after the period of suspension has expired.
- Amount of the fee—A bank must make disclosures regarding the amount of the fee. The disclosure must differ depending on whether the credit is open-end or closed-end. In the case of closed-end credit, the bank must disclose the total fee. In the case of open-end credit, the bank must either disclose that the periodic fee is based on the account balance multiplied by a unit cost and provide the unit cost, or disclose the formula used to compute the fee.
- Lump sum payment of fee—A bank must disclose, where appropriate, that a customer has the option to pay the fee in a single payment or in periodic payments. This disclosure is not appropriate in the case of a DCC or DSA provided in connection with a home mortgage loan since the option to pay the fee in a single payment is not available in that case. Banks are also required to disclose that adding the fee to the amount borrowed will increase the cost of the contract.
- Lump sum payment of fee with no refund—A bank must disclose that the customer has the option to choose a contract with or without a refund provision. This disclosure also states that prices of refund and no-refund products are likely to differ.
- Refund of fee paid in lump sum—If a bank permits a customer to pay the fee in a single payment and to add the fee to the amount borrowed, the bank must disclose the bank's cancellation policy. The disclosure informs the customer that the DCC or DSA may be canceled at any time for a refund, within a specified number of days for a full refund, or at any time with no refund.
- Whether use of credit line is restricted—A bank must inform a customer if the customer's activation of the contract would prohibit the customer from incurring additional charges or using the credit line.
- Termination of a DCC or DSA—A bank must explain the circumstances under which a customer or the bank could terminate the contract if termination is permitted during the life of the loan.
- Additional disclosures—A bank must inform consumers that it will provide additional information before the customer is required to pay for the product.
- Eligibility requirements, conditions, and exclusions—A bank must describe any material limitations relating to the DCC or DSA.

The content of the short and long form may vary, depending on whether a bank elects to provide a summary of the conditions and exclusions in the long form disclosures or refer the customer to the pertinent paragraphs in the contract. The short form requires a bank to instruct the customer to read carefully both the long form disclosures and the contract for a full explanation of the terms of the contract. The long form gives a bank the option of either separately summarizing the limitations or advising the customer that a complete explanation of the eligibility requirements, conditions, and exclusions is available in the contract and identifying the paragraphs where a customer may find that information.

Section 37.7

Section 37.7 requires a bank to obtain a customer's written affirmative election to purchase a contract and written acknowledgment of receipt of the disclosures required by § 37.6. If the sale of the contract occurs by telephone, the customer's affirmative election to purchase and acknowledgment of receipt of the required short form may be made orally, provided the bank maintains certain documentation.

If the contract is solicited through written materials such as mail inserts or ''take one'' applications and the bank provides only the short form disclosures in the written materials, then the bank shall mail the acknowledgment, together with the long form disclosures, to the customer. The bank may not obligate the customer to pay for the contract until after the bank has received the customer's written acknowledgment of receipt of disclosures unless the bank maintains certain documentation. The affirmative election and acknowledgment may also be made electronically.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Number of Respondents: 1,800.

Total Annual Responses: 1,800.

Frequency of Response: On occasion.

Total Annual Burden Hours: 43,200.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: August 15, 2008.

Michele Meyer,

Assistant Director, Legislative & Regulatory Activities Division.

[FR Doc. E8–19452 Filed 8–25–08; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0029]

Agency Information Collection (Offer To Purchase and Contract of Sale) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before September 25, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0029'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0029.''

SUPPLEMENTARY INFORMATION:

Titles:

a. Offer to Purchase and Contract of Sale, VA Form 26–6705.

b. Credit Statement of Prospective Purchaser, VA Form 26–6705b.

c. Addendum to VA Form 26–6705 Offer to Purchase and Contract of Sale,VA Form 26–6705d.

OMB Control Number: 2900–0029.

Type of Review: Extension of a currently approved collection.

Abstract:

a. VA Form 26–6705 is completed by private sector sales broker to submit an offer to purchase VA-acquired property on behalf of a prospective buyer. VA Form 26–6705 becomes a contract of sale if VA accepts the offer to purchase. It serves as a receipt for the prospective buyer for his/her earnest money deposit, describes the terms of sale, and eliminates the need for separate transmittal of a purchase offer.

b. VA Form 26–6705b is used as a credit application to determine the prospective buyer creditworthiness in instances when the prospective buyer seeks VA vendee financing. In such sales, the offer to purchase will not be accepted until the buyer's income and credit history have been verified and a loan analysis has been completed.

c. VA Form 26–6705d is an addendum to VA Form 26–6705 for use in the state of Virginia. The forms requires the buyer to be informed of the State's law at or prior to closing the transaction.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 3, 2008, at page 31736.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. VA Form 26–6705–10,000 hours.

b. VA Form 26–6705b–7,333 hours.

c. VA Form 26–6705d–125 hours.

Estimated Average Burden Per Respondent:

a. VA Form 26–6705–20 minutes.

b. VA Form 26–6705b–20 minutes.

c. VA Form 26–6705d–5 minutes.

Frequency of Response: On occasion.

Estimated Number of Total Respondents:

a. VA Form 26–6705–30,000.

b. VA Form 26–6705b–22,000.

c. VA Form 26–6705d–1,500.

Dated: August 18, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst Records Management Service.

[FR Doc. E8–19719 Filed 8–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0594]

Agency Information Collection (Election to Apply Selected Reserve Services to either Montgomery GI Bill–Active Duty or to the Montgomery GI Bill–Selected Reserve) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 25, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0594'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0594.''

SUPPLEMENTARY INFORMATION:

Title: Election to Apply Selected Reserve Services to either Montgomery GI Bill–Active Duty or to the Montgomery GI Bill–Selected Reserve—38 CFR 21.7042 and 21.7540.

OMB Control Number: 2900–0594.

Type of Review: Extension of a currently approved collection.

Abstract: Reservist who participant in the Montgomery GI Bill—Active Duty and served on active duty for two years followed by six years in the Selected Reserve must elect to apply the selected reserved credit either toward the Montgomery GI Bill–Active Duty or toward the Montgomery GI Bill–Selected Reserve benefits. Reservists must make this election in writing, which will take effect when the

individual either negotiates a check or receives education benefits via direct deposit or electronic funds transfer under the program elected. VA uses the election to determine which benefit is payable based on the individual's Selected Reserve service.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 3, 2008, at pages 31736–31737.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,667 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 8,000.

Dated: August 18, 2008.

By direction of the Secretary

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–19726 Filed 8–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0014]

Agency Information Collection (Authorization and Certification of Entrance or Reentrance Into Rehabilitation and Certification of Status) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 25, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0014'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0014.''

SUPPLEMENTARY INFORMATION:

Title: Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status, VA Form 28–1905.

OMB Control Number: 2900–0014.

Type of Review: Extension of a currently approved collection.

Abstract: VA case managers use VA Form 28–1905 to identify program participants and provide specific guidelines on the planned program to facilities providing education, training, or other rehabilitation services. Facility officials certify that the claimant has enrolled in the planned program and submit the form to VA. VA uses the data collected to ensure that claimants do not receive benefits for periods for which they did not participate in any rehabilitation, special restorative or specialized vocational training programs.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 10, 2008, at page 32790.

Affected Public: Not-for-profit institutions, Individuals or households, Business or other for-profit, Farms, Federal Government, and State, Local or Tribal Government.

Estimated Annual Burden: 7,500 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 90,000.

Dated: August 18, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–19734 Filed 8–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0004]

Agency Information Collection (Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 25, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0004'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0004.''

SUPPLEMENTARY INFORMATION: *Titles:*

a. Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable), VA Form 21–534.

b. Application for Dependency and Indemnity Compensation by a Surviving Spouse or Child—In-service Death Only, VA Form 21–543a.

OMB Control Number: 2900–0004.

Type of Review: Extension of a currently approved collection.

Abstract:

a. VA Form 21–534 is used to gather the necessary information to determine surviving spouse and/or children of veterans entitlement to dependency and indemnity compensation (DIC), death

benefits,(including death compensation is applicable), and any accrued benefits not paid to the veteran prior to death.

b. Military Casualty Assistance Officers complete VA Form 21–534 to assist surviving spouse and/or children of veterans who died on active duty in processing claims for dependency and indemnity compensation benefits. Accrued benefits and death compensation are not payable in claims for DIC.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 10, 2008, at pages 32790–32791.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. VA Form 21–534—76,136 hours.

b. VA Form 21–534a—600 hours.

Estimated Average Burden Per Respondent:

a. VA Form 21–534—75 minutes.

b. VA Form 21–534a—15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents:

a. VA Form 21–534—76,136.

b. VA Form 21–534a—600.

Dated: August 18, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–19737 Filed 8–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERAN AFFAIRS

Advisory Committee on VA Disability Compensation and Related Benefits; Notice of Establishment

As required by Section 9(a)(2) of the Federal Advisory Committee Act, the Department of Veterans Affairs hereby gives notice of the establishment of the Advisory Committee on VA Disability Compensation and Related Benefits. The Secretary of Veterans Affairs had determined that establishing the Committee is both necessary and in the public interest.

The Advisory Committee on VA Disability Compensation and Related Benefits will advise the Secretary of Veterans Affairs on establishing and supervising a schedule to conduct periodic reviews of each of the body systems in the VA Schedule for Rating Disabilities (VASRD), and to make recommendations on the possible expansion of VA benefits to address the impact on quality of life, the need for transition assistance, and the potential for successful rehabilitation.

Committee members will be selected by the Secretary of Veterans Affairs. The Committee's membership will be selected from among recognized experts, veterans, and others with special competence in areas such as disability claims adjudication, vocational rehabilitation, disability programs management, workers' compensation, rehabilitative medicine, mental health research, military medical services management, veterans' benefits advocacy, and survivor benefits advocacy.

Dated: August 19, 2008.

By direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–19659 Filed 8–25–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
August 26, 2008

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bay Checkerspot Butterfly (*Euphydryas editha bayensis*); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R8-ES-2008-0034; 92210-1117-0000-B4]

RIN 1018–AV24

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bay Checkerspot Butterfly (*Euphydryas editha bayensis*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating revised critical habitat for the Bay checkerspot butterfly (*Euphydryas editha bayensis*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 18,293 acres (ac) (7,403 hectares (ha)) fall within the boundaries of the revised critical habitat designation for the Bay checkerspot butterfly. The revision to critical habitat is located in San Mateo and Santa Clara Counties, California. This final revised designation therefore constitutes a reduction of 1,453 ac (588 ha) from our 19,746 ac (7,990 ha) proposed revised designation of critical habitat for the Bay checkerspot butterfly published on August 22, 2007.

DATES: This rule becomes effective on September 25, 2008.

ADDRESSES: The final rule, final economic analysis, and map of critical habitat will be available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/sacramento*. 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 Sacramento Fish and Wildlife Office, 2800 Cottage Way, Suite W-2605, Sacramento, CA 95825; telephone 916-414-6600.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825; telephone 916-414-6600; facsimile 916-414-6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

This final rule addresses revised critical habitat for the Bay checkerspot butterfly. For additional information on the taxonomy, biology, and ecology of the Bay checkerspot butterfly, refer to the final listing rule and revised proposed critical habitat rule published in the **Federal Register** on September 18, 1987 (52 FR 35366) and August 22, 2007 (72 FR 48178), respectively. It is our intention to discuss only those topics directly relevant to the revised designation of critical habitat in this final rule.

Previous Federal Actions

On April 30, 2001 (66 FR 21450), we published a final rule designating approximately 23,903 ac (9,673 ha) of critical habitat for the Bay checkerspot butterfly in San Mateo and Santa Clara Counties, California. On March 30, 2005, the Home Builders Association of Northern California filed suit against the Service challenging critical habitat for the Bay checkerspot butterfly and other species (*Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service* cv-01363-LKK-JFM.). On February 24, 2006, a settlement agreement was reached that requires the Service to reevaluate the final critical habitat rule in light of the standards for designating critical habitat set forth in *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service, 268 F. Supp. 2d 1197* (E.D. Cal 2002) and any applicable law. In addition, the settlement stipulated that a revised proposed rule be submitted for publication on or before August 14, 2007, and a final revised rule be submitted for publication on or before August 14, 2008. This final designation is being completed and published in the **Federal Register** in compliance with that settlement agreement. On August 22, 2007 (72 FR 48178), we published a revised proposed rule to designate approximately 19,746 ac (7,990 ha) in San Mateo and Santa Clara Counties, California. On April 15, 2008 (73 FR 20237), we published a draft economic analysis (DEA) for the proposed rule to revise critical habitat.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed rule to revise critical habitat for the Bay checkerspot butterfly and the associated DEA. During the comment period, we requested all interested parties to submit comments or information related to the proposed revision to the critical habitat designation, including, but not limited to, the following: information regarding dispersal areas, species occurrence information (specifically recent occupancy of the Pulgas Ridge Unit) and distribution, land use designations that may affect critical habitat, potential economic effects of the proposed designation, benefits associated with critical habitat designation, areas considered for exclusion, and the inclusion of water sources as a primary constituent element (PCE).

We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the revised proposed rule and the associated DEA. The comment period for the revised proposed rule opened on August 22, 2007, and closed on October 22, 2007. During the comment period for the revised proposed rule, we received eight comment letters on the proposed revised critical habitat designation and DEA: three from peer reviewers, two from local governments, and three from organizations or individuals. We received no comments from State or Federal agencies. The comment period for the DEA opened on April 15, 2008, and closed on May 15, 2008. We received two comment letters and no requests for public hearings.

Comments and new information received in response to the revised proposed rule that were relevant to the final designation were incorporated in the final rule as appropriate and are summarized below.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from three of the peer reviewers. The peer reviewers were generally supportive of the designation of critical habitat.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the Bay checkerspot butterfly. All comments received were grouped into general issue categories relating to the proposed rule to revise critical habitat for the Bay checkerspot butterfly and are addressed in the following summary and incorporated into this final revised rule as appropriate.

Peer Reviewer Comments

In general, all three peer reviewers supported the revised critical habitat designation. However, two peer reviewers questioned whether some

units were ''critical.'' One peer reviewer stated that the background information was comprehensive and reflected the decade's worth of research on the butterfly and that the accounts on nitrogen deposition and topographic effects are good summaries. One peer reviewer felt that using both currently occupied and historically occupied habitats was a good inclusive decision and effectively covered any remaining suitable habitat. Individual peer comments are listed below.

Comment 1: One peer review suggested that the designation of ''primary'' and ''secondary'' host plants implies that eggs are always laid on *Plantago erecta*. The reviewer indicated that their work on the Bay checkerspot butterfly suggests that this is true in some places such as at Jasper Ridge; however, at Edgewood approximately 70 percent of oviposition occurred on *Castilleja* and that in the 1980s, approximately 20 percent of oviposition at Kirby Canyon (the southern portion of Coyote Ridge) occurred on *Castilleja*.

Our Response: The comment is noted and clarification has been provided to indicate that ''primary'' refers to the host plant species that is used most frequently for oviposition, although not exclusively. Please see the ''Primary Constituent Elements'' section under ''Food'' for more information.

Comment 2: One peer reviewer noted that the evidence for repeat diapause is more robust than is noted in the literature. The commenter stated that several persons had observed repeat diapause by this insect, although he was not aware if larvae were capable of multiyear diapause without the opportunity to feed in-between years.

Our Response: We have added the peer reviewer's personal observations of multiple diapauses to this final rule in the ''Primary Constituent Elements'' section under ''Cover.''

Comment 3: One peer reviewer confirmed the use of water or ''puddling'' behavior described by Launer *et al*. (1993) in the Bay checkerspot butterfly. The peer reviewer also noted having observed puddling by both sexes of other Edith's checkerspots (*Euphydryas editha* spp.). However, he also noted that while puddling could extend an adult's lifespan, female Bay checkerspot butterflies were still likely to be able to lay most of their eggs under dry conditions if they still had access to nectar sources.

A second reviewer stated that while he had documented ''puddling'' in the Bay checkerspot butterfly and the use of water was interesting, it was not a significant finding. Further, the peer reviewer stated that water should not be considered when evaluating habitat quality for the Bay checkerspot butterfly.

A third peer reviewer stated the need for aquatic features is too strong and that the Bay checkerspot butterfly will use water when needed and available during drought years.

Our Response: Based on the above comments from peer reviewers, the Service has removed aquatic features as a PCE in this final rule. For more information, see the ''Primary Constituent Elements'' section of this final rule. Because all of the units designated contain all of the remaining PCEs identified in the proposed rule, the removal of aquatic features as a PCE did not affect the overall designation of critical habitat.

Comment 4: One peer reviewer questioned the utility of providing a list of grassland plant species and noted that an attempt to do so would likely result in a long list. However, he noted that, if a list is to be provided, that Italian ryegrass (*Lolium multiflorum)* should be included.

Our Response: The Service attempted to provide a list of plant species commonly found in open grasslands in California. The list of grassland species was not meant to be exhaustive or to represent species that the Bay checkerspot butterfly depends on. Since Italian ryegrass is commonly found in grasslands in California, the Service will add it to the list of species that commonly occur in grassland habitats in California.

Comment 5: One peer reviewer provided the following information regarding fire and prescribed burns: (1) Late spring burns reduce annual grass and increase native forbs for 1 to 2 years post burn, and in Santa Clara County grass reinvades quickly in the absence of grazing such that 3 to 4 years post burn the habitat is again dominated by annual grass; (2) fall burns reduce grass thatch but are not effective in reducing annual grass in subsequent years; (3) diapausing larvae can survive fire (in winter of 2007 and 2008, larvae were found in areas burned the previous spring and summer); (4) spring fires to control barbed goatgrass will be an essential management tool; (5) thatch removal by spring and fall burns are effective initially but must be followed by grazing to be effective in the long term; and (6) positive effects from burns will likely last longer in areas with lower nitrogen deposition (San Mateo County).

Our Response: The Service has incorporated the information provided regarding fire (from the Metcalf Center Energy reports CH2M Hill 2005, 2006, and 2008) into this final rule. Please see the ''Special Management Considerations or Protections'' section below for more information.

Comment 6: One peer reviewer provided the following comments regarding potential adverse modification of critical habitat: (1) Small scale disturbances in serpentine grasslands generally do not pose a risk to Bay checkerspot butterfly populations; (2) the section regarding short-term mortality from grazing and fire should be clarified to state that the negative effects of fire and grazing are significantly outweighed by the positive benefit to the Bay checkerspot butterfly; (3) removal of grazing provides one of the biggest threats to the subspecies; (4) nitrogen disposition is the current greatest threat; and (5) pesticides inappropriately applied could cause local negative effects.

Our Response: We have provided clarification in this final rule regarding the beneficial effects of grazing and fire to the Bay checkerspot butterfly's habitat. Please see the ''Special Management Considerations or Protections'' section below for more information.

Comment 7: One peer reviewer stated that data regarding host plant density might be available from The Howard Mooney Lab at Stanford University.

Our Response: The Service attempted to contact researchers with the Howard Mooney Lab but did not receive a reply.

Comment 8: One peer reviewer stated that while he was part of the group that promoted the Bay checkerspot butterfly as a metapopulation species, much of the information necessary to characterize the species as such is not well known. As an example, the peer reviewer stated that extinction and recolonization events, rates of long-distance dispersal, and the number of individuals required to establish new populations are not well known. Finally, the peer reviewer stated that the Bay checkerspot butterfly's metapopulation is ''not well known or as elucidated as it is sometimes portrayed (Launer 2008 p. 1).''

Our Response: The Service is aware that the exact nature of the Bay checkerspot butterfly's population dynamics is highly complex and that long-distance dispersal, extinction or recolonization rates, and the threshold of individuals required to establish or re-establish a population is not well documented. The Service took a conservative approach in designating critical habitat partly because of the lack of data available regarding dispersal and recolonization rates. We only designated areas that had documented occurrences

of the Bay checkerspot butterfly. We did not designate all areas within the range of the Bay checkerspot butterfly that could support the species, partly because of lack of data regarding the dispersal capabilities of the subspecies, number of individuals required to establish new populations, and the minimum size necessary to support a population. For additional information, please see the ''Criteria Used to Identify Critical Habitat'' section of this rule. In addition, we lacked occurrence data for sites outside those we designated as critical habitat; sites that were not occupied at the time of listing or since listing did not meet our criteria for designating critical habitat.

Comment 9: One peer reviewer believes that all conservation planning in the region (including critical habitat designations) should be aware of the unstable nature of the habitat in these areas. The conditions present today may not persist into the next quarter and half century; this is particularly true of the distribution of the Bay checkerspot butterfly and the apparent acceleration of climate change. The reviewer also stated that as much topographic diversity and geographic range should be included in the designation as possible.

Our Response: A current trend in conservation biology is the use of adaptive management. Adaptive management is a mechanism by which resource managers acknowledge the uncertainty of the effects of various management actions in addition to the often rapidly changing nature of the resource they are trying to manage. The Service is aware of the ongoing and often rapid changes in the environment that occur throughout the range of the Bay checkerspot butterfly. Because of the uncertainty in managing lands in the foreseeable future, many lands that have been set aside for the conservation of listed species, including the Bay checkerspot butterfly, now include an adaptive management component. While the amount of land within individual conservation areas is generally static, adaptive management should provide resource managers with the framework required to cope with a changing landscape. In addition, if the Service determines in the future that the designated area no longer meets the definition of critical habitat, we will consider proposing a revision to the critical habitat designation at that time or when our resources allow.

Please see the ''Criteria Used to Identify Critical Habitat'' section in regards to the comment that topographic diversity and geographic range should be included in the designation where possible, The Service only designated areas that had documented occurrences of the Bay checkerspot butterfly. We did not designate all areas within the range of the Bay checkerspot butterfly that could support the species, partly because of lack of data regarding the dispersal capabilities of the subspecies, number of individuals required to establish new populations, and the minimum size necessary to support a population.

Comment 10: One peer reviewer reiterated the fact that Bay checkerspot butterfly population levels fluctuate widely from one year to the next. In addition, the reviewer stated that while interesting, the number of individuals present at a given site in a given year is misleading and that multi-year trends are useful in conservation planning, but are much less available.

Our Response: The Service recognizes that the number of individuals in a single year does not adequately reflect the overall health of the population within a given unit due to the population dynamics of the species and its tendency towards wide swings in number of individuals. However, when evaluating the population status of a species, it is incumbent on the Service to use the best data available. While the reviewer correctly pointed out that long multi-year population data for this species are not available for many of the units, multi-year population trends are available for some of the units (i.e., those along Coyote Ridge). In other units, only single year assessments are available. Our designation of critical habitat for the Bay checkerspot butterfly is based on the best scientific information available.

Comment 11: One peer reviewer noted that almost all of the units include some area of nonserpentine soil and that these areas should probably be expanded in several units. The commenter also noted that, while these areas of nonserpentine soils do not support host plant densities sufficient to support checkerspot larvae, the adults do fly through these areas and it is important not to disrupt dispersal routes. The peer reviewer noted that while dispersal routes are not well documented for the Bay checkerspot butterflies, they are known to fly through nonserpentine areas, along ridgelines, and between close patches of suitable habitat if intervening habitats have not been overly modified.

Our Response: All units support all the PCEs, although each PCE is not evenly distributed throughout each unit. For example, within each unit all PCEs are present, but PCE 2 (larval host plants) may only be present in scattered patches and the exact distribution of PCE 2 (and PCE 3, adult nectar plants) changes from one year to the next. The fluctuation in host plant distribution made it impossible to base unit boundaries solely on PCE 2 or PCE 3. Larger areas of grassland habitat around larval host and adult nectar plants were included within unit boundaries, because they support PCEs 1, 3, 4, and 5. Therefore, independent of facilitating dispersal between patches of larval host and adult nectar plants, grasslands within units provide features essential to the conservation of the Bay checkerspot butterfly. As the peer reviewer noted, specific dispersal corridors have not been well documented (either within units or between units) for the Bay checkerspot butterfly. Since exact routes between units are unknown, the Service selected units occupied at listing or currently occupied with PCEs that were within the known dispersal distance of the species.

Comment 12: One peer reviewer stated that even though the San Bruno Mt. Unit (Unit 1) is potentially a valuable site, very little habitat for the species remains (in part due to succession of plant communities and continued invasion by nonnative species) in the unit and it is not within ''easy butterfly dispersal distance'' (Launer 2008) or other recently occupied habitat. In light of this information the peer reviewer felt a re-evaluation of what is possible with respect to Bay checkerspot butterfly habitat in San Mateo County should be conducted and that it is possible attention should focus on the other three units in the County.

A second reviewer stated the current distribution of habitat on San Bruno Mt. is poorly known and detailed surveys should be done. The peer reviewer also stated that dispersal between the Pulgas Ridge Unit and San Bruno Mt. is unlikely and should not be counted on as part of the population–metapopulation process. Finally, the peer reviewer stated that the exclusion of San Bruno Mt. appeared reasonable, although the site should be explored for potential reintroductions.

Our Response: The Service proposed the San Bruno Mt. Unit (Unit 1) for exclusion for several reasons, including: (1) The large distance between the unit and the other units in San Mateo County and the lack of adequate information regarding suitable intervening habitat; (2) the Bay checkerspot butterfly has not been observed on San Bruno Mt. since the mid 1980s despite repeated surveys; (3) much of San Bruno Mt. is protected under a habitat conservation plan

(HCP); and (4) Amendment 5 of the San Bruno Mountain Habitat Conservation Plan (SBMHCP) would add the Bay checkerspot as a covered species and provide an endowment for continued management actions within the HCP boundaries. Furthermore, the unit is occupied by the endangered Callippe silverspot butterfly (*Speyeria callippe callippe*), endangered Mission blue butterfly (*Icaricia icarioides missionensis*), and the endangered San Bruno elfin (*Callophyrs mossii bayensis*), and management of the unit for these species would likely be the same as for the Bay checkerspot butterfly; there would not likely be any additional benefits of designating the area as critical habitat for the Bay checkerspot butterfly.

At the time of the publication of the proposed rule, we expected Amendment 5 to the SBMHCP, which would include coverage specific to the Bay checkerspot butterfly, to have been finalized prior to the publication of this final designation of critical habitat. As this amendment is not yet finalized as of the writing of the final rule, we re-evaluated the proposed exclusion of the SBMHCP from critical habitat and determined that not to exclude this area based on the record before us. (See ''Application of Section 4(b)(2) of the Act'').

In addition, we disagree with the peer reviewers that very little habitat remains for the Bay checkerspot butterfly on San Bruno Mt. or that the distribution of that habitat is unknown. According to the San Bruno Mountain Habitat Management Plan (2008 p. VIII-6), the host plants for the Bay checkerspot butterfly are still abundant on the mountain in isolated patches within and outside the 2001 designation of critical habitat.

Comment 13: One peer reviewer stated that the Pulgas Ridge Unit (Unit 2) was marginal habitat, but prior to fragmentation, encroachment of surrounding development, and continued invasion by nonnative plant species, the unit and surrounding area supported a large population of Bay checkerspot butterflies. The peer reviewer also stated that the Pulgas Unit, in conjunction with the Edgewood Park Unit (Unit 3) and the Jasper Ridge Unit (Unit 4), could be useful as a complex of habitat.

A second peer reviewer stated that little is known about the Pulgas Ridge Unit, except that it contains all the PCEs, is extensive, and has topography similar to the Edgewood Park Unit. The peer reviewer also reiterated his earlier comment that dispersal between Pulgas Ridge and San Bruno Mt. was unlikely given the dispersal tendencies of the subspecies and the lack of intervening habitat (high level of urbanization and lack of grasslands).

Our Response: The Service is aware that the Pulgas Ridge Unit will require restoration and management in order to reduce non-native plant species. However, all the units are assumed to require ongoing restoration and management activities in order to restore and maintain sufficient habitat to support the Bay checkerspot butterfly, primarily due to the continued threat of nonnative plant species. The Service included the Pulgas Ridge Unit because the unit historically supported the subspecies, is in close proximity to the Edgewood Park Unit, where the subspecies was reintroduced in early 2007, and because a core population outside Santa Clara County is essential to the recovery of the subspecies. The viability of a population in San Mateo County is dependent on the population being self-sustaining. A single unit in San Mateo County is unlikely to support the metapopulation dynamics of the species and would likely ultimately fail.

Comment 14: With regard to the Edgewood Park Unit one peer reviewer said it should be viewed as essential to the recovery of the species because of its multiple subunits, topographic diversity, and ''ample expanse,'' but that the unit will need ongoing restoration to benefit the species.

A second peer reviewer stated that the Edgewood Park Unit was correctly identified in the proposed rule as the only potential core habitat remaining in San Mateo County, but the unit would need to be managed through rotational mowing for the time being. The reviewer also said that the reintroduction of the Bay checkerspot butterfly in 2007 was not as successful as anticipated (likely due to the extremely dry conditions in 2007). More precise information regarding the success of the introduction will be available after the 2008 flight season.

Our Response: Because the Edgewood Park Unit was occupied at the time of listing and continues to contain the PCEs essential to the conservation of the species, we agree with these peer reviewers that this unit should be designated as critical habitat.

Comment 15: One peer reviewer stated that there were two main problems with the Jasper Ridge Unit: (1) The serpentine grasslands within the biological preserve are relatively small, and (2) the preserve is managed by non-intervention. The reviewer also commented that the serpentine grassland present within the unit was in general in fair condition, with a few smaller sites of excellent quality habitat, but they are within a matrix of poor to marginal quality habitat. The peer reviewer believed that with active management Units 2, 3, and 4 could be essential to the recovery of the Bay checkerspot butterfly.

A second peer reviewer stated that the designation includes all suitable Bay checkerspot butterfly habitat within the unit, although it also includes surrounding woodlands, chaparral, and nonnative grasslands. Regarding dispersal to this unit from the Santa Clara County units, the peer reviewer stated the likelihood was extremely low.

Our Response: The Service agrees that the patches of serpentine soils within the unit are relatively small. However, the area of similar soil types within the unit encompasses the majority of the grasslands within the Biological Preserve. The unit supported multiple independent populations for several decades and we believe that in conjunction with Units 2 and 3, this unit is capable of supporting the subspecies again. In addition, we believe the unit is essential to maintaining a core population in San Mateo County, partly due to the low likelihood that individual Bay checkerspot butterflies would disperse from Santa Clara County.

The Service acknowledges that the primary focus of the Jasper Ridge Biological Preserve (JRBP), which encompasses Unit 3, is research and the preserve is not currently managed for any species, including protection of the Bay checkerspot butterfly; however, according to the 2004 draft Jasper Ridge Biological Preserve Strategic Plan (JRBP 2008, p. 1), species and habitat conservation is being proposed and these conservation efforts should be designed to include protection of habitat or individual species. Further, most units are not currently managed to benefit the Bay checkerspot butterfly, but still provide features essential to the conservation of the subspecies; Also, as noted above, the Service believes Unit 3 is necessary to support the metapopulation dynamics of the subspecies and to maintain a core population in San Mateo County independent of the Santa Clara County core population.

Comment 16: One peer reviewer noted that Unit 5 had only recently been referred to as ''Coyote Ridge'' and that historically it was known by many names. The peer reviewer recommended a more appropriate name for the unit be used. In addition, the reviewer stated the entire ridge from the northwest corner (Silver Creek Hills) to Anderson Reservoir Dam in the southeast, including the nonserpentine areas, is

essential for the continued persistence of the Bay checkerspot butterfly and that without it the subspecies would cease to exist. The reviewer supported the designation of this unit as critical habitat. The reviewer also believed that the unit should be expanded to include all nonserpentine areas along the ridge and an adequate buffer along the sides of the ridge.

The peer reviewer also noted there are likely more than four populations on Coyote Ridge 5 as indicated in the proposed rule and that the four mentioned represent the centers of classic study areas, but that multiple subpopulations or populations exist in each of the four historical centers.

A second peer reviewer also stated the unit was ''absolutely essential'' to the persistence of the Bay checkerspot butterfly. In addition, the reviewer believed the unit could be separated into multiple units, because some areas are separated by several kilometers of non-habitat. The reviewer also commented that the reduction in numbers of individuals in the Silver Creek population after 1992 was the result of removing grazing for a number of years. The reduction of the overall unit's population resulted from the combination of a series of poor weather and over-population of larvae in key areas, but that this likely represents natural fluctuations.

Our Response: The Service recognizes that proposed Unit 5 (final Units 5 and 13) has historically been identified by a variety of names, several of which were noted in the Recovery Plan for Serpentine Soil Species of the San Francisco Bay Area (Service 2001, p. II-178). We clarify the naming in this final rule by separating the unit into two units, based on a natural break in the habitat between the two. We have also added information in the unit descriptions stating that the four historical population centers are likely not the only populations that occur along the ridge.

The Service agrees with the peer reviewers regarding the importance of the entire ridge line. However, we disagree with one of the peer reviewers that additional areas should be designated as a buffer. The Service included almost all of the grassland on the southwest portion of the ridge up to U.S. Highway 101, with only a few exceptions (where there was existing development). On the north side of the ridge, the Service included all of the areas with serpentine or serpentine-like soils, with the exception of a few areas that were separated from the main ridgeline and were not grasslands (they were other habitat types). We did not include certain areas on the north side of the ridge, as explained below, based on specific information we received during preparation of the 2001 final critical habitat rule (i.e., information regarding lands owned by United Technology Corporation) as well as from numerous site visits to this unit.

We did not include grassland areas on nonserpentine or similar soils on the north side of the ridge because we believe these areas lack sufficient PCEs to support the Bay checkerspot butterfly. The Act defines critical habitat as (1) the specific areas within the geographic area occupied by a species, at the time of listing in accordance with the Act, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographic area occupied by a species at the time it is listed in accordance with section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. Buffer areas may serve to protect critical habitat units from encroachment by development, but these lands do not contain PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species and therefore do not meet the regulatory definition of occupied critical habitat, nor have we concluded that such unoccupied buffer lands are essential to the conservation of the species. In addition, buffers were not a criterion used to designate critical habitat for the Bay checkerspot butterfly.

Comment 17: One peer reviewer stated that the Tulare Hill Unit (Unit 6) is valuable and provides a natural location for between ridge dispersal and he supported designation of the unit as critical habitat. In addition, the commenter stated that while habitat quality within the unit declined in the 1980s and 1990s, it has recently improved due to increased management and that unit wide management should be undertaken.

A second peer reviewer identified this unit as a key link across the Santa Clara Valley and its value in previous assessments has been underemphasized. The reviewer stated that, if managed properly, the unit would support a population in the thousands or more; however, habitat on the northern portion of the unit has been degraded due to lack of grazing, which underscores the importance of an adequate grazing plan.

Our Response: The Service agrees that the Tulare Hill Unit provides an essential link between the east and west portions of the valley and serves as the most likely location for between ridge transfers of the Bay checkerspot butterfly. Without this unit Bay checkerspot butterflies' between-ridge movements are still possible, but would likely occur with much lower frequency. For species with a metapopulation dynamic, the successful colonization or recolonization of a site partly depends on the rate of colonization vs. the rate of extinction. Colonization must occur more often than extinction events for a site to remain occupied. Therefore, the inclusion of the Tulare Hill Unit in this final designation of critical habitat is necessary to maintain populations on the western side of the valley.

The northern portion of the Tulare Hill Unit will soon be managed to benefit the Bay checkerspot butterfly as a result of the finalization of a Safe Harbor Agreement with Pacific Gas and Electric, which will enable grazing of the northern portion of the unit; this safe harbor agreement is expected to result in an increase in the population of Bay checkerspot butterflies within the unit by facilitating grazing in the northern portion of the unit, which is not currently grazed and only supports low numbers of the subspecies.

Comment 18: One peer reviewer stated that designation of the Santa Teresa Hills Unit (Unit 7) was reasonable, but that an extensive management plan would need to be established, since much of the unit is within Santa Teresa County Park and has not been managed for the benefit of the Bay checkerspot butterfly. In addition, the peer reviewer stated that with proper management this unit could significantly contribute to the recovery of the subspecies. The peer reviewer made similar comments regarding the Calero Reservoir Unit (Unit 8) with the additional comment that the unit's location, its topographic diversity, and large size make the unit very valuable for long-term conservation of the Bay checkerspot butterfly.

A second peer reviewer stated the Calero Reservoir Unit (Unit 8) has high potential because of its topographic diversity and large size, but that occupancy is unclear (according to casual surveys) as the habitat has been degraded due to lack of grazing, although effects from air pollution may be somewhat less than areas to the east. In addition, the reviewer stated that emphasis should be on the serpentine grassland and it should be made clear effects of activities outside of these grasslands are only a small concern.

Our Response: The Service agrees that the Santa Teresa Hills Unit (Unit 7) will require restoration and management in order to reduce non-native plant species. However, as noted above, all the units are assumed to require ongoing restoration activities in order to restore and maintain adequate habitat to support the Bay checkerspot butterfly over time, due to the continued threat of nonnative plant species.

The Service does not completely agree with the peer reviewer who commented that effects to nonserpentine grasslands are of minor concern. Nonserpentine grasslands within a unit between serpentine and serpentine-like grasslands likely play an important role in dispersal of adult butterflies from one habitat patch to another. Development in intervening nonserpentine areas within a unit will likely reduce movement of adults between more suitable patches. However, based on the peer reviewer's comments, we have revised the northwestern portion of the unit boundary. Much of the area removed was heavily interspersed with woodland habitat and did not support many of the PCEs, such as the presence of serpentine or serpentine-like grasslands.

Comment 19: One peer reviewer stated that the series of small hills that make up the Kalana Hills Unit (Unit 9A and 9B) individually are not valuable to the subspecies; however, along with the intervening nonserpentine grasslands, they provide a significant resource for the Bay checkerspot butterfly. The peer reviewer supported the unit's inclusion as critical habitat. The peer reviewer recommended inclusion of more of the nonserpentine areas between the units.

A second peer reviewer stated that the unit was well described and the four small serpentine outcrops can be regularly occupied.

Our Response: The Service did not include all of the intervening nonserpentine areas between the large hill (subunit A) and the three smaller hills (subunit B) because they are separated by a disked agricultural field, which does not support the PCEs and does not meet our criteria for designating critical habitat. We did not include all areas between each of the three smaller hills because they are separated by a small network of local and private roads and at least two residences and do not support PCE 1, 2, 3, or 5. We did revise the unit boundaries slightly to reflect better resolution from vegetation data.

Comment 20: One peer reviewer stated that the Morgan Hill Unit (Unit 10) has historically been referred to as Hale or Falcon Crest. The peer reviewer also noted the unit is extensive and topographically diverse and that with proper management the unit is important for the long-term conservation of the Bay checkerspot butterfly and the peer reviewer supported this unit's inclusion as critical habitat.

Another peer reviewer commented that this area was one of the most important outlying areas from Coyote Ridge.

Our Response: The Service has renamed Unit 10 from Morgan Hill to Hale in order to prevent confusion with final Units 5 and 13 (which historically have been referred to as Morgan Hill).

Comment 21: One peer reviewer stated that the Bear Ranch Unit (Unit 11) consists of a series of small serpentine grasslands and that, prior to their inclusion into the Santa Clara County Parks and Recreation system, they were grazed and the habitat was in good condition. The reviewer expressed support that Santa Clara County Parks and Recreation has continued to graze the site. In addition, the reviewer stated that the nonserpentine grasslands between the patches were of great important to the Bay checkerspot butterfly at this site, and public structures (trails, parking facilities, etc.) should not be located between the small patches of serpentine grasslands. However, the peer reviewer questioned whether the site should be included as critical habitat because overall he believed the site was of less importance than the other units in Santa Clara County.

A second peer reviewer simply noted the unit encompassed the serpentine grassland within the park.

Our Response: We included this unit as critical habitat because it, along with Unit 12, represents the two southernmost known occurrences of the Bay checkerspot butterfly. As such, we believe they may provide an important role in the survival of the subspecies. However, the Service did revise this unit based on information obtained from or developed for the Santa Clara County HCP to better reflect the known distribution of serpentine bunchgrass communities within the unit and so as not to include nonserpentine grasslands to the west of the two serpentine patches.

Comment 22: One peer reviewer stated that the San Marin Unit (Unit 12) should not be considered critical habitat because the unit is too small, too hot, and too isolated. In addition, the reviewer stated that had development not occurred on the northern portion of the site in the 1980s and 1990s, the site may still benefit the Bay checkerspot butterfly, but that now the site is of marginal value.

A second peer reviewer also noted that the site may provide little value due to its size and current level of development.

Our Response: The Service requested additional information regarding development in this unit, but only one peer reviewer responded. The reviewer noted that the development was a series of large residential lots in the northern portion of the unit. However, based on aerial photographs, there are fewer than 10 residences within the northern portion of the unit. Topographic maps show a variety of slope aspects (including cool northeast slopes) present within the unit. The Service acknowledges the most diverse slopes are primarily located in the southern portion of the unit. However, the presence of both north and east slopes indicates that the entire unit is not ''too hot'' as noted by one of the peer reviewers. It does not appear that the current level of development has significantly degraded the overall habitat within the unit. In addition, as noted above, we included both Unit 12 and Unit 11 because they represent the southernmost known occurrences of the subspecies and as such may represent important adaptive differences between populations of Bay checkerspots butterflies in these units and populations in other units. The criteria we used to designate critical habitat were whether the area was occupied at listing or since listing and whether the area had sufficient PCEs to support a population. The unit was occupied at listing and currently supports all the PCEs; therefore it meets the criteria for critical habitat.

Comment 23: One peer reviewer supported non-inclusion of Communications Hill (Unit 6 in the 2001 designation) because, since development of the quarry, the remaining habitat is too hot and too limited.

Our Response: Multiple surveys have been conducted at Communications Hill over the last two decades, including two recent surveys by Dr. Richard Arnold in 2000 and 2007. According to Arnold (2007, p. 7), approximately half of the areas that supported the primary larval host plant in 2000 had been eliminated. Of the sites that still supported the primary host plant, most did not support either of the two secondary host plants. In addition, adult nectar sources were ''almost entirely lacking'' (Arnold 2007, p. 7). We believe the information presented in the 2000 and 2007 surveys by Dr. Richard Arnold in addition to aerial photographs and vegetation maps

supports the conclusion that much of Communications Hill has been developed and what little habitat remains does not provide PCEs in sufficient quantities to meet one or more life history requirements of the Bay checkerspot butterfly. In addition, there is only one unconfirmed record of a single Bay checkerspot butterfly on Communications Hill. Given the lack of confirmed records, the current developed state of the area, and lack of many of the PCEs, the area did not meet the criteria for designation as critical habitat.

Public Comments

Comment 24: One commenter recommended adding an area proposed as a conservation bank in southern Santa Clara County for inclusion within the critical habitat designation and noted that a small portion of the conservation bank is located within an area historically documented to support Bay checkerspot butterflies.

Our Response: The proposed conservation bank is located in the southern portion of Santa Clara County and is approximately 0.5 miles (mi) (0.80 kilometers (km)) southwest of the San Martin Unit. According to the commenter, the entire site is 1,685 acres with 43.3 ac (17.52 ha) of serpentine or serpentine-like grasslands scattered across three areas that includes all six PCEs. The Service agrees that portions of the proposed bank likely support all the PCEs; however, the overall amount of habitat that the butterfly could occupy at the site is low. According to the California Natural Diversity Data Base (CNDDB), the Bay checkerspot occurrence (CNDDB occurrence 19) that includes a small portion of the proposed bank is ''nonspecific'' and includes large areas of forest, agriculture, and residential areas (including a golf course) that do not support the PCEs. The observation was made by Dr. Richard Arnold in 1985, but the exact location is not clear and may have been part of the serpentine grasslands within the San Martin Unit.

The commenter did not provide any information regarding larvae or adult surveys at the proposed conservation bank or if any individual Bay checkerspot butterflies have been observed at the site. A review of the literature indicates that apart from the CNDDB's nonspecific occurrence by Dr. Richard Arnold, the site has not been identified as supporting Bay checkerspot butterflies in the past. At this time the Service has insufficient information regarding the ability of the site to support Bay checkerspot butterflies to include it in critical habitat.

Comment 25: Two commenters supported non-inclusion of Communications Hill in the revised critical habitat designation. One commenter provided additional information in the form of vegetative surveys by Dr. Richard Arnold in 2000 and 2007.

Our Response: According to the information provided by one of the commenters, additional surveys have been conducted on Communications Hill by Dr. Richard Arnold in 2000 and 2007. According to Arnold (2007 p. 7) approximately half of the areas that supported the primary larval host plant in 2000 had been eliminated. Of the sites that still supported the primary host plant, most did not support either of the two secondary host plants. In addition, adult nectar sources were ''almost entirely lacking'' (Arnold 2007, p. 7). We believe the information presented by the commenters supports the conclusion that much of Communications Hill has been developed and what little habitat remains does not provide PCEs in sufficient quantities to meet one or more life history requirements of the Bay checkerspot butterfly.

Comment 26: One commenter stated that based on their evaluation of their property within the Metcalf Unit (northern portion of proposed Unit 5; final Unit 4) that large portions of the site do not include serpentine soils or any of the known host plants for the species. Furthermore the commenter stated that the soils appear to be thicker than serpentine soils and are clay-like. In addition, the commenter stated the Service should obtain more detailed and accurate information regarding soil and vegetation before designating critical habitat.

Our Response: The Service reviewed soil and geological data from multiple sources over multiple years, including geographic information system (GIS) data from Jones and Stokes (the primary consultant writing the Habitat Conservation Plan for Santa Clara County). All of the information the Service has obtained regarding soil type indicates that large tracks of serpentine or serpentine-like soils occur throughout the majority of the Metcalf Unit. The Service reevaluated the soil types present north of Metcalf Road, and based on our review of land ownership data and the most conservative soil maps, there are approximately 2,547 acres of serpentine soils in the area in question. While the analysis shows there are patches of nonserpentine soils present within the area, our data indicate that the vast majority of the site is comprised of soils from the Montara soil series. Additionally, the commenter did not provide the results of any surveys they may have conducted regarding soil types or vegetation that is currently found on their property, nor did they provide a map of their property.

It is incumbent on the Service to use the best available information when making critical habitat determinations; however, the Service does not have adequate resources to undertake site-specific surveys throughout each critical habitat unit. If site-specific surveys are available that the Service was unaware of, the public comment period should be used to provide the Service with that information. In this case, the commenter noted that their own evaluation of the site indicated serpentine soils were not present over large portions of the site, but did not provide those evaluations (surveys) to the Service. Therefore, the area in Unit 4 referred to by the commenter has not been removed from this final designation of critical habitat.

Comment 27: One commenter stated that the Service should not treat critical habitat designations as dispositive for consultations under the Act and that while conducting section 7 reviews, the Service should not use the critical habitat designation as conclusive.

Our Response: The Service reviews the baseline information for each section 7 consultation. If site-specific habitat assessments have not been submitted with the initial consultation package, the Service typically requests an assessment be prepared. If a project is within a critical habitat designation, and the site assessment indicates the PCEs are not present within the action area or will not be adversely affected by the proposed action, then additional consultation with the Service is not required. The presence of the PCEs and the effects of the project on those PCEs determine whether formal consultation with respect to adverse modification or destruction of critical habitat is necessary.

Comment 28: One commenter stated that according to their records they were not contacted regarding the proposed critical habitat designation, which included portions of their property. The commenter requested a 60–day extension on the comment period or reopening of the comment period due to lack of notification.

Our Response: According to Service records, two attempts were made to contact the commenter by telephone and voice messages were left both times, but no response was received. In addition, the Service conducted

outreach by notifying appropriate elected officials, local jurisdictions, interested groups, and property owners. We conducted much of this outreach through legal notices in regional newspapers, telephone calls, letters, and news releases faxed or mailed to appropriate officials, local jurisdictions, and interest groups, and publication of the proposed determination and associated material on our Internet page. A second public comment period was opened for the draft economic analysis, and the Service contacted the commenter for a third time regarding the opportunity to provide comments. We believe we have provided sufficient time for public comment with two open comment periods totaling 90 days. Additionally, we are under a court-mandated due date to submit a final rule to the **Federal Register** by August 14, 2008. In order to meet this date, we cannot open an additional comment period.

Comment 29: The San Francisco Public Utilities Commission (SFPUC) stated they owned 203 ac (82.15 ha) within the Pulgas Ridge Unit (final Unit 1) and 130 ac (52.61 ha) within proposed the Edgewood Park Unit (final Unit 2).

Our Response: According to the proposed and this final rule the Pulgas Ridge Unit is approximately 179 ac (72 ha) total in size, all of which is owned by the SFPUC. A review of GIS data indicates that more of the Edgewood Park Unit is owned by the SFPUC than stated in the proposed rule. According to our information the SFPUC owns approximately 140 ac (57 ha) within the Edgewood Park Unit. We have corrected the land ownership amount in this final rule.

Comment 30: One commenter questioned whether the Pulgas Ridge Unit still supports all the PCEs.

Our Response: It is not a requirement that each unit contain all the PCEs in order to be designated as critical habitat. However, a review of the vegetation data and soils and geology data indicate the unit has all the PCEs. In addition, site-specific information (i.e., surveys) was not provided by the commenter to support whether the unit contained all the PCEs or not, and two peer reviewers indicated that the unit is extensive and has topography similar to the Edgewood Park Unit, where Bay checkerspot butterflies were introduced in Spring 2007. The unit was occupied at the time of listing and contains all the features essential for the conservation of the subspecies; therefore, it meets the definition of critical habitat.

Comment 31: One commenter stated they were in the early stages of preparing a Habitat Conservation Plan (HCP) for the Peninsula Watershed Management Plan, which includes portions of the Pulgas Ridge and Edgewood Park Units and that they are working to protect serpentine-endemic species.

Our Response: The Service supports actions taken by local governments and the general public to protect and enhance habitat for listed species through a variety of programs including Safe Harbor Agreements, Habitat Conservation Plans, our Partners for Fish and Wildlife Program, and other programs. The Service looks forward to working with the commenter in the preparation of an HCP in order to benefit serpentine species in the San Francisco Bay area.

Comment 32: Two commenters stated that the purpose of designating critical habitat is to facilitate species recovery and that the Service should designate additional areas of unoccupied serpentine and nonserpentine habitat to ensure the recovery of the Bay checkerspot butterfly and sustain the metapopulation dynamics of the species.

Our Response: In our revised proposed designation of critical habitat for the Bay checkerspot butterfly, we selected areas based on the best scientific data available that possess those physical and biological features essential to the conservation of the subspecies, and that may require special management considerations or protection. We included in the revised proposed designation areas that were occupied at the time of listing as well as one area occupied since the time of listing. However, the Service lacked specific information to indicate which, if any, unoccupied areas outside those we proposed are essential for the conservation of the species. The Service cannot designate as critical habitat areas occupied at the time of listing that we are unable to determine have the features essential to the conservation of the subspecies, or unoccupied areas that we are unable to determine are essential for the conservation of the species. Further, under section 3(5)(C) of the Act, critical habitat shall not include the entire geographical area that can be occupied by the species except in those circumstances determined by the Secretary of the Interior. Thus, in this rule, we only designate those areas we have determined meet the definition of critical habitat. The commenter did not provide information regarding unoccupied areas outside those we designated that would allow the Service to evaluate whether those areas supported the physical and biological features essential to the conservation of the subspecies. If such information becomes available in the future, the Service will consider proposing a revision to the critical habitat designation at that time or when our resources allow.

Comment 33: Two commenters stated that PCE 1 should be modified. One commenter recommend PCE 1 be deleted and the other recommended a modification to remove the list of grass species.

Our Response: All published literature on this species indicates it is a grassland species with relatively sedentary tendencies and may avoid areas of nonhabitat, including chaparral and oak woodland; therefore the Service believes the presence of grasslands is an essential component of Bay checkerspot butterfly habitat, although a list of specific grass species is not. In this final revised critical habitat rule, PCE 1 is ''The presence of annual or perennial grasslands with little to no overstory that provide north–south and east–west slopes with a tilt of more than 7 degrees for larval host plant survival during periods of atypical weather (for example, drought).'' We then list grassland species as examples of species common to grasslands in California, and since nonnative grasses are more common than native species, we include nonnative species in the example. The presence of any specific grass or grasses listed in the PCE is not required, and is not provided as a means to measure habitat quality, but merely as an indicator of grassland habitat; we clarify this in this final rule.

Comment 34: Two commenters stated that the PCEs should include features that facilitate dispersal of the Bay checkerspot butterfly since dispersal between habitat patches is essential for recolonization, metapopulation persistence, and recovery. These commenters further stated that the Service did not designate sufficient critical habitat to allow for successful dispersal and that the Service should secure these areas and restore them.

Our Response: PCE 1 includes both perennial and annual grasslands in order allow for dispersal. All of the units include some amount of nonserpentine grasslands interspersed with areas of serpentine and serpentine-like grasslands in order to enhance dispersal between the more suitable patches both within a unit and among units. In this way the Service has attempted to designate as many small patches within the boundaries of individual units, such as with the Metcalf and Kirby units, which support numerous populations and

subpopulations scattered over the entire eastern ridgeline in Santa Clara County. The Santa Teresa Hills Unit includes an area next to the Tulare Hill Unit that was specifically included in order to facilitate the dispersal of Bay checkerspot butterflies from the core population along Coyote Ridge on the eastern side of Santa Clara Valley, to the ridges on the western side of the valley. In addition, the Kalana Unit (Unit 9a and 9b) is also considered important for dispersing Bay checkerspot butterflies to the southernmost units (Units 10, 11, and 12) in Santa Clara County. Based on the current occupancy of the majority of the units, the Service believes that dispersal between small populations within each unit, as well as between units, is occurring. For additional information please see the ''Criteria Used to Identify Critical Habitat'' section of this rule.

Regarding the acquisition of land, the purchase and restoration of land for the benefit of the Bay checkerspot butterfly is beyond the scope of this rule.

Comment 35: One commenter stated that PCE 5 (in the proposed rule and PCE 4 in this final rule) should include restored native grassland on nonserpentine soils and that researchers have suggested the Bay checkerspot butterfly's historic habitat included native grasslands on nonserpentine soils.

Our Response: The Service agrees that some researchers have hypothesized that the range of the Bay checkerspot butterfly once included nonserpentine grasslands, which we noted in the proposed rule. The Service is not aware of any data that support the hypothesis. However, as noted in our response to comment 34, the Service included both perennial and annual grassland habitats as part of PCE 1. The presence of all PCEs was not a criterion used to designate critical habitat, and all units include areas of nonserpentine grasslands. In addition, the Service cannot predict where nonserpentine grassland habitats that will be restored in the future will be located, nor are we able to predict whether these areas would support other PCEs sufficient to support populations of the Bay checkerspot butterfly.

Comment 36: One commenter stated that proposed PCE 6 (final rule PCE 5) should be revised to state that stable holes and cracks in the soil and surface rock outcrops, while beneficial and in need of protection, are not required for the habitat to have value.

Our Response: The Service disagrees with the commenter regarding the importance of PCE 5 in this final rule. As stated in the proposed rule, White (1986, p. 58) observed that pupal mortality rates, as well as cause of mortality (i.e., predation, parasitism, crushing, or disease), varied significantly depending on location. For example, crushing was most likely in areas of bare ground, whereas pupae in areas with dense vegetation had a higher rate of mortality due to mold and viruses. Since pre-diapause larval mortality is the most significant factor influencing population size, a variety of diapause sites are necessary to ensure adequate numbers of larvae survive diapause. Further, because prescribed burns are an important management tool to control nonnative and invasive vegetation, diapause locations that are not at risk due to fire are important.

Comment 37: One commenter stated that adopting PCEs 2 and 3 (larval host plants and adult nectar plants) risk causing temporary low-quality or degraded areas to be treated as non-habitat, which would allow their destruction or adverse modification.

Our Response: Critical habitat designations are not required to support all PCEs over the entire extent of the critical habitat unit; as defined in section 3(5)(A) of the Act, critical habitat is defined as (1) the specific areas within the geographic area occupied by a species, at the time of listing in accordance with the Act, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographic area occupied by a species at the time it is listed in accordance with section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. This definition does not require all PCEs to be present throughout the entire unit. Further, section 7 consultations on critical habitat also do not require all PCEs to be present in order to determine adverse modification. An adverse modification includes when an action impairs a unit's ability to continue to provide those features essential for the conservation of the species. For example, areas of open grasslands may not support the larval host or adult host plants, but would still provide open grasslands for dispersal of adults between patches of more suitable habitat. In this case, the absence of the larval host plants or adult nectar plants would not negate the importance of the grassland habitat, which is PCE 1.

Comment 38: One commenter stated the principle PCE should be the presence of suitable soils and that the order of the PCE should be rearranged to indicate this.

Our Response: The order that the PCEs appear is not an indicator of their importance. The Service does not believe ranking the PCEs is appropriate because the presence of any one of the PCEs may not adequately reflect habitat quality or the presence of the species. For example, serpentine soils occur throughout California (and the world), but the Bay checkerspot butterfly does not. Similarly both the larval host plants and adult nectar plants also have ranges that extend beyond the historical range of the Bay checkerspot butterfly.

Comment 39: One commenter stated that populations of pollinators of the larval and adult host plants should be a PCE and that if they are as poorly known as we indicated in the proposed rule the commenter would undertake a project to identify them for the Service. Further the commenter stated that our assumption regarding the presence of host plants implying their successful reproduction is erroneous and a serious error.

Our Response: According to *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service 268 F.* Supp. 2d (1197) 2003, the Service must describe the PCEs with a certain degree of specificity. In order to establish pollinators as a PCE, the Service would need detailed life history data of the Bay checkerspot butterfly's larval host and adult nectar plants and list their pollinators. The Service has general data regarding insect pollinators, but we lacked data specific enough on the pollinators for the majority of larval host and nectar plants to designate pollinators as a PCE. In addition, since the Service is under a court-ordered deadline for publishing this final rule, there was insufficient time to undertake a study designed to determine the pollinators of the larval host and adult nectar plants.

Comment 40: One commenter supported aquatic features as a PCE and stated they had observed ''puddling'' in early April 2002 and the weather had not been particularly hot or dry. The commenter believes that puddling may occur more frequently than previously believed for this species.

Our Response: All three peer reviewers, while acknowledging aquatic features have been used by this subspecies, stated the Bay checkerspot butterfly was capable of surviving without access to these features. Murphy *et al.* (1983, p. 261) observed that egg production varied with diet (no food; water; water with 20 percent sugar; water with amino acids; nectar; and nectar with amino acids), but that

water alone had no direct role on female fitness. Therefore, based on expert opinion, we have removed aquatic features as a PCE.

Comment 41: One commenter stated that mean rainfall should also be considered when designating critical habitat and additional units should be designated to include a wide variation of annual rainfall.

Our Response: The Service agrees with the commenter regarding the importance of annual rainfall. Variations in amount and timing of rainfall play a significant role in determining when host plants become senescent which in turn influences larval mortality and ultimately is the key factor in population size (Singer 1972, p. 77; Weiss *et al.* 1988, p. 1486), as we noted in the proposed rule in the section titled ''Distribution and Population Trends.'' Variable topography (i.e., different slope aspects) was included as a PCE (PCE 1) in order to support the life cycle of the Bay checkerspot butterfly. In addition, we included three unoccupied units in San Mateo County, because we recognized that units in close proximity to one another (i.e., many of the units in Santa Clara County) would likely experience similar environmental conditions.

Comment 42: One commenter stated that the rule should be revised to state that only structures present at the time of this rulemaking within critical habitat are excluded by text and are not designated as critical habitat and that areas developed after the rule making should not be automatically excluded by the language of the text.

Our Response: When determining critical habitat boundaries for this rule, we made every effort to avoid including developed areas such as lands covered by buildings, paved areas, and other structures that lack PCEs for the Bay checkerspot butterfly. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, on the effective date of this rule, Federal actions limited to these areas would not trigger section 7 consultation, unless they may affect the species or PCEs in adjacent critical habitat.

The Service does not believe it would be appropriate to state that only areas that are developed at the time of this rulemaking would not be designated as critical habitat. Any area that is developed in the future, with or without consultation with the Service, would then still be considered critical habitat, even though it would not contain any of the PCEs and no longer support any of the species life history requirements.

Comment 43: Two commenters stated that San Bruno Mountain Unit should be retained as a critical habitat unit and that the proposed rule was confusing regarding whether the unit was proposed for inclusion or for exclusion. In addition, both commenters stated that HCPs exist for the purpose of taking listed species and that HCPs include actions that are harmful to listed species. One of these commenters also stated the current San Bruno Mountain HCP does not provide adequate management or protection because it does not cover the Bay checkerspot butterfly.

Our Response: We proposed the San Bruno Mountain unit for exclusion because the existing San Bruno Mountain HCP covers all remaining habitat for the Bay checkerspot butterfly on the mountain, three other listed butterflies with some similarities in life histories and habitat requirements occur on San Bruno Mountain, and management of the habitat on the mountain for the three other listed butterflies is expected to benefit the Bay checkerspot butterfly. Additionally, at the time of the publication of the proposed rule, we expected Amendment 5 to the San Bruno Mountain HCP, which would include coverage specific to the Bay checkerspot butterfly, to have been finalized prior to the publication of this final designation of critical habitat. As this amendment is not yet finalized as of the writing of the final rule, we re-evaluated the proposed exclusion of the San Bruno Mountain HCP from critical habitat and determined on the basis of the record before us not to exclude this area (See ''Application of Section 4(b)(2) of the Act'').

Comment 44: One commenter stated that by retaining four units on Coyote Ridge, the effects of projects consulted on under section 7 of the Act would be analyzed at the unit level and that combining the units would dilute or obscure the analysis of effects.

Our Response: When analyzing the effects of a proposed project on critical habitat, the Service analyzes the effects of the action and whether the action will result in adverse modification or destruction of critical habitat on all units that have been designated. The Service does not typically limit its analysis regarding adverse modification or destruction of critical habitat to only the critical habitat unit in which the action is occurring. The Service does review the baseline information for the unit; however, baseline information will be the same for a given area regardless of whether the area has been identified as one unit or multiple units.

Comment 45: One commenter stated that the Service did not designate habitat patches of sufficient number, quality, or proximity to ensure the survival and recovery of the Bay checkerspot butterfly, and at a minimum the Service should designate as critical habitat the number of habitat patches that the Recovery Plan specifies as necessary for the recovery of the species.

A second commenter recommended clarification in the final rule regarding the Service's statement in the proposed rule that the designation of critical habitat may not include all habitat areas that we may eventually determine necessary for recovery.

Our Response: Each unit is capable of supporting multiple populations; we do not believe it is necessary to match the number of critical habitat units with the number of populations identified in the Recovery Plan. In addition, the Service lacked specific information to indicate if any particular areas outside those we proposed to designate are essential for the conservation of the species. Since occupancy at the time of listing or since listing was a criterion for determining which areas were to be designated as critical habitat, additional areas outside of those we are designating would not meet our criteria. We recognize areas other than those we are designating as critical habitat, such as those defined in the Recovery Plan, may be important for the eventual recovery of the Bay checkerspot butterfly; however, these areas did not meet our criteria for being essential to the conservation of this butterfly. If such information becomes available in the future, the Service will consider proposing a revision to the critical habitat designation at that time or when our resources allow.

Comment 46: One commenter stated the revised PCEs are problematic and would result in a reduced protection of the species habitat within (and potentially that outside of) designated units, because the PCEs are hyper-specific, lack any expression for the need for dispersal, and may be used during section 7 consultations outside of critical habitat to determine if a site has appropriate habitat or not. The commenter recommended revising the PCEs.

Our Response: As noted above in our response to Comment 39, according to *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service* 268 F. Supp. 2d (1197) 2003, the

Service must describe the PCEs with a certain degree of specificity. We revised the list of PCEs from the 2001 rule (66 FR 21450), in an attempt to comply with the requirements as set forth in the above mentioned case.

As noted in our response to Comment 34, PCE 1 includes both perennial and annual grasslands, which in part is to facilitate dispersal within units and between units. The Santa Teresa Hills Unit (Unit 7) includes an area next to the Tulare Hill Unit (Unit 6) that was specifically included in order to facilitate the dispersal of Bay checkerspot butterflies from the core population along Coyote Ridge on the eastern side of Santa Clara Valley, to the ridges on the western side of the valley. In addition, Unit 9a, 9b, and 10 are also considered important for dispersing Bay checkerspot butterflies to the southern most units (Units 11 and 12) in Santa Clara County.

The Service does not specifically use the presence or absence of PCEs outside of critical habitat designations to determine whether or not an area provides habitat for a given species. PCEs are only considered when a proposed project is within or may affect a designated critical habitat unit. The presence of all PCEs is not required in order to initiate consultation under section 7 of the Act. The presence of a single PCE within the boundaries of critical habitat and the potential effects of a proposed project on that PCE is sufficient. PCE 4, soils derived from serpentinite ultramafic rock (Montara, Climara, Henneke, Hentine, and Obispo soil series) or similar soils (Inks, Candlestick, Los Gatos, Fagan, and Barnabe soil series), are present throughout the majority of the units, and the presence of this PCE alone would result in consultation for proposed projects with a Federal nexus.

Comment 47: One commenter stated that the Service should undertake the establishment of experimental populations of the species outside its historically known range.

Our Response: The establishment of experimental populations is outside the scope of this critical habitat rule.

Comment 48: One commenter stated that given the species' continued decline, the species should be uplisted to endangered.

Our Response: The Service will initiate a 5–year review on this species in 2008. Recommendations regarding the status of a species, including whether to uplist, downlist, or delist, will be made upon completion of the 5–year review.

Comment 49: One commenter stated that annual rainfall should be considered in the designation of critical habitat for the Bay checkerspot butterfly, that the Service should designate areas that encompass a wide range of mean annual rainfall to buffer against climate variability and global warming, and that ongoing climate change is a threat to the species.

Our Response: See response to Comment 41 regarding rainfall. Current climate model forecasts vary in their predicted outcomes, and range from cooler and drier to warmer and wetter (Miller *et al.* 2003; Deffenbaugh *et al.* 2005; Leung and Ghan 1999), which makes it difficult to adequately assess the effects that climate change may have on populations of the Bay checkerspot butterfly. Further, the Service is not aware of climate models that have been refined to provide forecasts at the local scale, or specifically models that have been developed for areas occupied by the Bay checkerspot butterfly.

Despite the lack of a consensus with respect to climate change, we designated units in both San Mateo and Santa Clara Counties, because we recognized that units in close proximity to one another would likely experience similar environmental conditions. We designated units in San Mateo County that were occupied at the time of listing? despite the fact that all the units, with the possible exception of Edgewood Park, are currently? unoccupied and are beyond the reported dispersal capabilities of the species from occupied sites in Santa Clara County. However, based on information regarding land use, vegetative cover, soil data, and topography, we believe we have designated all potential habitats in San Mateo County that could support the species and meet the definition of critical habitat. Our designation is supported by two peer reviewers, who also believe that the area designated as critical habitat covers all remaining suitable habitat.

In addition, as stated above in our response to Comment 45 the Service lacked specific information to indicate whether particular areas outside those we are designating are essential to the conservation of the species. We do not believe it is appropriate to designate critical habitat in areas where we are lacking adequate information. In the proposed rule, we specifically requested comments regarding the amount and distribution of Bay checkerspot butterfly habitat, but we did not receive specific responses. If such information becomes available in the future, the Service will consider proposing a revision to the critical habitat designation at that time or when our resources allow.

Comments related to the Draft Economic Analysis (DEA)

Comment 50: One commenter stated that specific management actions for serpentine soil grasslands, such as grazing, had not yet been determined in the Santa Clara Valley HCP - NCCP (SCVHCP) and therefore should not be included in the DEA.

Our Response: In order to estimate the costs of future conservation activities for the butterfly, the DEA must predict the actions most likely to be taken and estimate the amount of resources / funding required to implement them. Grazing and prescribed burning are recommended for serpentine soil management in Section 5.3.3 of the SCVHCP Working Draft. We recognize that these recommendations may change as the plan is finalized. However, the plan represents the best currently-available information regarding likely future conservation activities. Therefore, the costs of implementing these management actions are included in the DEA.

Comment 51: One commenter asked for clarification as to how the economic impacts were determined for ''recreation and public access'' in Table 2-1 of the DEA.

Our Response: The impacts for ''recreation and public access'' in Table 2-1 are based on the December 2007 SCVHCP Implementation Budget Preliminary Draft.

Comment 52: A commenter noted that some of the County parks and recreation activities within those parks were not correctly identified in Table 1-2. The commenter also pointed out that County parks within proposed critical habitat were incorrectly identified in Section 2.4.3 of the DEA.

Our Response: Table 1-2 and Section 2.3.1 (which contains former Section 2.4.3) were revised to state that Unit 5 contains Motorcycle County Park, Field Sports Park, part of Anderson Lake Park and part of Coyote Creek Parkway; and Unit 6 contains part of Coyote Creek Parkway. Table 1-2 was revised to state that Metcalf Park is managed by the City of San Jose. Table 1-2 now includes off-road vehicle recreation and a firing range in the land use description for Motorcycle County Park and Field Sports Park.

Comment 53: A commenter noted that the implementation of the grazing programs in Santa Teresa County Park and Calero County Park will occur independently of the implementation program identified in the SCVHCP.

Our Response: Section 2.3.1 (which contains former Section 2.4.3) of the DEA was revised to clarify that these

grazing projects are part of the County's ongoing fire control and invasive plant species management and will occur independently of the SCVHCP grazing program. However, the costs of these projects are retained in the analysis, as they represent part of the baseline protection provided to the habitat.

Comment 54: A commenter noted that Santa Clara County Parks uses many methods to manage invasive plant species, including prescribed fires, herbicide application and manual removal, but that livestock grazing is the predominant method used. The commenter said that County Parks conducts prescribed burns infrequently and is cutting back on herbicide treatment. The commenter noted that County Parks will be employing more costly methods, such as hand removal and grazing, to manage invasive plant species in the future.

Our Response: The DEA was revised to qualitatively discuss all potential invasive species management options, including manual removal, prescribed burns, and herbicide application. However, according to the County Parks Department, these alternative options are very rarely used and are expected to be used less often in the future. In Section 2.3.1, the DEA quantifies the costs of grazing programs to manage invasive plant species in serpentine soil habitats because it is the current predominant method and is expected to be used even more widely in the future.

Comment 55: A commenter disagreed with the economic analysis' assessment that livestock grazing is cost effective or that costs of implementing and managing a grazing program are revenue neutral.

The commenter points out that fencing costs estimated in the DEA are outdated and underestimated. Additionally, the costs of fencing do not include the associated costs for surveys, plan development, administrative costs, or development of other related infrastructure such as water sources for livestock. The commenter requested that the economic analysis consider the implementation, administrative, and management costs associated with the grazing programs in addition to the fencing construction costs.

Our Response: Section 2.3.1 of the DEA was revised to better quantify all the costs of implementing a grazing program, including costs of all infrastructure, planning, and management. The DEA also includes the best estimates of revenues from leasing the land to grazers. The updated cost and revenue information were obtained from the County of Santa Clara Parks and Recreation Department.

Summary of Changes from the Proposed Rule

The areas identified in this final rule constitute a revision from the areas we proposed as critical habitat for Bay checkerspot butterfly on August 22, 2007 (72 FR 48178). The primary differences include the following:

(1) Our proposed rule excluded Unit 1. The final rule includes Unit 1 as designated critical habitat.

(2) The 2007 revised proposed critical habitat rule consisted of 12 units comprising a total of 19,746 ac (7,990 ha). The majority of the final units correspond to those in the revised proposed rule. However, we have refined the units to eliminate areas that are unlikely to support the PCEs such as areas that are forested or areas that were developed. Proposed rule Unit 5 was split into two individual units, Unit 5 and Unit 13. This was done to remove intervening areas that did not contain the features essential to the conservation of the Bay checkerspot butterfly. This final designation of critical habitat consists of 13 units.

(3) We have clarified the list of specific species in PCE 1 to state that the list of grassland species is an example of species common to grasslands in California, and since nonnative grasses are more common than native species, we include nonnative species in the example. The presence of any specific grass or grasses listed in the PCE is not required, and is not provided as a means to measure habitat quality, but merely as an indicator of grassland habitat.

(4) We have removed PCE 4 from the revised proposed designation, as well as mention of water in other PCEs. All three peer reviewers stated the use of water was overemphasized in the revised proposed rule. All three peer reviewers stated that the Bay checkerspot butterfly is opportunistic with regard to water and will use it when water is present and there is a need for water, but that absence of water did not influence the presence or absence of the subspecies.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) essential to the conservation of the species and

(b) that may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical or biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the PCEs laid

out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed as critical habitat only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the Recovery Plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designations, will continue to be subject to conservation actions that we and other Federal agencies implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future Recovery Plans, HCPs, or other species conservation planning efforts if the best scientific and commercial information available at the time of these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific data available in determining areas that contain the features essential to the conservation of the Bay checkerspot butterfly, areas unoccupied at the time of listing that are essential to the conservation of the Bay checkerspot butterfly, or both. This includes information used to prepare the 2001 designation of critical habitat (66 FR 21450), the Recovery Plan for Serpentine Soil Species of the San Francisco Bay Area, the CNDDB, published and unpublished papers, reports, academic theses and surveys, Geographic Information System (GIS) data (such as species occurrence, soil data, land use, topography, and ownership maps), correspondence to the Service from recognized experts, and other information as available.

We have also reviewed available information that pertains to the habitat requirements of this species, including:

- Data in reports submitted during section 7 consultations and submitted by biologists holding section 10(a)(1)(A) recovery permits;
- Research published in peer-reviewed articles and presented in academic theses and agency reports;
- Information from species experts; and
- Information gathered during site visits to Bay checkerspot butterfly habitat in Santa Clara County.

Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species that may require special management considerations or protection. We consider the physical or biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. The PCEs include:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

The specific PCEs required for the Bay checkerspot butterfly are derived from the biological needs of the Bay checkerspot butterfly as described in the Background sections of the August 22, 2007, proposed critical habitat rule (72 FR 48178) and in the final listing rule published in the **Federal Register** on September 18, 1987 (52 FR 35366).

Space for Individual and Population Growth and for Normal Behavior

The Bay checkerspot butterfly occurs in open grassland habitats of the San Francisco Bay in Santa Clara and San Mateo counties. Prior to European settlement, California grasslands are believed to have been comprised of perennial bunchgrasses with both annual and perennial forbs (Jackson 1985, p. 349; Huenneke *et al.* 1990, p. 478; Corbin and D'Antonio 2004, p. 1273). Today, grassland habitats in California are almost entirely composed of Eurasian annual grasses and forbs (Jackson 1985, p. 349; Huenneke *et al.* 1990, p. 478; Seabloom *et al.* 2003, p. 13384; Malmstrom *et al.* 2005, p. 154) where classical succession does not occur (Huenneke *et al.* 1990, p. 478; Kie 2005, p. 2). Plant density in nonnative grasslands is extremely high compared to plant density in native grasslands (Malmstrom *et al.* 2005, p. 154). Dyer and Rice (1997, pp. 484, 490) estimated that pre-settlement densities of some native species was between 1-7 mature individuals per square meter. This is in sharp contrast to densities of several nonnative grasses and forbs; a study by Biswell and Graham (1956, pp. 116-117) found densities of some nonnative species, such as *Bromus hordeaceus*, *Erodium botrys*, and *Festuca megalura*, to be 20,000 to 78,000 mature individuals per square meter. Heady (1958, p. 405) observed somewhat lower densities than Biswell and Graham (1956) of the same species with densities ranging from 4,750 to 28,370 mature individuals per square meter. This suggests that grasslands with

nonnative species have large numbers of individuals, but few species (i.e., low diversity). According to Malmstrom *et al.* (2005, p. 154), California native grasslands, prior to the introduction of Eurasian vegetation, were likely a mix of forbs and grasses, but today these species are out-competed by nonnative grasses.

Serpentine or serpentine-like soils are characterized as shallow, nutrient poor (typically lacking in nitrogen and calcium), containing high magnesium (and other heavy metals), and with low water-holding capacity. All currently occupied habitats of the Bay checkerspot butterfly occur on serpentine or serpentine-like grasslands that support at least two of the subspecies' larval host plants. Due to poor nutrient availability, as well as other soil characteristics, serpentine and serpentine-like grasslands are, for the most part, inhospitable to the nonnative grasses and forbs that dominate other California grassland ecosystems; these areas are essentially isolated patches where native grassland vegetation is capable of persisting in a landscape that is otherwise dominated by nonnative and invasive species. These soils support many rare plant species including populations of the Bay checkerspot butterfly's larval host plants *Plantago erecta*, *Castilleja densiflora*, and *Castilleja exserta*. However, these remnant native grasslands are being invaded and crowded out by nonnative species and are under increased pressure as a result of nitrogen deposition primarily caused by air pollution (Weiss 1999, p. 1477). The enrichment of these soils with nitrogen has allowed nonnative grasses to invade these traditionally nutrient poor habitats, and the result is a thick mat of standing vegetation (thatch). Dense thatch has been reported to inhibit the growth of native forbs (Huenneke *et al.* 1990, p. 488). Huenneke *et al.* (1990, p. 489) found that treatment areas that were fenced to prevent grazing resulted in an increase in native perennial and nonnative annual grasses, but in grazed treatments, forbs continued to represent an important component. Low and moderate grazing regimes, approximately one cow per 10 acres, have been implemented on portions of Tulare Hill and Coyote Ridge. Because cattle tend to select nonnative grasses over native forbs (Weiss 1999, p. 1484), the result of these grazing regimes has been local increases of the Bay checkerspot butterfly's larval host plants.

The Bay checkerspot butterfly requires areas with topographic diversity (warm south and west slopes as well as cool north and east slopes), because some slopes become unfavorable depending on annual weather conditions and time of year. Fleishman *et al.* (2000, p. 34) defined warm and very warm slopes as south- and west-facing slopes with a tilt greater than 11 and 17 degrees, respectively, with cool and very cool slopes defined as those facing north or east with a tilt greater than 11 and 17 degrees, respectively. Harrison *et al.* (1988, p. 365) defined warm slopes as those facing south, southwest, and southeast with a tilt greater than 7 degrees and cool slopes as those facing north or northeast with a tilt greater than 7 and 12 degrees, respectively. In hot, dry years, north-and east-facing slopes remain cool and moist longer and larval host plants tend to senesce (reach later maturity; grow old) later than those on other slopes (Weiss *et al.* 1988, p. 1493; Fleishman *et al.* 2000, p. 33). The delayed senescence of plants on cool, moist slopes allows larvae to reach their fourth instar (larval development stage or molt) and enter diapause (dormancy) before host plants become inedible. Larvae that are not able to enter diapause prior to host plant senescence starve and die (Singer and Ehrlich 1979, p. 54; White 1987, p. 209; Weiss 1996, p. 6). Because host plants on cool slopes can flower and senesce 3 or more weeks after those on warmer slopes (Weiss *et al.* 1988, p. 1493), cool slopes are especially important during extremely dry years (i.e., droughts). However, larval feeding and growth tends to increase on warm slopes because they receive more solar exposure than other slopes; this allows post-diapause larvae to grow quickly and pupate earlier than those on cool slopes. Individuals that pupate earlier have a much greater chance of reproductive success (Weiss *et al.* 1988, pp. 1493-94).

In addition to weather, slope is important relative to the timing of egg laying. As the adult mating season (referred to as the flight season) progresses, females tend to lay more eggs on cool slopes than on warm slopes (Weiss *et al.* 1988, p. 1493). The timing of the adult flight season varies with weather, but can generally be described as occurring from late February to early May (Murphy *et al.* 2004, p. 25). Larvae that hatch late in the flight season have a greater chance of reaching diapause on cooler slopes than those laid at the same time on warm slopes, because host plants mature later on cool slopes. The pattern of larval survivorship across different slopes changes from one year to the next as well as within years; therefore, it becomes important that a variety of slopes and aspects are present to support the butterfly and its host plants.

Food

The primary larval host plant for the Bay checkerspot butterfly is a small, annual, native plantain (*Plantago erecta*). The Bay checkerspot butterfly also requires the presence of a secondary host plant, either purple owl's-clover (*Castilleja densiflora*) or exserted paintbrush (*Castilleja exserta*) (Singer 1972, p. 76; Murphy and Ehrlick 1980, p. 316; Fleishman *et al.* 1997, p. 32; Weiss 1999, p. 1478; Hellman 2002, pp. 926, 931). The need for a secondary host plant is related to the timing of senescence of the primary host plant. In many years, the primary host plant dries up before larvae have reached their fourth instar and entered diapause. Because purple owl's-clover and exserted paintbrush tend to senesce later than the plantain, larvae that switch to these plants may extend their feeding season long enough to reach their fourth instar. The terms ''primary'' and ''secondary'' also loosely refers to the host plant that females most commonly oviposit (lay eggs) on *Plantago erecta* in some locations, such as Jasper Ridge; however, at Edgewood approximately 70 percent of oviposition occurred on *Castilleja* and that in the 1980s approximately 20 percent of oviposition at Kirby Canyon (the southern portion of the Kirby Unit) occurred on *Castilleja.*

Adult Bay checkerspot butterflies utilize nectar from a variety of plants associated with serpentine grasslands. Commonly used nectar plants include desert parsley (*Lomatium* spp.), California goldfields (*Lasthenia californica*), tidy-tips (*Layia platyglossa*), sea muilla (*Muilla maritima*), scytheleaf onion (*Allium falcifolium*), false babystars (*Linanthus androsaceus*), and intermediate fiddleneck (*Amsinckia intermedia*). Egg production (both size of individual eggs and number of eggs) significantly increases with the intake of nutrients (Murphy *et al.* 1983, p. 261; Boggs 1997a, pp.181, 184). Murphy *et al.* (1983, p. 261) observed increased longevity and reduced weight loss in adult Bay checkerspot butterflies that were fed sugar. Murphy *et al.* (1983, p. 261) also observed that amino acid intake produced heavier eggs and that larvae from these eggs had an increased likelihood of survival. A study by O'Brien *et al.* (2004, p. 286), which examined egg production and adult diet in three species of butterflies in the family Nymphalidae, found the percent of carbon in eggs, derived from adult

diets, increased with time (up to 80 percent in one species). Currently there is no information regarding nectar usage on adult male longevity or reproduction.

All of the host plants have ranges greater than that of the Bay checkerspot butterfly, and the larval plants may be found in areas that do not meet the life-history requirements of the Bay checkerspot butterfly. For example, *Castilleja densiflora* historically occurred throughout California, *Plantago erecta* occurred throughout California and Oregon, and *Castilleja exserta* occurred in California, Arizona, New Mexico, Hawaii, and Massachusetts (USDA 2007). In addition, the range of many of the nectar sources is also much greater than the geographic range of the Bay checkerspot butterfly.

Soils

The Bay checkerspot butterfly inhabits areas with soils derived from serpentinite ultramafic rock (Montara, Climara, Henneke, Hentine, and Obispo soil series) or similar nonserpentine soils (such as Inks, Candlestick, Los Gatos, Fagan, and Barnabe soil series). Serpentine soils are characterized as having low amounts of nutrients (such as nitrogen and calcium); high concentrations of magnesium; low water-holding capacity; and patches of heavy metals. These characteristics create a refuge for many rare native plants, because other plant species are not capable of surviving in these soils (nitrogen is often a limiting factor in plant growth). The nonserpentine soils mentioned above have characteristics that allow them to support grassland communities similar to those on serpentine soils, such as low water-holding capacity, slight to moderate acidity (pH 5.8), and varied topography (slopes ranging from 5 to 75 percent). Together, these soils provide the last remaining habitat within the geographic range of the Bay checkerspot butterfly where the larval host plants are capable of persisting and not be outcompeted or crowded out by introduced annuals. Some researchers have hypothesized that the Bay checkerspot butterfly once occurred widely in nonserpentine grasslands throughout the San Francisco Bay area prior to the invasion of nonnative invasive grasses and forbs (Murphy and Weiss 1988, p. 197), but has subsequently been relegated to these fragmented habitats due to plant competition.

Cover

Larval Bay checkerspot butterflies enter diapause in order to survive the summer dry period, once their host plants senesce. Diapause is an obligatory dormancy period that begins once larvae reach their fourth instar, which takes approximately 3 weeks, but may vary considerably depending on abiotic factors (non-living components of the biosphere) (Kuussaari, *et al.* 2004, p. 140). Singer (2008, p. 1) observed repeat diapause in small post diapause larvae in laboratory environments. Other researchers (White and Levin 1981, p. 355; Harrison 1989, p. 1242; Kuussaari *et al.* 2004, pp. 139-140; Mattoni *et al.* 1997, p. 106) also provide evidence that larvae are capable of entering diapause more than once. Diapause continues until the summer dry period is broken by the onset of the rainy season, generally some time in November–January (Weiss 1996, p. 6). The larvae pass through diapause in holes and cracks in the soil and under rocks (White 1987, p. 209; Weiss 1996, p.7) that provide protection from weather, predation, and parasitism. White (1986, p. 58) observed that pupal mortality rates, as well as cause of mortality (i.e., predation, parasitism, crushing, or disease), varied significantly depending on location, with significant differences in mortality between microhabitat types. For example, crushing was most likely in areas of bare ground, whereas pupae in areas with dense vegetation had a higher rate of mortality due to mold and viruses.

Primary Constituent Elements for the Bay Checkerspot Butterfly

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the habitat requirements for sustaining the essential life history functions of the species, we have determined that Bay checkerspot butterfly PCEs are:

(1) The presence of annual or perennial grasslands with little to no overstory that provide north–south and east–west slopes with a tilt of more than 7 degrees for larval host plant survival during periods of atypical weather (for example, drought).

Common grassland species include wild oats (*Avena fatua*), soft chess (*Bromus hordeaceus*), California oatgrass (*Danthonia californica*), Italian ryegrass (*Lolium multiflorum*), purple needlegrass (*Nassella pulchra*), and Idaho fescue (*Festuca idahoensis*); less abundant in these grasslands are annual and perennial forbs such as filaree (*Erodium botrys*), true clovers (*Trifolium* sp.), and dwarf plantain (*Plantago erecta*). These species, with the exception of dwarf plantain, are not required by the Bay checkerspot butterfly, but merely are provided here as an example of species commonly found in California grasslands.

(2) The presence of the primary larval host plant, dwarf plantain (*Plantago erecta*), and at least one of the secondary host plants, purple owl's-clover (*Castilleja densiflora*) or exserted paintbrush (*Castilleja exserta*), are required for reproduction, feeding, and larval development.

(3) The presence of adult nectar sources for feeding. Common nectar sources include desert parsley (*Lomatium* spp.), California goldfields (*Lasthenia californica*), tidy-tips (*Layia platyglossa*), sea muilla (*Muilla maritima*), scytheleaf onion (*Allium falcifolium*), false babystars (*Linanthus androsaceus*), and intermediate fiddleneck (*Amsinckia intermedia*).

(4) Soils derived from serpentinite ultramafic rock (Montara, Climara, Henneke, Hentine, and Obispo soil series) or similar soils (Inks, Candlestick, Los Gatos, Fagan, and Barnabe soil series) that provide areas with fewer aggressive, nonnative plant species for larval host plant and adult nectar plant survival and reproduction.

(5) The presence of stable holes and cracks in the soil, and surface rock outcrops that provide shelter for the larval stage of the Bay checkerspot butterfly during summer diapause.

With this final designation of critical habitat, we intend to conserve the physical and biological features essential to the conservation of the species, which support the life history functions of the species, through the identification of the appropriate quantity and spatial arrangement of areas containing the PCEs. Some units contain all of these PCEs and support multiple life processes, while some units contain only a portion of these PCEs, those necessary to support the species' particular use of that habitat. Because not all life history functions require all the PCEs, not all critical habitat units will contain all the PCEs.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and to contain the physical and biological features essential to the conservation of the species may require special management considerations or protection. Threats to those features we identify as the PCEs laid out in the appropriate quantity and spatial arrangement for conservation of the Bay checkerspot butterfly include habitat loss and fragmentation, invasion of exotic plants, nitrogen deposition (including NO_x and ammonia), pesticide

application (including drift), illegal collecting, fire, overgrazing, and gopher control.

We have determined that the essential features in critical habitat units 1, 2, 4, 5, 6, 7, 8, 9, 10, and 13 may require special management considerations or protection due to threats posed by habitat loss and fragmentation resulting from urban and suburban growth. Development pressure in Santa Clara County is likely to increase in the foreseeable future. The City of San Jose has developed a general plan to guide development in the area into the year 2020. Portions of the general plan share boundaries with critical habitat units, including Units 4, 5, 6, 7, and 9. Some currently or proposed projects include the Coyote Valley Research Park, numerous projects currently proposed for inclusion under the Santa Clara Habitat Conservation Plan, as well as numerous single family residential units and road grading projects. In 1997, the California Court of Appeals 6th District found that the City of San Jose's zoning did not have to be consistent with the City's General Plan (*Juarez et al.* v. *City of San Jose et al.* (6th District, Case No. CV736436 H014755)); this may result in areas not currently within the urban growth boundary still being proposed for development, including those areas that are environmentally sensitive such as critical habitat units. In addition, portions of Unit 10 are within the planning boundaries of the City of Morgan Hill's general plan.

We have determined that the essential features in all final critical habitat units may require special management considerations or protection due to the threats posed by the invasion of nonnative vegetation that result from air pollution (primarily nitrogen deposition) (Weiss 1999, p. 1477). Nitrogen deposition enriches serpentine and serpentine-like soils that are usually nutrient poor. Increased nitrogen (typically a limiting factor in plant growth) in these areas has resulted in the accumulation of a thick carpet of vegetative material (thatch) each year. Dense thatch has been reported to inhibit the growth of native forbs (Huenneke *et al.* 1990, p. 488). The increased density of nonnative vegetation would negatively affect the Bay checkerspot butterfly's host plant through competition and crowding (Weiss 1999, p. 1481).

The essential features in all final critical habitat units may require special management considerations or protection due to the threats posed by pesticide use. Use of pesticides (for example, insecticides and herbicides) in or adjacent to critical habitat may affect populations of butterflies within these units. Populations adjacent to areas where there is intensive use of pesticides may be at risk as a result of drift and runoff. In at least one instance, larvae appeared to have survived a direct application of malathion by the California Department of Food and Agriculture; however, the application was conducted in the fall of 1981 when larvae were still in diapause.

We have determined that he essential features in all final critical habitat units may require special management considerations or protection due to the threat posed by fire. No Bay checkerspot butterflies were seen on San Bruno Mountain after a wildfire swept across portions of the mountain in 1986. However, only about 50 adult butterflies were observed on the mountain in 1984 (CNDDB 2006), so their subsequent disappearance may not have been solely related to the 1986 fire. The use of fire as a management regime in serpentine grasslands has not been well studied. Studies that have been conducted are primarily monitoring opportunities made possible after wildfires.

Use of prescribed burns may be an effective management tool depending on timing, intensity, and size of the area burned. Prescribed burns are widely used as a land management tool to counter the invasion of nonnative and invasive plant species and to stimulate growth and reproduction of those species adapted to disturbance. An experimental prescribed burn was conducted over a small portion of Coyote Ridge (portions of Unit 13) in 2006 and 2007. A third burn is proposed for 2008, with results available sometime in early 2009. A portion of the Tulare Hill Unit was burned in late-May 2004 and since that time vegetative surveys have been conducted at this site. These studies were established to document differences between grazed-burned, ungrazed-burned, and ungrazed-unburned treatments. Sites that had grazed-burned treatments had the highest percentage of *Plantago erecta* than any other sites (including several sites within Unit 13). In 2005, Plantago erecta cover was approximately 16.7 percent at grazed-burned sites compared to 13.9 percent at ungrazed-unburned sites (CH2M Hill 2006, p. 6-2). Similar results were obtained in 2007, with *Plantago erecta* cover being highest at grazed-burned sites (8.6 percent) (CH2M Hill 2008, p. 6-1). Nectar plants on Tulare Hill were also highest in grazed-burned sites (4.1 percent) and low at ungrazed-unburned sites (1.5 percent) (CH2M Hill 2006, p. 6-2). Bunchgrass cover and native plant cover was also highest in grazed-burned sites on Tulare Hill in 2005, 3.5 percent for bunchgrasses and 58 percent for native plant cover (CH2M Hill p. 6-2).

We also find that the essential features in all occupied final critical habitat units may require special management considerations or protection due to the threat posed by illegal collecting. The collecting of butterflies as a hobby is well known. The collection and trade of butterflies, especially rare species, is well documented. The Bay checkerspot butterfly's rarity and beauty make it a desirable addition to butterfly collections. Because butterfly numbers are so low, the collection of even a few individuals could harm the butterfly population. Collecting is illegal without a permit from the U.S. Fish and Wildlife Service. Providing the public information regarding the detrimental effects of collecting rare species may assist in the conservation of Bay checkerspot butterfly.

We have determined that the essential features in all final critical habitat units may require special management considerations or protection due to the threat posed by overgrazing or undergrazing. Although grazing is frequently used as a management tool to reduce standing biomass of nonnative vegetation, overgrazing can be a potential threat if grazing densities are not appropriately managed. Huenneke *et al.* (1990, p. 489) and Weiss (1999, p. 1480) found that areas that were fenced to prevent grazing or sites where grazing had been removed resulted in an increase in annual grasses, which crowd out forbs including those that are essential to the Bay checkerspot butterfly. Forbs continued to be an important component in areas that included limited grazing. Therefore, we consider limited grazing to be primarily beneficial to Bay checkerspot habitat.

We also find that the essential features in all final critical habitat units may require special management considerations or protection due to the threats posed by gopher control. Larval host plants have been observed to stay green and edible longer when located on or near soils recently tilled by gophers (*Thomomys bottae*) (Singer 1972, p. 75; Murphy *et al.* 2004, p. 26). Huenneke *et al.* (1990, p. 490) hypothesized that soil disturbance by gophers may limit the performance of grasses similar to results caused by grazing, with grazers reducing the standing grass biomass in a system, which allowed the persistence of small forbs. Larval host plants that stay green longer into the dry season may allow prediapause larva to reach the fourth instar.

Criteria Used To Identify Critical Habitat

Geospatial datasets were used within ArcGIS/ArcMap 9.2 (Environmental Systems Research Institute, Redlands, California) and analyzed to define the areas that best contain the features that are essential to the conservation of the Bay checkerspot butterfly. To delineate the units of critical habitat, we plotted all occurrence records of Bay checkerspot butterfly from the time of listing to the present on maps as polygons. We then examined whether these areas supported the PCEs.

We have defined critical habitat in this rule as: (1) Those grasslands on serpentine or serpentine-like soils containing the PCEs that were occupied by the Bay checkerspot butterfly at the time of listing in 1987, and (2) those grasslands on serpentine or serpentine-like soils containing the PCEs that have been occupied since the time of listing. Units did not have to contain all PCEs. We used information compiled for the proposed and final listing rules; reports prepared by San Mateo County Parks, Santa Clara County Parks, the CNDDB, researchers, and consultants; and published and unpublished literature to identify the specific locations occupied by the Bay checkerspot butterfly at the time of listing and currently occupied.

The currently occupied habitat for the Bay checkerspot butterfly is highly fragmented and isolated; the majority of all extant occurrences are within an approximate 9-mile (14.5-kilometer) radius in Santa Clara County, California. The population estimates in San Mateo County are extremely small and those in Santa Clara County have declined significantly in recent years. As a result of population declines and fragmented habitats, we are designating all areas currently known to support the Bay checkerspot butterfly as critical habitat.

Several areas occupied by the Bay checkerspot butterfly at the time of listing are not currently occupied. Some of these areas have been surveyed since listing and no Bay checkerspot butterflies were observed; however, not all of the units have been recently surveyed and, due to the metapopulation dynamics of the subspecies, it is possible that the subspecies has recolonized some of these areas. The metapopulation dynamics of the subspecies have shown that population fluctuations occur and extirpation and recolonization is a normal occurrence for the Bay checkerspot butterfly (Ehrlich *et al.* 1975, pp. 221-228; 1980; Harrison 1994, pp. 111-128). The units that have been surveyed since the time of listing without observations of the subspecies include Pulgas Ridge and Jasper Ridge Biological Preserve in San Mateo County, California. We are designating these areas as critical habitat because they were all occupied at the time of listing and currently contain the features essential to the conservation of the species and designation of these units will reduce the likelihood of extinction by providing source (larger patches of high-quality habitat) or sink (small patches of marginal habitat) areas and ''stepping stone'' (often smaller, unconnected areas that bridge the distance between larger blocks of suitable habitat) habitats for the subspecies. Since the Bay checkerspot butterfly is susceptible to extreme weather events these additional units in San Mateo County will also reduce the risk of extinction from stochastic natural events and extreme weather conditions, and will help to ensure survival of the subspecies by providing potential dispersal habitat for individuals that were reintroduced to Edgewood Park early in 2007.

The distribution of critical habitat areas (occupied and currently unoccupied) was selected to help reduce the level of habitat fragmentation associated with a federal agency action within the geographic range of the Bay checkerspot butterfly by providing dispersal and recolonization opportunities for the subspecies. The butterfly is considered relatively sedentary (Ehrlich 1965, p. 333; Harrison 1989, pp. 50-51; Singer and Hanski 2004, p. 187) and reduced fragmentation should facilitate movements between habitat patches. McKechnie *et al.* (1975, p. 561) observed that, out of several years of mark recapture studies, only 1.7 percent of males and 4.8 percent of females moved a distance of approximately 1,600 feet (ft) (500 meter (m)). These figures are consistent with observations made by Weiss (1996, p. 93) who reported that adult movement declined with increasing distance with only about 5 percent moving between 656 to 984 ft (200 to 300 m).

Although the butterfly is considered sedentary, long-distance movements have been documented. The longest documented movements observed by Harrison (1989, p. 1239) were 3.5 mi (5.6 km) for one male and 2 mi (3.2 km) for one female. Murphy (Service 2001, p. 21451) reported movement of Bay checkerspot butterflies of 4.7 mi (7.6 km). Harrison *et al.* (1988, p. 371) hypothesized that habitats greater than 4.3 to 5.0 mi (7 to 8 km) from a source population (Coyote Ridge in the study) were unlikely to ever sustain populations of the Bay checkerspot butterfly. This hypothesis was based on the presence or absence of adult Bay checkerspot butterflies in Santa Clara County in apparently suitable habitat and their relative distance from Coyote Ridge. The study was not designed to predict the Bay checkerspot butterfly's upper limit of dispersal. Harrison (1989, p. 371) hypothesized that the rate of colonization, relative to the rate of extinction, was too low to maintain populations of the Bay checkerspot butterfly on distant habitat patches (distant from a source patch; that is, greater than 5.0 mi (8 km)). Harrison *et al.* (1988) modeled two scenarios: (1) 50–year extinction (based on patterns of extreme drought in California), and (2) continuous extinction (based on stepping stone habitat or population). The continuous model indicated that a small habitat patch (2.22 ac (0.9 ha)) would experience extinction events once every 1 to 13 years, while larger patches (615.29 ac (249 ha)) would go extinct once every 12 to 26 years (Harrison *et al.* 1988, p. 377). The rate of colonization in Harrison *et al.* (1988) was variable and depended on both habitat patch size as well as distance from a source population. Given the subspecies' historical distribution, its metapopulation dynamics, and its sedentary tendencies, reducing habitat fragmentation, by designating occupied and currently unoccupied habitats that provide quality stepping stone habitat, will increase the likelihood of recolonization of more distant patches of suitable habitat.

We have determined that, due to the limited availability of habitat for the subspecies, its limited distribution, and its generally low dispersal tendencies, the long-term conservation of the Bay checkerspot butterfly is dependent upon the protection of all habitat that was occupied at the time of listing as well as additional habitat that is currently occupied. The presence of all six PCEs was not a requirement to designating a unit as critical habitat; however, all 12 units currently support all six PCEs.

When determining the revisions to critical habitat boundaries for this final rule, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the Bay checkerspot butterfly. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them at the time of this designation and inadvertently left inside critical habitat boundaries shown on the maps of this

final critical habitat have been excluded by text in this final rule. Therefore, Federal actions limited to these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless they may affect the subspecies or primary constituent elements in adjacent critical habitat.

All final critical habitat units are within areas that we have determined were occupied at the time of listing or are currently occupied, and are the appropriate quantity and spatial arrangement of areas containing the PCEs to constitute the physical and biological features essential to the conservation of the species, which support the life history functions of the species.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal species incidental to otherwise lawful activities. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement to minimize and mitigate the impacts on the species by the requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of such exclusions outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. To date, two HCPs, Pacific Gas and Electric's (PG&E) Metcalf Evendale–Monta Vista Line and their Metcalf-El Patio and Hicks–Vasona Lines, are the only HCPs that have been completed that include the Bay checkerspot butterfly as a covered species. PG&E's Evendale–Monta Vista Line HCP was issued in 1998, was in effect for 3 years, and covered approximately 4 ac (1.6 ha). Because this HCP has expired, we are not excluding lands once covered under this HCP. PG&E's Metcalf-El Patio and Hicks–Vasona Lines HCP covers temporary effects to 2.4 ac (0.97 ha). The HCP was issued in 2008 and is in effect for a period of 3 years. Because this HCP covers temporary effects, covers only a small area, and is in effect for only 3 years, we are not excluding lands covered under this HCP. We re-evaluated our proposed exclusion of the San Bruno Mountain HCP and determined not to do so on the basis of the record before us. Our decision considered the non-inclusion of the Bay checkerspot butterfly as a covered species under the current HCP, and the inadequacy of existing funding mechanisms to implement specific conservation measures to conserve and protect the features essential to the conservation of the Bay checkerspot butterfly. (See ''Application of Section 4(b)(2) of the Act''). Stanford University is developing an HCP for lands owned by Stanford University that includes the Jasper Ridge Biological Preserve (Unit 3); however, as currently proposed, this HCP would not include the Bay checkerspot butterfly or any other butterfly species, so lands covered by this HCP are not being excluded. Santa Clara County is currently developing a regional HCP that would encompass the majority of Santa Clara County, including all critical habitat units in the county (Units 4 through 13). This HCP is in the early stages of development, and as proposed would include the Bay checkerspot butterfly. However, the Santa Clara County HCP is not expected to be finalized until summer of 2010; therefore, we are not excluding lands that may be covered by this HCP.

Revised Critical Habitat Designation

We are designating 13 units as critical habitat for the Bay checkerspot butterfly. These units, which generally correspond to those units in the 2007 proposed revised designation, when finalized, would entirely replace the current critical habitat designation for the Bay checkerspot butterfly at 50 CFR 17.95(i).

Table 1 and 2 shows the occupancy of each final revised critical habitat unit and the approximate area encompassed within each final revised critical habitat unit with land ownership.

TABLE 1. OCCUPANCY OF REVISED CRITICAL HABITAT UNITS FOR THE BAY CHECKERSPOT BUTTERFLY.

Unit	Occupied at time of listing	Currently occupied	Acres (Hectares)
Unit 1: San Bruno Mountain	Yes	No	775 (314)
Unit 2: Pulgas Ridge	Yes	No	179 (72)
Unit 3: Edgewood Park	Yes	Yes	409 (166)
Unit 4: Jasper Ridge	Yes	No	329 (133)
Unit 5: Metcalf	Yes	Yes	4,503 (1,822)
Unit 6: Tulare Hill	Yes	Yes	348 (141)
Unit 7: Santa Teresa Hills	Yes	Yes	3,278 (1,327)
Unit 8: Calero Reservoir	Yes	Yes	1,543 (624)
Unit 9: Kalana Hills			
Subunit 9A	Yes	Yes	170 (69)
Subunit 9B	Yes	Yes	56 (23)
Unit 10: Hale	Yes	Yes	507 (205)
Unit 11: Bear Ranch	No	Yes	283 (114)
Unit 12: San Martin	Yes	Yes	467 (189)
Unit 13: Kirby	Yes	Yes	5,446 (2,204)
Total			18,293 (7,403)

TABLE 2. REVISED CRITICAL HABITAT UNITS FOR THE BAY CHECKERSPOT BUTTERFLY.[AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES IN ACRES (HECTARES).]

Unit	Federal	State or Local	Private	Total Area Designated
Unit 1: San Bruno Mt.	0	577 (234)	198 (80)	775 (314)
Unit 2: Pulgas Ridge	0	179 (72)	0	179 (72)
Unit 3: Edgewood Park	0	309 (165)	0	409 (166)
Unit 4: Jasper Ridge	0	0	329 (133)	329 (133)
Unit 5: Metcalf	0	123 (50)	4,380 (1,772)	4,503 (1,822)
Unit 6: Tulare Hill	0	14 (6)	334 (135)	348 (141)
Unit 7: Santa Teresa Hills	0	425 (172)	2,853 (1,155)	3,278 (1,327)
Unit 8: Calero Reservoir	0	1,543 (624)	0	1,543 (624)
Unit 9: Kalana Hills				
Subunit 9A	0	0	170 (69)	170 (69)
Subunit 9B	0	0	56 (23)	56 (23)
Unit 10: Hale	0	0	507 (205)	507 (205)
Unit 11: Bear Ranch	0	283 (114)	0	283 (114)
Unit 12: San Martin	0	0	467 (189)	467 (189)
Unit 13: Kirby	0	90 (37)	5,356 (2,167)	5,446 (2,204)
Total	0	3,643 (1,475)	14,650 (5,928)	18,293 (7,403)

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Bay checkerspot butterfly, below.

Unit 1: San Bruno Mountain

Unit 1 consists of 775 ac (314 ha) in San Mateo County. The unit is primarily within San Bruno Mountain State and County Park, and is entirely within the boundaries of the San Bruno Mountain Area Habitat Conservation Plan. This unit was occupied at the time of listing and contains all the features essential for the conservation of the subspecies; however, the Bay checkerspot butterfly has not been observed in this unit since a wildfire in 1986 and is currently unoccupied. Unit 1 represents the most northerly part of the subspecies' range on the San Francisco peninsula. Unit 1 is necessary as a supporting element of the San Mateo metapopulation because it represents the largest area of contiguous native grassland habitat that can support the Bay checkerspot butterfly's host and nectar plants within San Mateo County. This unit currently supports populations of the federally endangered Callippe silverspot butterfly (*Speyeria callippe callippe*), endangered San Bruno elfin butterfly (*Callophrys mossii bayensis*), and endangered Mission blue butterfly (*Icaricia icarioides missionensis*), which share some of the habitat requirements as the Bay checkerspot butterfly (such as native grasslands). The majority of this unit, approximately 577 ac (234 ha), is within the boundaries of the San Bruno Mountain State and County Park, while the rest of the unit is privately owned (198 ac (80 ha)). The distance between Unit 1 and the most proximate unit, Unit 2, is greater than the published dispersal distance of the Bay checkerspot butterfly; however, numerous small patches of intervening grasslands may serve as additional stepping stones to potentially allow for movement between these two units. These patches of grassland habitat are not designated as critical habitat because the Service has no information regarding the presence of sufficient PCEs within these areas.

Unit 2: Pulgas Ridge

Unit 2 consists of 179 ac (72 ha) in San Mateo County. The unit is located north of the intersection of Interstate 280 and Highway 92, east of Crystal Springs Reservoir. This unit was occupied at the time of listing and contains all the features essential for the conservation of the subspecies. Since listing, Bay checkerspot butterflies in this unit have been extirpated, and the unit is currently unoccupied. However, the Bay checkerspot butterfly formerly inhabited this unit, and the unit still contains all the PCEs. The land within this unit is owned by San Francisco Public Utilities Commission (SFPUC) and is part of the Peninsula watershed and not subject to development. This unit provides habitat for the subspecies, especially in years with particularly favorable weather conditions that support expanding populations of Bay checkerspot butterflies; represents a stepping stone location to nearby units; and secures the metapopulation dynamics of the subspecies by providing adjacent or dispersal habitat for the subspecies. According to the Peninsula watershed management plan (SFPUC 2002, pp. 2-11), portions of the watershed currently support populations of the endangered San Bruno elfin butterfly and the endangered Mission blue butterfly that share similar habitat requirements as the Bay checkerspot butterfly (including native grasslands). In addition, according to the environmental impact statement for the Peninsula watershed management plan (SFPD 2001, p. XLB-7), portions of the watershed have a high probability of supporting the Bay checkerspot butterfly and are designated as serpentine grassland habitat.

Unit 3: Edgewood Park

Unit 3 consists of 409 ac (166 ha) in San Mateo County. This unit is comprised primarily of the Edgewood Park and Natural Preserve, a San Mateo

County park located east of the junction of Edgewood Road and Interstate 280. A portion of the unit, approximately 141 ac (57 ha), is owned by the San Francisco Public Utilities Commission and is part of the Peninsula watershed. This unit was occupied at the time of listing, is currently occupied, and contains all the features essential to the conservation of the subspecies. Until recently, this unit supported the main population of Bay checkerspot butterflies within the San Mateo metapopulation. However, the subspecies was last observed here in 2002, after a steady decline beginning in the late 1990s. Larval Bay checkerspot butterflies were reintroduced to this unit in early 2007. The population of Bay checkerspot butterflies within this unit has been described as the only core population in San Mateo County, and without Bay checkerspot butterflies in this unit, the subspecies in San Mateo County is unlikely to persist, which would leave only the one metapopulation in Santa Clara County and the loss of Unit 3 would constitute a significant range reduction for the subspecies.

Unit 4: Jasper Ridge

Unit 4 consists of 329 ac (133 ha) in San Mateo County. The unit is entirely contained within Stanford University's Jasper Ridge Biological Preserve. The unit is 4 mi (7 km) southeast of Unit 3 and 23 mi (37 km) west-northwest of Unit 5, and represents the closest connection to the Santa Clara County metapopulation. This unit was occupied at the time of listing and contains all the features essential to the conservation of the subspecies. Dozens of published scientific papers about the Jasper Ridge population of the Bay checkerspot butterfly exist. The population was almost extirpated by prolonged drought in the late 1970s and again in the late 1980s. The unit was occupied at the time of listing; however the last known observation of the Bay checkerspot butterfly in this unit was in 1997. The unit is currently unoccupied. The unit is managed as a biological preserve by Stanford University, and suitable habitat, containing all the PCEs, continues to be present. Unit 4 is the closest unit in San Mateo County to populations of the Bay checkerspot butterfly in Santa Clara County. While currently not known to be occupied, metapopulation dynamics may allow for natural recolonization to occur by Bay checkerspot butterflies from the Edgewood Park Unit (Unit 3). The Jasper Ridge Unit is the closest suitable habitat with sufficient PCEs to the recently reintroduced Edgewood Park population and is necessary to support and maintain the Edgewood Park population, which in turn supports the metapopulation dynamics of the Bay checkerspot butterfly in San Mateo County.

Unit 5: Metcalf

Unit 5 consists of 4,503 ac (1,822 ha) in Santa Clara County. The unit encompasses Units 10, 11, and 12 as identified in the 2001 designation and is the northern half of Unit 5 as identified in the 2007 proposed revised designation. The unit comprises the northern half of the ridgeline currently referred to as Coyote Ridge (although in the past has been referenced as Morgan Hill, Kirby Canyon, and the East Hills), the majority of which is in private ownership, although approximately 110 ac (45 ha) are owned by Santa Clara County Parks for off-road vehicle recreation. To the north the unit is bordered by Yerba Buena Road near its intersection with U.S. Highway 101 and Metcalf Road to the south. The unit was occupied at the time of listing, contains all the features essential to the conservation of the subspecies, and represents the northern portion of the only remaining core population of the Bay checkerspot butterfly. Other units in Santa Clara County depend on the core population as a source for recolonization. The unit represents the second largest, most contiguous, and highest quality habitat containing the second largest population of Bay checkerspot butterflies.

Researchers historically referred to the Bay checkerspot butterflies within this unit as three populations, Metcalf, San Felipe, and Silver Creek Hills, and our 2001 designation identified them as separate units. However, according to Launer (2008, p. 4), there are likely multiple subpopulations or populations within each of the historically studied populations, and the four names only represent the centers of historic study areas. The Metcalf population supported an estimated 400,000 individuals in 2004, but has suffered a significant decline down to an estimated 45,000 individuals in 2006 (Weiss 2006, p. 1). The Metcalf population is within the limits of the City of San Jose and is located on private land. The San Felipe population is also located on private lands and within the limits of the City of San Jose. The Service is unaware of any recent surveys of the San Felipe population; however, the population was estimated at 100,000 individuals in 1999 (Weiss 2006, p. 1). The Silver Creek Hills population is the last of the three populations within this unit. The population was considered relatively large, with approximately 115,000 individuals in 1993 (Weiss 2006, p. 1). This population was significantly affected by the development of a residential area and associated golf course (Ranch on Silver Creek) in the late 1990s. As a result of formal consultation on the Ranch on Silver Creek, approximately 473 ac (191 ha) owned by William Lyon Homes were preserved under a conservation easement and are being managed for the Bay checkerspot butterfly. Approximately 40 adults were observed at the Silver Creek Preserve in 2006 (WRA 2006, p. i).

Unit 6: Tulare Hill

Unit 6 consists of 348 ac (141 ha) in Santa Clara County. The unit is located in the middle of the Santa Clara Valley, south of San Jose, and west of the crossing of Metcalf Road and Monterey Highway. The unit was occupied by the Bay checkerspot butterfly at the time of listing and is noted as one of the locations occupied in Harrison *et al.* (1988, p. 362). The unit is currently occupied, contains all the features essential to the conservation of the subspecies, and is essential to the conservation of the subspecies because it acts as a population center and because it provides a dispersal corridor across Coyote Valley. This unit is the closest suitable intervening habitat between the Coyote Ridge core population and most of the other populations in Santa Clara County, primarily those on the western side of Coyote Valley. Hundreds of butterflies have been observed on the southern half of the unit from 2001-2006 (Weiss 2006, p. 1). The highest numbers of individuals were 2,000 to 3,000 post diapause larvae in 2002, but the population has declined significantly, and that decline is believed to be due to lack of grazing over much of the unit (CH2M Hill 2008, p. 8-8). We have determined that the long-term viability of the Bay checkerspot butterfly in Santa Clara County depends on the presence of corridors for dispersal of adults between Coyote Ridge and the other units in Santa Clara County. Tulare Hill is an ideal location for such a corridor because of the narrowness of the valley at this location, the limited amount of development currently present, the presence of high elevations on the hill that may attract butterflies over the highways and developed areas, and the presence of suitable habitat on Tulare Hill itself. Migrant butterflies from either Santa Teresa Hills or Coyote Ridge may settle on Tulare Hill, contributing individuals to the population within this unit, and adults

from Tulare Hill may migrate to the adjacent habitat areas. Locally owned lands within this unit include parts of Coyote Creek Park, Metcalf Park, and Santa Teresa County Park totaling approximately 14 ac (5 ha). Roughly half of Tulare Hill itself is within the limits of the City of San Jose; the remainder is on private lands in unincorporated Santa Clara County. Approximately 114 ac (46 ha) of the unit is currently protected under a conservation easement and is managed for the Bay checkerspot butterfly by the Land Trust for Santa Clara County. The unit is bisected by transmission lines from Pacific Gas & Electric (PG&E), and the operations and maintenance of these lines are the subject of a Safe Harbor Agreement and Habitat Conservation Agreement for the Bay checkerspot butterfly.

Unit 7: Santa Teresa Hills

Unit 7 consists of 3,278 ac (1,327 ha) in Santa Clara County. The unit lies north of Bailey Avenue, McKean Road, and Almaden Road; south of developed areas of the city of Santa Clara; and west of Santa Teresa Boulevard. The unit abuts Unit 6. This unit was occupied at the time of listing, although that was not specifically mentioned in the listing rule. An unspecified number of Bay checkerspot butterflies were observed in this unit in 1988 (CNDDB 2006, p. 26). The unit is currently occupied (Arnold 2007, p. 1; H.T Harvey and Associates 1998, p. 11), and contains the physical and biological features essential to the conservation of the subspecies. Further, it includes the largest block of undeveloped habitat containing all the PCEs west of U.S. Route 101 in Santa Clara County. In addition, due to the prevailing winds, Unit 7 may experience less air pollution (i.e., nitrogen and ammonia deposition) than the units on the east side of Coyote Valley. Approximately 425 ac (172 ha) within the unit is owned by Santa Clara County Department of Parks and Recreation with the remainder of the unit consisting of private land.

Unit 8: Calero Reservoir

Unit 8 consists of 1,543 ac (624 ha) in Santa Clara County. The unit is south of McKean Road and east of the town of New Almaden, Almaden Road, and Alamitos Creek. This unit was occupied at the time of listing (CNDDB 2006, p. 26), is currently occupied, and contains all the features essential for the conservation of the subspecies. The unit is less than 0.5 mi (0.8 km) south of Unit 7 and 1 mi (1.6 km) east of Unit 9. It is also 3.3 mi (5.3 km) southwest of the core population in Unit 5, and this distance is well within the dispersal capabilities of the subspecies; therefore, Unit 8 is an important component of the species' Santa Clara County metapopulation. The unit is comprised of over 1,400 ac (567 ha) of mapped serpentine soils on public land. The majority of the unit is within the Calero County Park and managed by Santa Clara County Department of Parks and Recreation. The remainder is owned and managed by the Santa Clara Valley Water District.

Unit 9: Kalana Hills

Unit 9 consists of two separate subunits: Subunit 9A (170 ac (69 ha)) and Subunit 9B (56 ac (22 ha)), totaling 226 ac (91 ha) in Santa Clara County. The two subunits are located on the southwest side of the Santa Clara Valley between Laguna Avenue and San Bruno Avenue and are entirely on private land. Both subunit 9A and 9B were occupied by the Bay checkerspot butterfly at the time of listing and are noted as one of the locations occupied in Harrison *et al.* (1988, p. 362). Adults were again observed during the last survey of the unit in 1997 (CNDDB 2006, p. 23). The two subunits include four hilltop serpentine outcrops, which contain all the features essential for the conservation of the species, and some intervening grassland. The intervening grassland does not contain the larval host plants or serpentine or similar soils, but does contain PCEs 1, 3, and 4 and connects the four serpentine outcrops. Unit 5 lies about 2.1 mi (3.2 km) to the northeast, Unit 7 is 1 mi (1.6 km) to the northwest, Unit 8 is 1 mi (1.6 km) to the west, and Unit 10 about 2.2 mi (3.5 km) to the southeast. The essential physical and biological features in Unit 9 assist in maintaining the metapopulation dynamics of the subspecies by providing habitat for the subspecies within dispersal distance of adjacent or nearby critical habitat units. Because of its proximity to several other large population centers for the Bay checkerspot butterfly, we expect the Kalana Hills subunits to be regularly occupied by the subspecies and assist in maintaining the metapopulation dynamics for the subspecies. If, as is possible given the Bay checkerspot butterfly's large population swings, the butterfly's population in these subunits were to become extirpated, the subunits are likely to be repopulated by Bay checkerspot butterflies immigrating from adjacent sites. These subunits act as a ''stepping stone'' to adjacent or nearby units. A portion of the largest and northernmost serpentine outcrop within subunit 9A is within the limits of the City of San Jose; the remainder of the subunit is in unincorporated Santa Clara County. Subunit 9A's northeast boundaries are bordered by the proposed Coyote Valley Specific Plan.

Unit 10: Hale

Unit 10 consists of 507 ac (205 ha) in Santa Clara County. The unit is northwest of the City of Morgan Hill, east of Willow Springs Road, and south of Hale Avenue. The unit name ''Hale'' was changed from ''Morgan Hill'' in our 2007 proposed revised designation based on comments from peer reviews. This unit was occupied in the late 1980s and is described in the CNDDB as an ''active site'' (CNDDB 2006) for the subspecies. The unit was occupied at the time of listing and is noted as one of the locations occupied in Harrison *et al.* (1988, p. 362). Adult butterflies were observed in the unit in 1997 (CNDDB 2006). Unit 10 is essential to the conservation of the subspecies because it has large areas of serpentine soils and grassland with a variety of slope exposures, contains all the PCEs, and serves as a ''stepping stone'' between the southernmost occurrences of the subspecies (Unit 12) and the populations to the north. The unit is 1.5 mi (2.4 km) southwest of Unit 5 and 2.2 mi (3.5 km) southeast of Unit 9, provides dispersal habitat from adjacent critical habitat units, and provides habitat during years with particularly favorable weather conditions that support expanding populations of the Bay checkerspot butterfly. This unit is comprised mostly of private property, a portion of which is within the limits of the City of Morgan Hill and the rest in unincorporated Santa Clara County.

Unit 11: Bear Ranch

Unit 11 consists of 283 ac (114 ha) in Santa Clara County. The unit is adjacent to Coyote Reservoir and is entirely contained within the Coyote Lake–Harvey Bear Ranch County Park. The Bay checkerspot butterfly was known to occur within this unit in the mid-1970s, but was considered extirpated in the listing rule; however, Bay checkerspot butterflies were observed in this unit in 1994, 1997, and 1999 (CNDDB 2006, p. 15; Launer 2000, p. 1). This unit is currently occupied and is the most southern occurrence of the Bay checkerspot butterfly on the east side of Coyote Valley. Although we are unable to determine from the available data that Unit 11 was occupied by the species at the time of listing, we have determined that this area is essential for the conservation of the subspecies because it assists in maintaining the metapopulation dynamics of the subspecies by providing adjacent or

nearby habitat for Bay checkerspot butterflies to disperse to or to use as foraging or resting habitat during longer dispersal events. The unit contains all the features essential for the conservation of the species. This unit is underlined by both serpentine and serpentine-like soils. There are two patches of serpentine soils separated north–south by intermittent woody vegetation; these patches are surrounded by grasslands underlined by serpentine-like soils that provide adequate dispersal corridors between the two patches.

Unit 12: San Martin

Unit 12 consists of 467 ac (189 ha) in Santa Clara County. The unit is located in the western foothills of the Santa Clara Valley. This unit was occupied at the time of listing, is currently occupied, and contains all the features essential for the conservation of the subspecies. The unit has extensive areas of serpentine soils interspersed with grasslands that have PCEs 1, 3, 4, and 5. These areas are important for dispersal between higher quality habitats within the unit that contain all the necessary features essential for conservation of the subspecies. The unit lies entirely on private lands in unincorporated Santa Clara County, about 4 mi (6.4 km) west-southwest of Unit 11, 4 mi (6.4 km) southeast of Unit 10, and 6 mi (9.6 km) south of Unit 5's core area. This unit is the southernmost occurrence of the Bay checkerspot butterfly. The adjacent Cordevalle Golf Club has purchased approximately 298 ac (121 ha) of property within the unit, has developed a management plan for the property, and is currently working to establish a conservation easement for preservation as open space. A portion of the proposed open space, approximately 42.3 ac (17.1 ha), will be managed to benefit serpentine species including the Bay checkerspot butterfly. The remainder of the unit is privately owned.

Unit 13: Kirby

Unit 13 consists of 5,446 ac (2,204 ha) in Santa Clara County. The unit encompasses Unit 8 identified in the 2001 designation and is the southern half of Unit 5 as identified in the 2007 revised proposed rule. The unit comprises the southern half of the ridgeline currently referred to as Coyote Ridge (but as noted above has been referred to by a variety of names in the past), the majority of which is in private ownership. To the north the unit is bordered by Metcalf Road, to the southwest by U.S. Highway 101, and Metcalf Road to the south. The unit was occupied at the time of listing, contains all the features essential to the conservation of the subspecies, and represents the southern portion of the only remaining core population of the Bay checkerspot butterfly (Unit 5 contains the northern portion of the core population). Other units in Santa Clara County depend on the core population as a source for recolonization. The unit represents the largest, most contiguous, and highest quality habitat containing the largest population of Bay checkerspot butterflies.

The Kirby population is the southernmost of the four historically studied populations and has consistently had the largest numbers of Bay checkerspot butterflies. The Kirby area had an estimated 700,000 individuals in 2004, 100,000 individuals in 2005 (Weiss 2006, p. 1), and 40,000 in 2007 (CH2M Hill p. 8-8). Although still under private ownership, approximately 291 ac (118 ha) of the Kirby area is under some form of protection or management for special status species, including the Bay checkerspot butterfly. In addition, a 250-ac (101-ha) butterfly preserve is being managed by Waste Management Incorporated (WMI) as compensation for adverse effects to the Bay checkerspot butterfly in association with its landfill. However, the protection afforded the butterfly preserve is not permanent, and the land the preserve is on is not owned by WMI. Approximately 90 ac (37 ha) is owned by the Santa Clara Department of Parks and Recreation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. Decisions by the Fifth and Ninth Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Under section 7(a)(2) of the Act, if a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect

subsequently listed species or designated critical habitat.

Federal activities that may affect the Bay checkerspot butterfly or its designated critical habitat will require section 7(a)(2) consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are examples of agency actions that may be subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or carried out, do not require section 7(a)(2) consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the Bay checkerspot butterfly.

Section 4(b)(8) of the Act requires us to evaluate and describe in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the Bay checkerspot butterfly include, but are not limited to:

(1) Actions that would cause ground disturbance, including, but not limited to, trenching, grading, and discing. Ground disturbance would likely result in the loss of larval and adult food plants and in an increased mortality of larvae as a result of starvation. Individual Bay checkerspot butterfly larvae, pupae, and eggs could be crushed during any of these activities. A reduction in adult nectar sources could result in reduced fecundity and longevity of females, and possibly reduced longevity of males. Ground disturbance may also result in a reduction in the number of stable holes and cracks that larvae use during diapause, which would result in an increased risk of predation.

(2) Actions that would remove, destroy, or alter vegetation, including, but not limited to, changes in grazing regimes (such as increase or decrease in livestock density, changes in frequency or timing of grazing, or removal of all grazing), prescribed burns (generally limited to short-term effects), or other vegetation management strategies that reduce densities of the larval and adult host plants. These actions would have similar effects as those associated with ground disturbance, such as loss of larval and adult food plants. Prescribed burns may also result in direct injury or mortality to larvae, pupae, and eggs if conducted during the fall or early spring. Grazing is likely to result in some individual larvae, eggs, and pupae being trampled or inadvertently eaten.

(3) Construction activities that destroy, degrade, or fragment critical habitat, such as urban and suburban development (e.g., subdivisions, road building, placement of utilities, golf courses, trail construction, off-road vehicle use). These activities could result in the permanent loss of habitat or create barriers to movement between patches of habitat. Construction activities could result in crushing of both larval and adult food plants as well as larvae, pupae, and eggs. Adults may be injured or killed as a result of collisions with vehicles. In addition, larvae crossing open areas of construction sites in search of edible host plants could be trampled. Urban development could also cause changes in hydrology of Bay checkerspot butterfly habitat. The presence of unseasonal water could result in an alteration in the life cycle of larval and adult food plants, such that plant growth and blooming are out of phase with the life cycle of the subspecies, resulting in increased mortality of both larvae and adults. Artificially wet conditions may also result in an increase in parasites or diseases that could reduce larval and adult survival. In addition, changes in hydrology that result in reduced water levels in nearby creeks could result in increased mortality of adults during periods of prolonged spring drought. Activities that result in direct loss of habitat would also result in direct loss of individuals of all life stages of the Bay checkerspot butterfly. Loss of habitat patches that are ''stepping stone'' habitats would result in increased distances between other patches of suitable habitat and reduce the likelihood of distant patches being colonized, thus disrupting the metapopulation dynamics of the subspecies and resulting in a decrease in the stability of core populations and possible extinction of the Bay checkerspot butterfly.

(4) Direct application on, or drift onto, critical habitat of pesticides, herbicides, fertilizers, or other chemicals or biological agents. Drift or runoff of chemicals, pesticides, and other biological agents could kill or injure Bay checkerspot butterflies through direct toxicity or by harming their food plants.

(5) Deposition or release onto critical habitat of nitrogen compounds, such as NO_x and ammonia. Nitrogen deposition (i.e., NO_x and ammonia) in and around Bay checkerspot butterfly habitat would result in nutrient enrichment of serpentine and serpentine-like soils. This enrichment allows for the successful invasion of exotic and invasive plants, which out-compete nativeforbs and grasses, into serpentine grasslands, resulting in lower densities of larval and adult food plants. Lower densities of both larval and adult food plants would result in fewer larval and adult Bay checkerspot butterflies.

We have determined that all of the units designated contain features essential to the conservation of the Bay checkerspot butterfly. All units are within the geographic range of the species, all were occupied by the species at the time of listing or are currently occupied (based on most recent observations made), and all are likely or have the potential to be used by the Bay checkerspot butterfly. Federal agencies already consult with us on activities in areas currently occupied by the Bay checkerspot butterfly, as well as unoccupied critical habitat units, to ensure that their actions, which may affect the species or its designated critical habitat, are not likely to jeopardize the continued existence of the Bay checkerspot butterfly or result in adverse modification of critical habitat.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider economic, national security and other relevant impacts of designating a particular area as critical habitat. Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat if the Secretary determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat.

However, this exclusion cannot occur unless the Secretary determines that it will not result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. On April 15, 2008, we published a notice of availability (73 FR 20237), the draft analysis (dated March 12, 2008), and we accepted public comments on the draft document from April 15, 2008 to May 15, 2008. We received two public comments related to the draft economic analysis. A final analysis of the potential economic effects of the designation was developed (Berkeley Economic Consulting 2008), taking into consideration any relevant new information.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of revised critical habitat for the Bay checkerspot butterfly. 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 subspecies. 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.

The economic analysis quantifies impacts associated with the conservation of Bay checkerspot butterfly including future urban development, management of invasive plants, pesticide use, and overgrazing or undergrazing. These activities were identified as factors that may require special management (72 FR 48183-48184). Pre-designation (1987 to 2007) impacts associated with species conservation activities in areas designated as critical habitat are estimated at approximately $9 million in 2007 dollars. The final EA forecasts baseline economic impacts in the areas designated to be approximately $390 million ($24 million annualized) (2008 dollars) applying a 3 percent discount rate over the next 22 years and $270 million ($24 million annualized) (2008 dollars) applying a 7 percent discount rate over the next 22 years. The final EA forecasts incremental economic impacts to be approximately $0 to $750,000 ($0 to $44,000 annualized) (2008 dollars) applying a 3 percent discount rate over the next 22 years. The cost estimates are based on the proposed revised designation of critical habitat published in the **Federal Register** on August 22, 2007 (72 FR 48178).

The final EA considers the potential economic effects of actions relating to the conservation of the Bay checkerspot butterfly, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of revised critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the Bay checkerspot butterfly in areas containing features essential to the conservation of the species. The final EA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

The final EA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The final EA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector. Finally, the final EA looks retrospectively at costs that have been incurred since the date we listed the Bay checkerspot butterfly as endangered (52 FR 35366, September 18, 1987) and considers those costs that may occur in the 22 years following the designation of critical habitat. Because the final EA considers the potential economic effects of all actions relating to the conservation of the Bay checkerspot butterfly, including costs associated with sections 4, 7, and 10 of the Act and those attributable to a revised designation of critical habitat, the final EA may have overestimated the potential economic impacts of the revised critical habitat designation.

The final economic analysis is available at *http://www.regulations.gov* and *http://www.fws.gov/sacramento* or upon request from the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Application of Section 4(a)(3) of the Act

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense lands with a completed integrated natural resources management plan within this final revised critical habitat designation.

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In the following sections, we address a number of general issues that are relevant to the exclusions we have considered.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. Before we may exclude an area, we must determine that

the exclusion would not result in the extinction of the species.

Portions of Units 5, 6, 12, and 13 are currently protected or proposed for protection. Not all areas protected are under conservation easements, some are protected through other means such as fee title, deed restrictions, etc. (see unit descriptions above for acreages). Some easements were established for the protection of the California red-legged frog (*Rana aurora draytonii*) or the California tiger salamander (*Ambystoma californiense*), while others were established for the Bay checkerspot butterfly. These areas were considered for exclusion, but were not excluded from this final revised designation of critical habitat because some of them do not have management plans and some only provide management plans for the tiger salamander or the California red-legged frog. Those areas with conservation easements that specifically provide protection for the Bay checkerspot butterfly were not considered for exclusion because the easements are not believed to be sufficiently funded to adequately deal with nonnative invasive plants, such as the recent invasion of barbed goat grass (*Aegilops triuncialis*). A conservation easement that has been proposed for a portion of Unit 12 has not been finalized and has also not been excluded in this final rule.

San Bruno Mountain Habitat Conservation Plan (SBMHCP)

After consideration under section 4(b)(2) of the Act, we are not excluding lands covered under the SBMHCP. The SBMHCP was originally completed in November 1982, and we issued a 30–year section 10(a)(1)(B) permit to the permittees on March 4, 1983. The permit (PRT 2-9818) expires on March 4, 2013, unless it is renewed (Jones and Stokes 2007, pp. 1-2). San Bruno Mountain is located on the northern end of the San Francisco Peninsula, south of the San Mateo–San Francisco County line, and is bordered to the north by Daly City, to the east by the City of Brisbane, to the south by the City of South San Francisco, and to the west by the City of Colma. The SBMHCP is comprised of 3,600 ac (1,457 ha), of which approximately 3,500 ac (1,416 ha) are open space. To date, there have been four amendments to the SBMHCP. A notice of availability for a draft of amendment five was published in the **Federal Register** on April 15, 2008 (73 FR 20324). The draft of amendment five to the SBMHCP includes proposed and ongoing conservation actions designed to benefit both the Bay checkerspot butterfly and Callippe silverspot butterfly. Conservation actions include: (1) Vegetation management (prescribed fire, mowing, and grazing); (2) replanting and restoration; (3) monitoring; and (4) approximately $ 4 million in an endowment for ongoing habitat management. The Service expects amendment five, if approved, would provide substantial protection for all of the primary constituent elements (PCEs) for the Bay checkerspot butterfly, and that protected lands will receive the special management required through funding mechanisms that will be implemented under amendment five of the SBMHCP.

In our August 22, 2007, proposed rule (72 FR 48178), we relied largely on the draft provisions of amendment five to the SBMHCP as the basis of the proposed exclusion of Unit 1 from critical habitat. As stated above, we believed those provisions would significantly contribute to the conservation of the essential features for the Bay checkerspot butterfly. However, the finalization of amendment five will not occur prior to the publication of this final rule. Therefore, our evaluation of the potential exclusion of Unit 1 is based on the current provisions of the SBMHCP, as amended by amendments one through four.

The Bay checkerspot butterfly is not currently a covered species under the SBMHCP. Although all habitat for the Bay checkerspot butterfly on San Bruno Mountain is contained within the SBMHCP, there is currently inadequate funding to manage the grasslands within the HCP in a manner that would conserve the species' larval host and adult nectar plants (PCE 2). Without management actions (such as grazing, prescribed burns, and exotic species control) that remove the buildup of dense stands of grass (thatch), the species' larval host and adult nectar plants are outcompeted by nonnative vegetation and the Bay checkerspot butterfly is no longer able to persist. Therefore, without adequate funding, the current HCP does not provide sufficient protection for the Bay checkerspot butterfly or the features essential to the conservation of the species.

Including this area in critical habitat may serve as an educational tool for potential habitat restoration efforts and potential re-introduction of the Bay checkerspot butterfly to Unit 1. Inclusion of these non-Federal lands as critical habitat would not necessitate additional management and conservation activities that would exceed the approved SBMHCP and its implementing agreement; however, amendment 5 to the SBMHCP provides funding to carry out the existing management plan. As a result, we do not anticipate that any action on these lands would destroy or adversely modify these areas. Therefore, we do not expect that including Unit 1 in the final designation would lead to any changes to actions on the conservation lands to avoid destroying or adversely modifying that habitat.

Based upon the above considerations, the lands covered under the SBMHCP in Unit 1have not been excluded in this final revised designation of critical habitat.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the Bay checkerspot butterfly will not have a

significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities. We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the Bay checkerspot butterfly (see *Section 7 Consultation* section). Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification'' Standard* section).

In our economic analysis of this designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the designation of critical habitat for the Bay checkerspot butterfly. No entities that are likely to bear incremental impacts from the rule are identified as small entities. There are only 5 acres in Unit 1 that are privately owned and may be affected by critical habitat. By definition, private landowners are not small businesses. To the extent that a private landowner does operate a business that relies on the potentially affected land, this would be considered in this small business analysis. According to the economic analysis, no information suggests this is the case. The economic analysis therefore did not forecast impacts to small entities associated with the designation on private land. Therefore, based on the above reasoning and currently available information, we certify that this rule will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination (see **ADDRESSES** for information on obtaining a copy of the final economic analysis).

Executive Order 13211 – Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The final economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Bay checkerspot butterfly conservation activities within the final critical habitat designation are not expected. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), 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. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) Due to current public knowledge of the species' protection, the prohibition against take of the species both within and outside of the designated areas, the fact that the majority of the areas are already designated as critical habitat, and the fact that critical habitat provides no incremental restrictions, our economic analysis did not forecast any economic impacts to small governments. Therefore, we do not anticipate that this rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating revised critical habitat for the Bay checkerspot butterfly in a takings implications assessment. The takings implications assessment concludes that this designation of revised critical habitat for the Bay checkerspot butterfly does not pose significant takings implications.

Federalism

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this revised critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by the Bay checkerspot butterfly imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the PCEs necessary to support the life processes of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of the Bay checkerspot butterfly.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that there are no Tribal lands that meet the definition of critical habitat for the Bay checkerspot butterfly.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES**).

Author(s)

The primary author of this package is the staff of the Sacramento Fish and Wildlife Office.

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. Amend § 17.95(i) by revising the entry for ''Bay Checkerspot Butterfly (*Euphydryas editha bayensis*)'' to read as follows:

§ 17.95 Critical habitat—wildlife.

(i) *Insects*.

(Bay Checkerspot Butterfly (*Euphydryas editha bayensis*)

(1) Critical habitat units are depicted for San Mateo and Santa Clara Counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for the Bay checkerspot butterfly are the habitat components that provide:

(i) The presence of annual or perennial grasslands with little to no overstory that provide north–south and east–west slopes with a tilt of more than 7 degrees for larval host plant survival during periods of atypical weather (for example, drought). Common grassland species include wild oats (*Avena fatua*), soft chess (*Bromus hordeaceus*), California oatgrass (*Danthonia californica*), purple needlegrass (*Nassella pulchra*), and Idaho fescue (*Festuca idahoensis*); less abundant in these grasslands are annual and perennial forbs such as filaree (*Erodium botrys*), true clovers (*Trifolium* sp.), dwarf plantain (*Plantago erecta*), and turkey mullein (*Croton setigerus*). These species, with the exception of dwarf plantain, are not required by the Bay checkerspot butterfly, but merely are provided here as an example of species commonly found in California grasslands.

(ii) The presence of the primary larval host plant, dwarf plantain (*Plantago erecta*), and at least one of the secondary host plants, purple owl's-clover (*Castilleja densiflora*) or exserted paintbrush (*Castilleja exserta*), are required for reproduction, feeding, and larval development.

(iii) The presence of adult nectar sources for feeding. Common nectar sources include desertparsley (*Lomatium* spp.), California goldfields (*Lasthenia californica*), tidy-tips (*Layia platyglossa*), sea muilla (*Muilla maritima*), scytheleaf onion (*Allium falcifolium*), false babystars (*Linanthus androsaceus*), and intermediate fiddleneck (*Amsinckia intermedia*).

(iv) Soils derived from serpentinite ultramafic rock (Montara, Climara, Henneke, Hentine, and Obispo soil series) or similar soils (Inks, Candlestick, Los Gatos, Fagan, and Barnabe soil series) that provide areas with fewer aggressive, nonnative plant species for larval host plant and adult nectar plant survival and reproduction.

(v) The presence of stable holes and cracks in the soil, and surface rock outcrops that provide shelter for the larval stage of the Bay checkerspot butterfly during summer diapause.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical habitat map units. Data layers defining map units were created on a base of USGS 7.5′ quadrangles using USDA National Agricultural Imagery Program (NAIP) county-wide MrSID compressed mosaics of 1 meter resolution and natural color aerial photography from summer 2005. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 10, North American Datum (NAD) 1983 coordinates.

(5) *Note*: Index map for Bay checkerspot butterfly critical habitat units follows:

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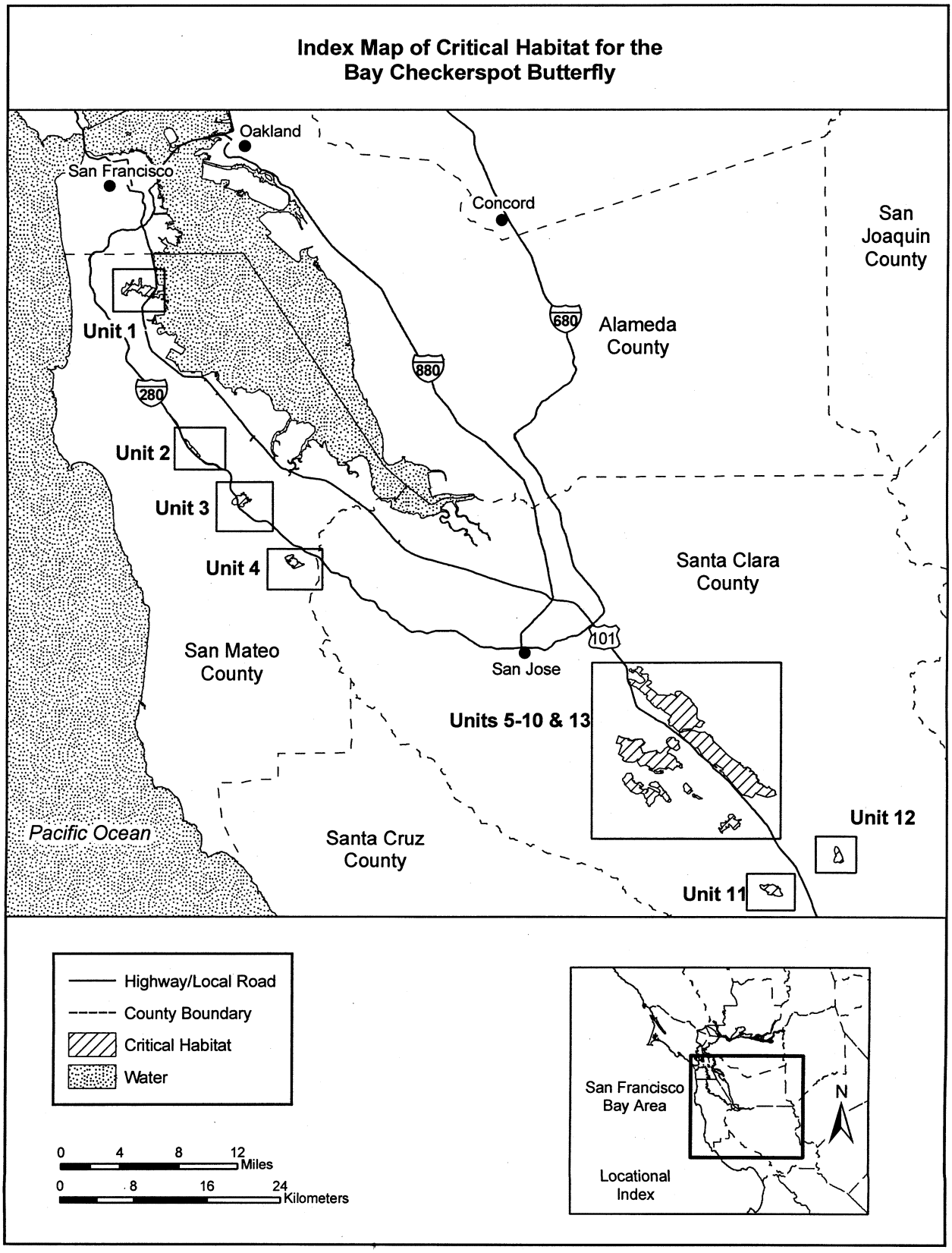

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(6) Unit 1: San Bruno Mountain, San Mateo County, California. From USGS 1:24,000 scale quadrangle San Francisco South.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 52853, 4170062; 52856, 4170038; 52862, 4170043; 52866, 4170045; 52889, 4170061; 52915, 4170074; 52940, 4170084; 52970, 4170091; 52991, 4170102; 53010, 4170112; 53036, 4170134; 53057, 4170130; 53070, 4170151; 53089, 4170171; 53112, 4170170; 53135, 4170154; 53153, 4170109; 53184, 4170104; 53203, 4170081; 53207, 4170041; 53201, 4169958; 53214, 4169958; 53241, 4169938; 53257, 4169970; 53281, 4169974; 53303, 4169965; 53323, 4169971; 53344, 4169964; 53355, 4169943; 53374, 4169943; 53402, 4169930; 53404, 4169906; 53428, 4169900; 53458, 4169913; 53489, 4169909; 53527, 4169898; 53563, 4169900; 53592, 4169902; 53627, 4169892; 53656, 4169877; 53671, 4169859; 53713, 4169856; 53710, 4169804; 53665, 4169711; 53618, 4169606; 53604, 4169575; 53559, 4169488; 53521, 4169481; 53492, 4169479; 53478, 4169457; 53474, 4169413; 53454, 4169388; 53434, 4169364; 53387, 4169340; 53357, 4169322; 53336, 4169300; 53317, 4169269; 53301, 4169264; 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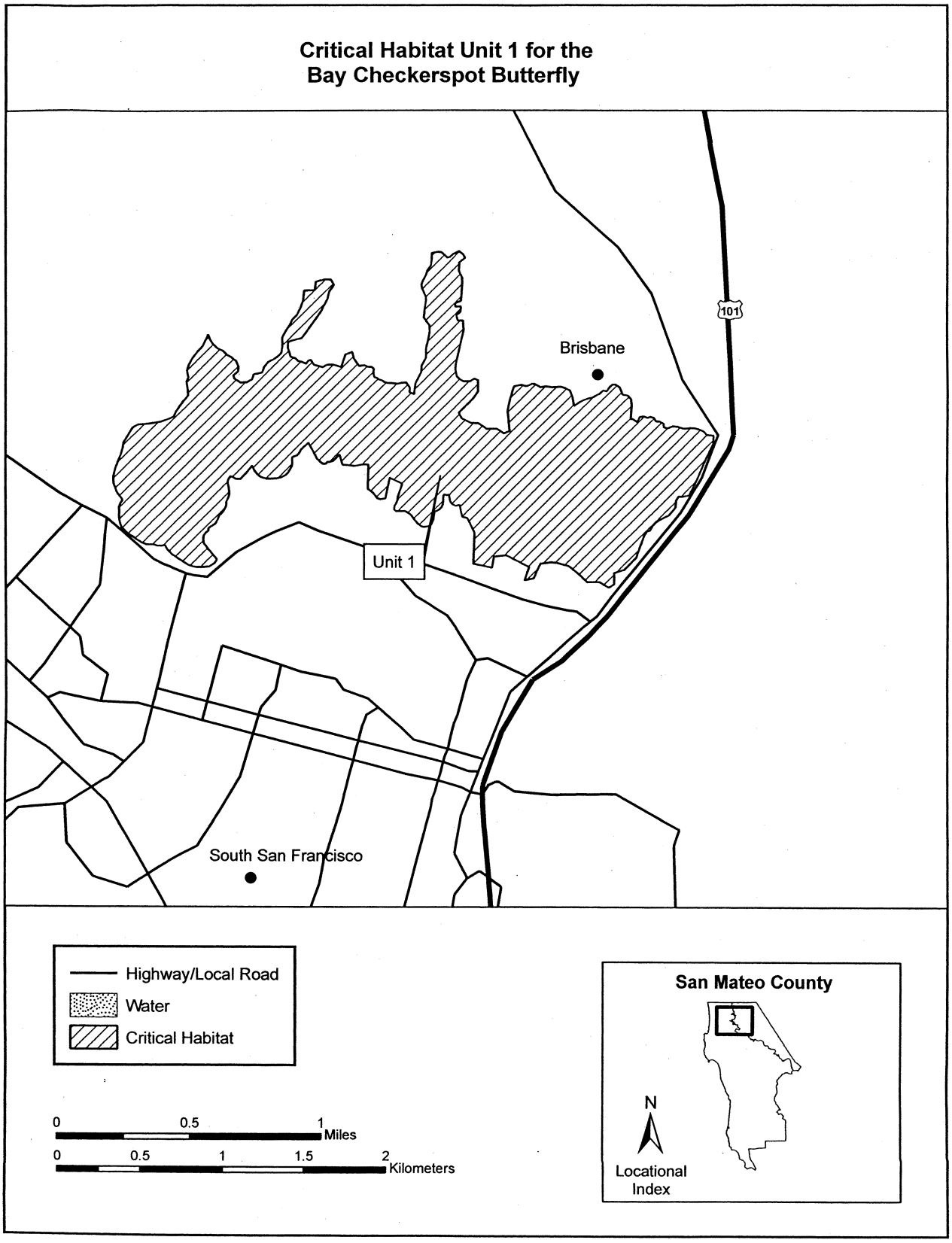
4170202; 52176, 4170190; 52214, 4170190; 52243, 4170206; 52266, 4170196; 52266, 4170129; 52236, 4170086; 52202, 4170051; 52145, 4169994; 52165, 4169960; 52221, 4169933; 52269, 4169930; 52319, 4169895; 52385, 4169894; 52425, 4169868; 52461, 4169881; 52449, 4170010; 52462, 4170073; 52488, 4170158; 52518, 4170166; 52539, 4170168; 52560, 4170160; 52575, 4170162; 52596, 4170173; 52616, 4170174; 52651, 4170154; 52683, 4170159; 52723, 4170154; 52754, 4170155; 52782, 4170155; 52805, 4170147; 52831, 4170134; 52847, 4170094; returning to 52853, 4170062.

(ii) *Note*: Map of Unit 1 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



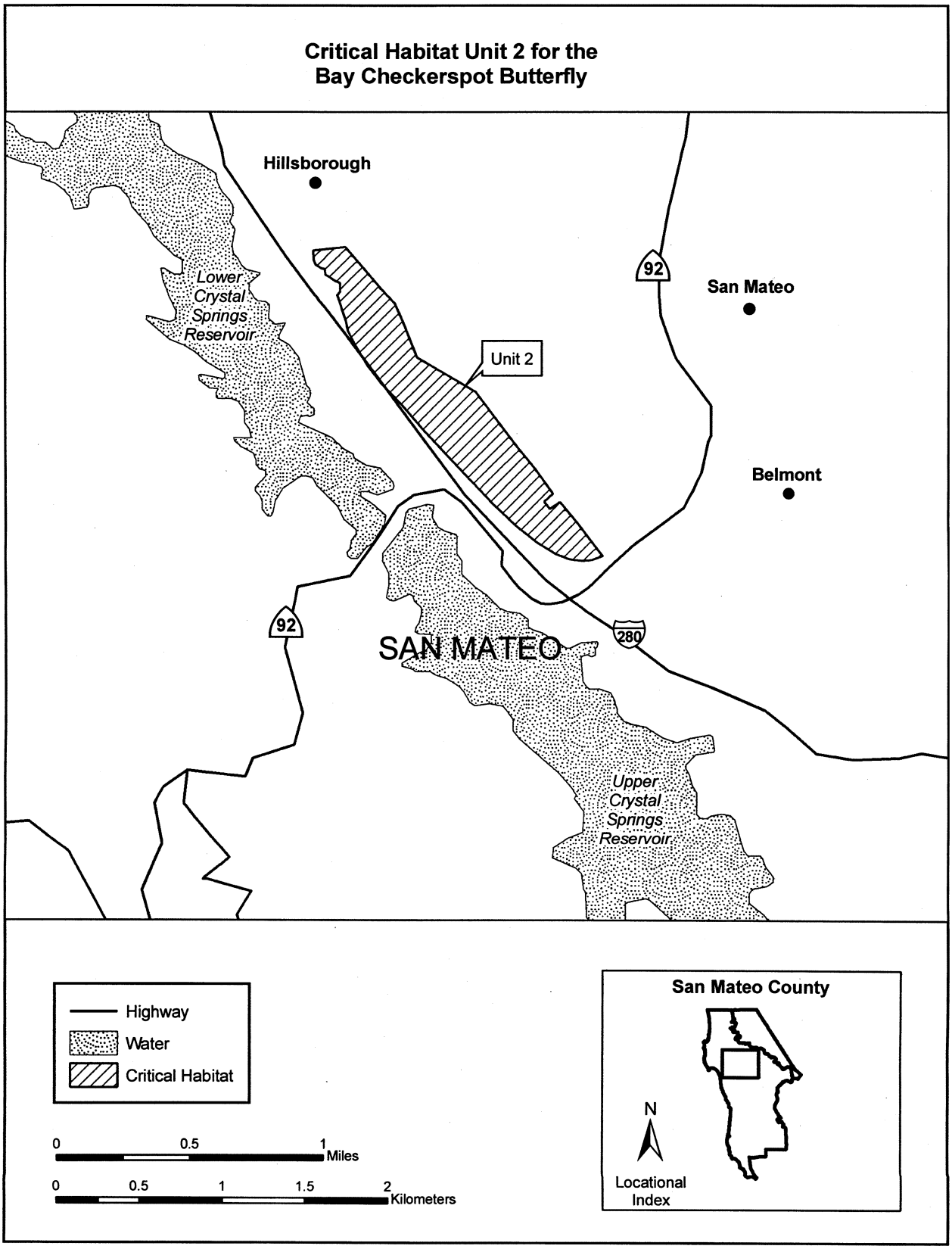
BILLING CODE 4310–55–C

(7) Unit 2: Pulgas Ridge, San Mateo County, California. From USGS 1:24,000 scale quadrangle San Mateo.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 558502, 4151442; 558422, 4151451; 558339, 4151484; 558223, 4151555; 558094, 4151656; 557957, 4151788; 557745, 4152013; 557545, 4152228; 557398, 4152392; 557274, 4152523; 557191, 4152632; 557123, 4152751; 557076, 4152838; 557061, 4152902; 557012, 4153060; 557027, 4153077; 557027, 4153130; 556994, 4153145; 556961, 4153171; 556939, 4153182; 556936, 4153216; 556913, 4153220; 556880, 4153242; 556868, 4153273; 556867, 4153329; 557060, 4153350; 557277, 4153095; 557358, 4153009; 557407, 4152900; 557494, 4152681; 557576, 4152631; 557851, 4152470; 558104, 4152134; 558210, 4152004; 558320, 4151850; 558268, 4151803; 558302, 4151758; 558363, 4151800; 558474, 4151666; 558625, 4151470; 558602, 4151463; 558557, 4151448; returning to 558502, 4151442.

(ii) *Note*: Map of Unit 2 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



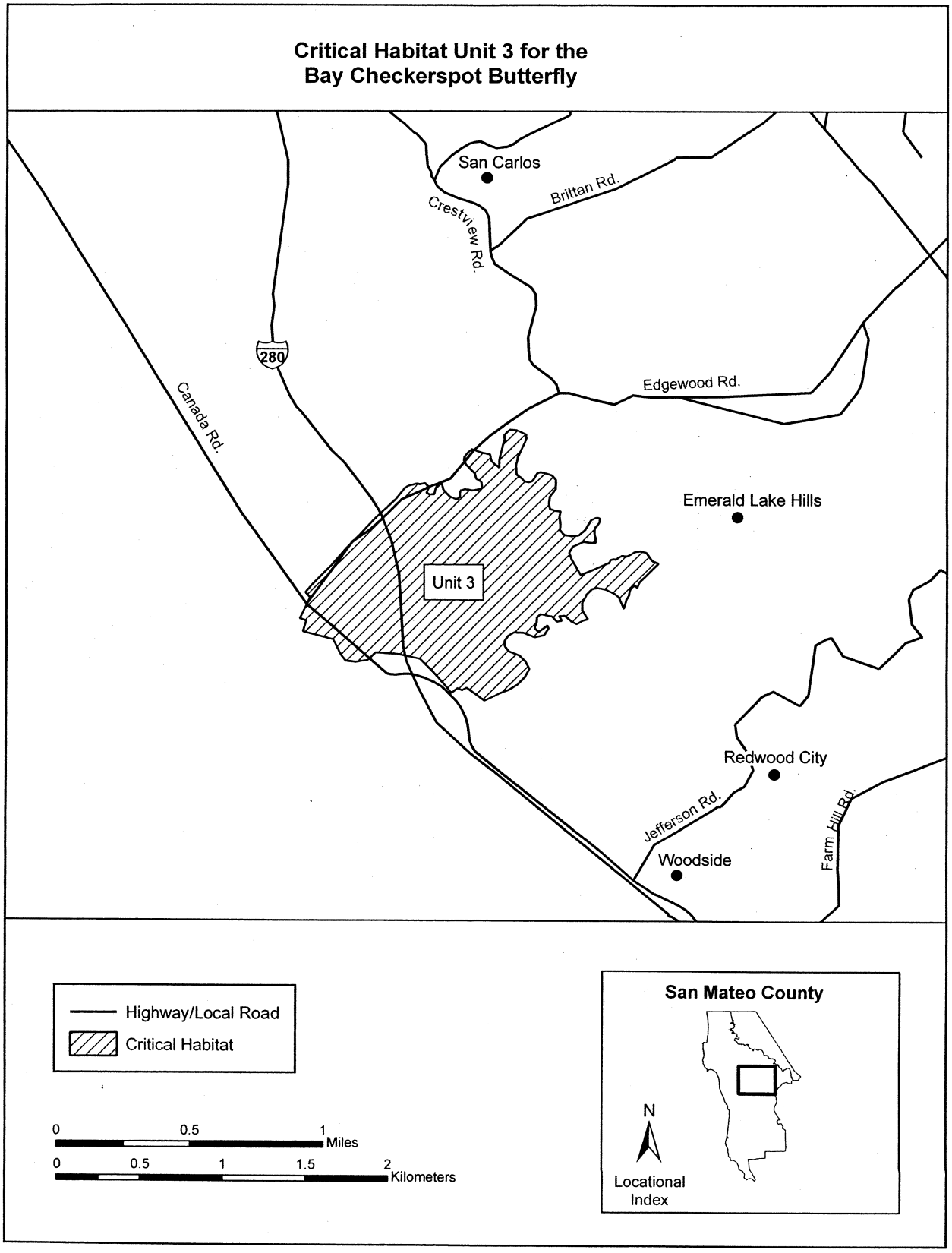
BILLING CODE 4310–55–C

(8) Unit 3: Edgewood Park, San Mateo County, California. From USGS 1:24,000 scale quadrangle Woodside.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 564162, 4146806; 564197, 4146796; 564234, 4146748; 564270, 4146731; 564196, 4146657; 564182, 4146642; 564169, 4146630; 564154, 4146615; 564142, 4146585; 564128, 4146601; 564108, 4146585; 564097, 4146565; 564092, 4146540; 564078, 4146514; 564061, 4146457; 564032, 4146525; 564003, 4146549; 563949, 4146575; 563903, 4146582; 563868, 4146576; 563834, 4146542; 563809, 4146492; 563808, 4146448; 563842, 4146394; 563811, 4146384; 563774, 4146364; 563747, 4146377; 563726, 4146394; 563702, 4146416; 563668, 4146413; 563684, 4146384; 563656, 4146377; 563626, 4146409; 563555, 4146423; 563533, 4146403; 563533, 4146374; 563520, 4146338; 563543, 4146316; 563596, 4146356; 563604, 4146338; 563576, 4146297; 563520, 4146284; 563450, 4146312; 563396, 4146314; 563360, 4146293; 563338, 4146263; 563340, 4146229; 563365, 4146198; 563424, 4146176; 563464, 4146140; 563488, 4146094; 563459, 4146043; 563420, 4146003; 563361, 4145965; 563305, 4145945; 563215, 4145902; 563106, 4145980; 563077, 4145966; 563050, 4145976; 563014, 4145948; 562923, 4146053; 562820, 4146153; 562674, 4146184; 562550, 4146190; 562503, 4146146; 562432, 4146134; 562367, 4146141; 562337, 4146177; 562290, 4146269; 562106, 4146315; 562126, 4146380; 562087, 4146395; 562148, 4146523; 562121, 4146554; 562162, 4146602; 562260, 4146697; 562284, 4146723; 562369, 4146818; 562418, 4146870; 562467, 4146918; 562548, 4147005; 562667, 4147115; 562724, 4147186; 562744, 4147200; 562771, 4147206; 562796, 4147214; 562816, 4147212; 562849, 4147216; 562862, 4147203; 562874, 4147191; 562858, 4147160; 562876, 4147148; 562907, 4147149; 562915, 4147187; 562936, 4147221; 562955, 4147207; 562963, 4147174; 563001, 4147137; 563034, 4147121; 563052, 4147122; 563063, 4147135; 563063, 4147160; 563070, 4147174; 563098, 4147180; 563141, 4147173; 563179, 4147179; 563199, 4147187; 563196, 4147227; 563164, 4147243; 563156, 4147274; 563140, 4147290; 563124, 4147308; 563103, 4147329; 563087, 4147356; 563093, 4147379; 563113, 4147405; 563138, 4147424; 563196, 4147403; 563228, 4147396; 563247, 4147392; 563256, 4147354; 563275, 4147334; 563304, 4147313; 563304, 4147357; 563312, 4147395; 563324, 4147437; 563329, 4147458; 563336, 4147478; 563334, 4147508; 563354, 4147530; 563371, 4147543; 563411, 4147539; 563440, 4147526; 563465, 4147513; 563468, 4147488; 563457, 4147462; 563446, 4147441; 563436, 4147420; 563429, 4147405; 563422, 4147390; 563415, 4147377; 563414, 4147360; 563406, 4147327; 563408, 4147272; 563443, 4147244; 563457, 4147229; 563480, 4147222; 563502, 4147229; 563517, 4147251; 563534, 4147276; 563553, 4147283; 563569, 4147282; 563595, 4147274; 563623, 4147264; 563646, 4147239; 563645, 4147181; 563608, 4147135; 563604, 4147096; 563609, 4147060; 563647, 4147048; 563675, 4147047; 563668, 4147013; 563671, 4146982; 563673, 4146964; 563675, 4146954; 563669, 4146934; 563697, 4146903; 563739, 4146896; 563788, 4146903; 563825, 4146934; 563853, 4146979; 563862, 4146993; 563882, 4147004; 563902, 4147007; 563915, 4147002; 563912, 4146981; 563900, 4146963; 563883, 4146944; 563881, 4146913; 563889, 4146885; 563888, 4146855; 563858, 4146857; 563817, 4146861; 563749, 4146833; 563727, 4146798; 563744, 4146751; 563776, 4146699; 563799, 4146661; 563863, 4146689; 563971, 4146735; 563979, 4146753; 563997, 4146758; 564017, 4146756; 564030, 4146769; 564048, 4146778; 564080, 4146775; 564099, 4146784; 564131, 4146803; returning to 564162, 4146806.

(ii) *Note*: Map of Unit 3 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



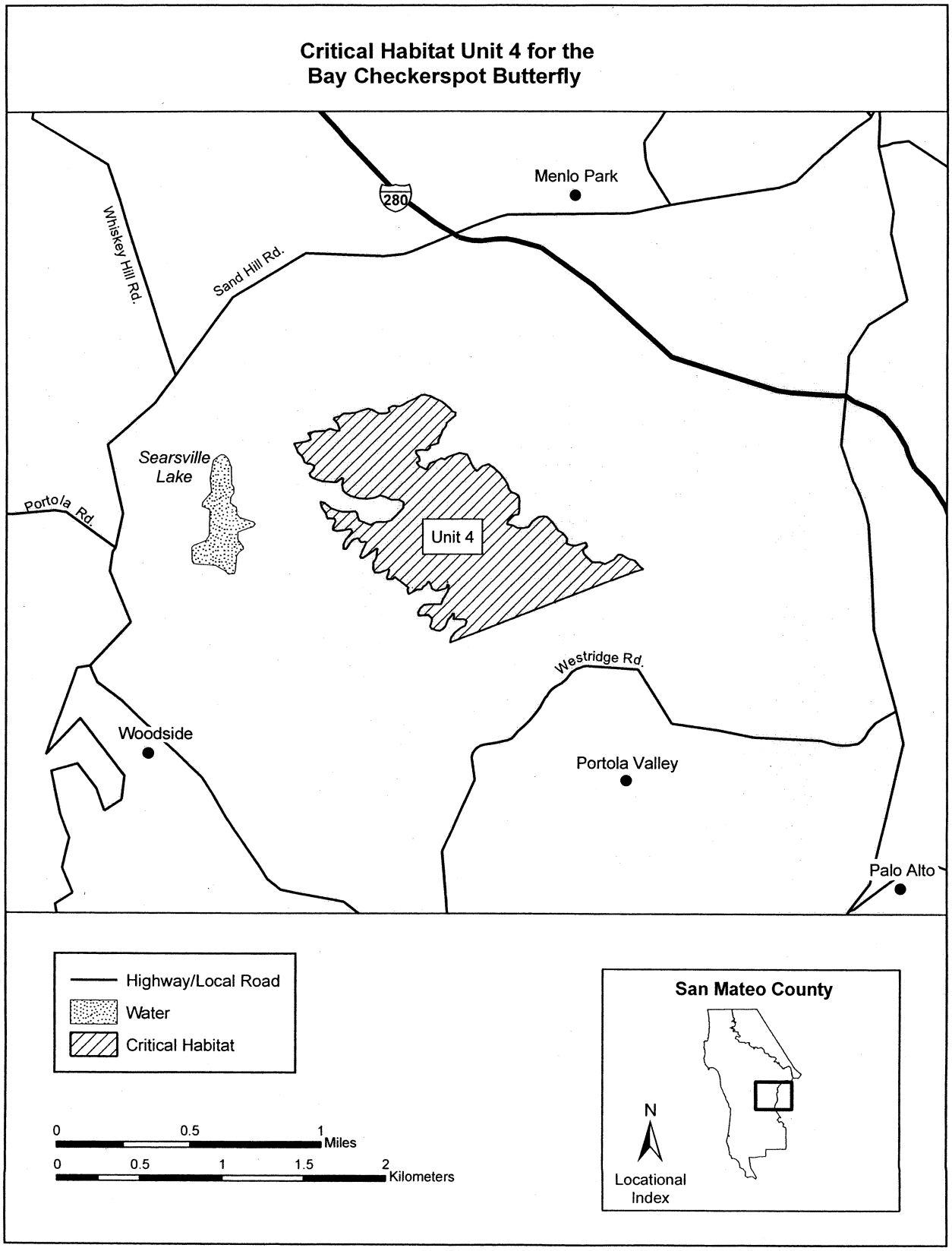
BILLING CODE 4310–55–C

(9) Unit 4: Jasper Ridge, San Mateo County, California. From USGS 1:24,000 scale quadrangle Palo Alto.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 569513, 4139881; 569524, 4139862; 569550, 4139849; 569569, 4139829; 569580, 4139812; 569578, 4139791; 569578, 4139780; 569605, 4139771; 569631, 4139770; 569696, 4139789; 569703, 4139764; 569676, 4139743; 569686, 4139716; 569736, 4139668; 569782, 4139670; 569815, 4139659; 569839, 4139671; 569869, 4139687; 569893, 4139716; 569915, 4139714; 569954, 4139692; 569993, 4139680; 570014, 4139658; 570027, 4139642; 570046, 4139627; 569983, 4139608; 568859, 4139177; 568865, 4139205; 568889, 4139237; 568921, 4139265; 568951, 4139280; 568962, 4139308; 568947, 4139319; 568908, 4139319; 568882, 4139319; 568882, 4139327; 568885, 4139340; 568885, 4139353; 568876, 4139355; 568869, 4139342; 568848, 4139319; 568831, 4139278; 568816, 4139261; 568797, 4139250; 568775, 4139252; 568758, 4139261; 568747, 4139261; 568736, 4139274; 568745, 4139299; 568749, 4139323; 568728, 4139344; 568702, 4139342; 568674, 4139342; 568666, 4139342; 568664, 4139362; 568676, 4139387; 568698, 4139407; 568743, 4139411; 568771, 4139411; 568805, 4139411; 568816, 4139441; 568846, 4139490; 568852, 4139520; 568852, 4139527; 568844, 4139531; 568833, 4139507; 568788, 4139495; 568771, 4139495; 568749, 4139505; 568741, 4139527; 568730, 4139548; 568724, 4139548; 568713, 4139531; 568694, 4139518; 568685, 4139503; 568674, 4139501; 568657, 4139501; 568642, 4139495; 568627, 4139484; 568603, 4139473; 568597, 4139499; 568603, 4139512; 568520, 4139578; 568505, 4139565; 568475, 4139565; 568470, 4139574; 568479, 4139595; 568485, 4139621; 568481, 4139625; 568462, 4139617; 568425, 4139604; 568400, 4139604; 568389, 4139623; 568389, 4139641; 568391, 4139668; 568404, 4139688; 568410, 4139705; 568410, 4139722; 568412, 4139741; 568417, 4139746; 568408, 4139752; 568389, 4139737; 568361, 4139718; 568325, 4139694; 568314, 4139694; 568307, 4139703; 568322, 4139737; 568335, 4139765; 568348, 4139791; 568335, 4139793; 568315, 4139789; 568305, 4139799; 568296, 4139814; 568270, 4139808; 568246, 4139783; 568225, 4139748; 568210, 4139748; 568210, 4139778; 568221, 4139803; 568247, 4139836; 568261, 4139857; 568252, 4139870; 568210, 4139863; 568165, 4139858; 568142, 4139865; 568145, 4139890; 568159, 4139919; 568152, 4139934; 568108, 4139937; 568099, 4139966; 568083, 4139989; 568070, 4140011; 568066, 4140038; 568090, 4140032; 568131, 4139998; 568168, 4139984; 568203, 4139975; 568250, 4139976; 568279, 4139979; 568289, 4139967; 568294, 4139945; 568303, 4139922; 568324, 4139914; 568345, 4139906; 568371, 4139896; 568407, 4139913; 568461, 4139913; 568495, 4139923; 568526, 4139951; 568571, 4140000; 568574, 4140034; 568543, 4140051; 568497, 4140049; 568467, 4140066; 568430, 4140076; 568397, 4140063; 568353, 4140055; 568300, 4140059; 568250, 4140072; 568225, 4140087; 568205, 4140107; 568200, 4140141; 568207, 4140177; 568200, 4140183; 568163, 4140157; 568082, 4140161; 568023, 4140180; 568005, 4140193; 567998, 4140211; 568015, 4140225; 568027, 4140241; 568028, 4140259; 568006, 4140269; 567984, 4140271; 567967, 4140280; 567962, 4140301; 567948, 4140320; 567930, 4140339; 567915, 4140373; 567904, 4140392; 567938, 4140398; 567980, 4140405; 568008, 4140418; 568001, 4140442; 567988, 4140457; 568031, 4140467; 568098, 4140470; 568123, 4140484; 568166, 4140471; 568183, 4140472; 568180, 4140494; 568172, 4140517; 568147, 4140543; 568153, 4140554; 568184, 4140561; 568209, 4140577; 568249, 4140579; 568285, 4140585; 568318, 4140597; 568356, 4140608; 568383, 4140600; 568423, 4140577; 568471, 4140580; 568488, 4140590; 568483, 4140612; 568507, 4140625; 568551, 4140623; 568572, 4140632; 568606, 4140653; 568658, 4140676; 568681, 4140691; 568705, 4140693; 568723, 4140687; 568741, 4140684; 568762, 4140673; 568807, 4140653; 568830, 4140634; 568862, 4140607; 568873, 4140591; 568894, 4140584; 568891, 4140566; 568881, 4140556; 568856, 4140536; 568838, 4140520; 568834, 4140499; 568812, 4140474; 568803, 4140445; 568791, 4140422; 568786, 4140395; 568739, 4140382; 568733, 4140366; 568719, 4140353; 568682, 4140355; 568648, 4140350; 568651, 4140331; 568668, 4140312; 568672, 4140286; 568653, 4140278; 568668, 4140256; 568713, 4140235; 568736, 4140273; 568769, 4140284; 568805, 4140303; 568827, 4140297; 568848, 4140312; 568872, 4140321; 568918, 4140335; 568964, 4140327; 569000, 4140248; 569024, 4140226; 569058, 4140256; 569097, 4140267; 569129, 4140244; 569166, 4140211; 569186, 4140185; 569202, 4140165; 569217, 4140136; 569219, 4140119; 569228, 4140106; 569240, 4140094; 569260, 4140088; 569282, 4140073; 569286, 4140045; 569284, 4140017; 569286, 4139986; 569279, 4139961; 569254, 4139955; 569242, 4139943; 569217, 4139920; 569211, 4139900; 569246, 4139893; 569275, 4139877; 569305, 4139877; 569342, 4139883; 569367, 4139919; 569404, 4139945; 569434, 4139949; 569455, 4139945; 569485, 4139917; returning to 569513, 4139881.

(ii) *Note*: Map of Unit 4 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



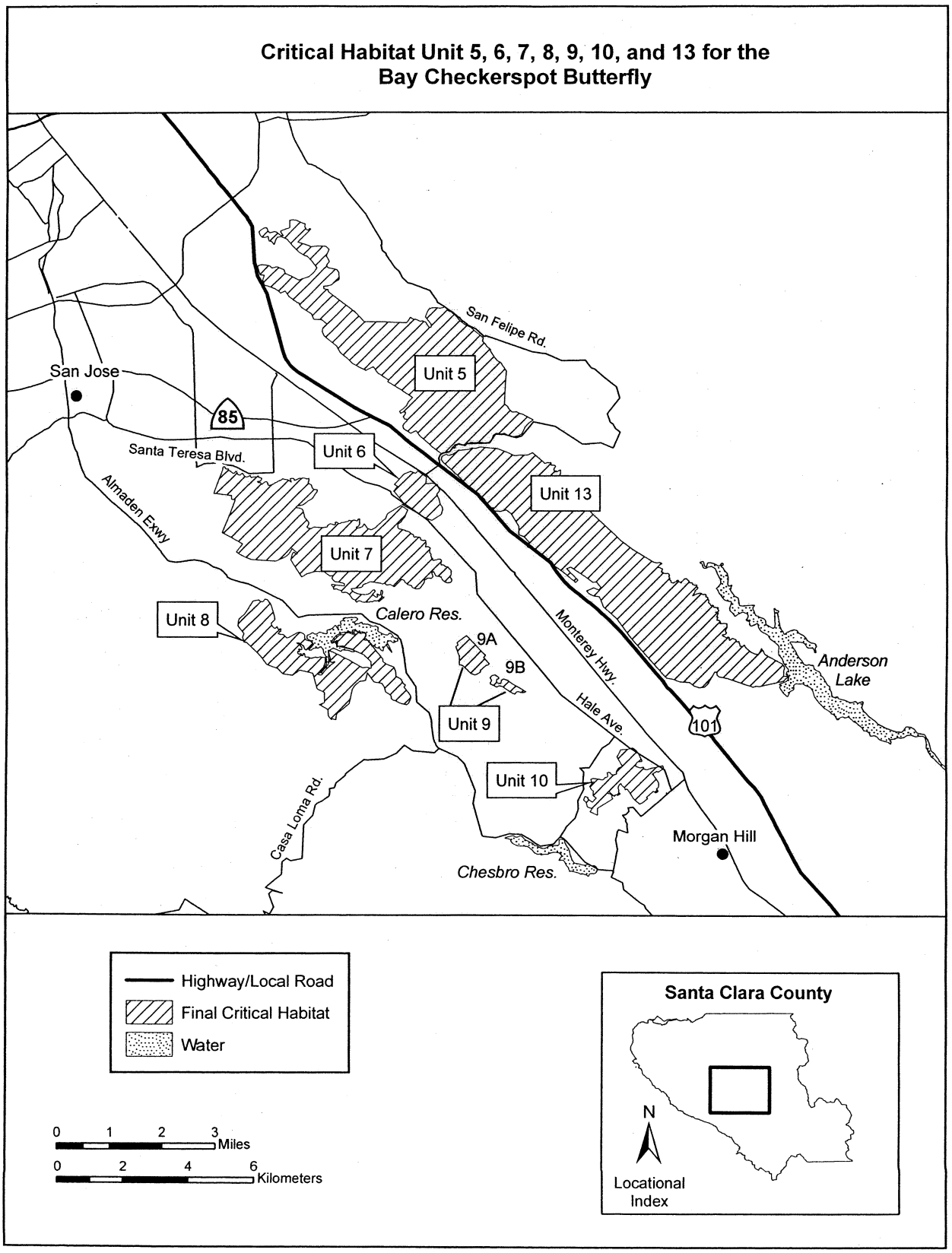
BILLING CODE 4310–55–C

(10) Unit 5: Metcalf, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 611242, 4121203; 611273, 4121300; 611382, 4121353; 611488, 4121320; 611607, 4121360; 611707, 4121423; 611776, 4121486; 611856, 4121482; 611945, 4121496; 612084, 4121502; 612190, 4121555; 612315, 4121543; 612448, 4121585; 612577, 4121572; 612974, 4121532; 613302, 4121410; 613507, 4121310; 613672, 4121337; 613907, 4121337; 614056, 4121410; 614393, 4121110; 614418, 4121079; 614479, 4121095; 614513, 4121108; 614547, 4121103; 614579, 4121103; 614616, 4121102; 614628, 4121071; 614610, 4121032; 614633, 4121024; 614691, 4121025; 614737, 4121019; 614760, 4120988; 614750, 4120961; 614713, 4120939; 614711, 4120903; 614703, 4120876; 614718, 4120863; 614731, 4120832; 614743, 4120810; 614774, 4120852; 614784, 4120819; 614904, 4120878; 614919, 4120849; 614913, 4120812; 614919, 4120775; 614897, 4120730; 614874, 4120715; 614886, 4120686; 614891, 4120659; 614921, 4120671; 614969, 4120678; 614999, 4120664; 614999, 4120625; 614974, 4120593; 614980, 4120547; 614950, 4120517; 614942, 4120488; 614970, 4120470; 614986, 4120424; 614996, 4120339; 615037, 4120410; 615163, 4120270; 615782, 4119656; 615873, 4119555; 616548, 4118936; 616751, 4118743; 617140, 4118453; 617774, 4118066; 617873, 4118037; 617986, 4118057; 618040, 4118015; 617983, 4117993; 617934, 4117940; 617896, 4117916; 617930, 4117901; 617984, 4117896; 618000, 4117874; 618032, 4117863; 618054, 4117849; 618052, 4117820; 618027, 4117810; 618025, 4117766; 618067, 4117760; 618067, 4117728; 618144, 4117713; 618222, 4117720; 618262, 4117696; 618278, 4117655; 618256, 4117633; 618279, 4117591; 618286, 4117527; 618323, 4117503; 618317, 4117455; 618359, 4117439; 618413, 4117435; 618427, 4117461; 618457, 4117471; 618489, 4117476; 618489, 4117501; 618516, 4117516; 618545, 4117506; 618559, 4117469; 618589, 4117466; 618618, 4117430; 618642, 4117442; 618642, 4117477; 618684, 4117503; 618711, 4117527; 618730, 4117550; 618760, 4117564; 618797, 4117553; 618818, 4117545; 618836, 4117511; 618852, 4117500; 618877, 4117494; 618874, 4117457; 618894, 4117445; 618932, 4117427; 618932, 4117442; 618957, 4117445; 618976, 4117432; 618976, 4117393; 619062, 4117364; 619092, 4117373; 619113, 4117369; 619111, 4117323; 619145, 4117283; 619062, 4117188; 619058, 4117150; 619037, 4117123; 618984, 4117044; 619147, 4117114; 619236, 4117123; 619294, 4117077; 619329, 4117080; 619357, 4117092; 619387, 4117074; 619392, 4117037; 619382, 4117011; 619414, 4117004; 619446, 4116993; 619441, 4116938; 619469, 4116920; 619483, 4116876; 619460, 4116840; 619496, 4116812; 619525, 4116780; 619536, 4116746; 619553, 4116743; 619592, 4116766; 619630, 4116739; 619626, 4116701; 619641, 4116687; 619677, 4116701; 619706, 4116681; 619753, 4116690; 619769, 4116667; 619745, 4116648; 619789, 4116592; 619775, 4116566; 619685, 4116547; 619768, 4116513; 619764, 4116489; 619720, 4116399; 619758, 4116390; 619725, 4116298; 619792, 4116295; 619827, 4116268; 619843, 4116231; 619832, 4116189; 619956, 4116200; 620026, 4116196; 620027, 4116146; 620037, 4116090; 619981, 4115976; 620018, 4115910; 619981, 4115866; 619891, 4115850; 619903, 4115813; 619978, 4115796; 619996, 4115766; 620072, 4115793; 620111, 4115763; 620096, 4115712; 620116, 4115680; 620199, 4115750; 620314, 4115703; 620320, 4115653; 620356, 4115633; 620401, 4115659; 620444, 4115506; 620503, 4115495; 620571, 4115549; 620617, 4115454; 620788, 4115324; 620903, 4115266; 620995, 4115260; 621058, 4115374; 621097, 4115435; 621107, 4115413; 621122, 4115390; 621149, 4115374; 621156, 4115344; 621200, 4115254; 621608, 4115039; 621668, 4115004; 621715, 4114977; 621744, 4114932; 621789, 4114879; 621788, 4114836; 621788, 4114810; 621768, 4114773; 621773, 4114740; 621772, 4114662; 621773, 4114638; 621766, 4114618; 621782, 4114597; 621842, 4114600; 621857, 4114586; 621875, 4114583; 621881, 4114552; 621827, 4114518; 621800, 4114474; 621727, 4114441; 621038, 4114280; 620937, 4114292; 620831, 4114261; 620046, 4114525; 619795, 4114578; 619736, 4114633; 619738, 4114702; 619674, 4114732; 619453, 4114356; 619351, 4114262; 619197, 4114240; 619041, 4114293; 618895, 4114410; 618599, 4114424; 618361, 4114506; 618185, 4114530; 617740, 4115026; 617095, 4115754; 616662, 4116332; 616403, 4116568; 616244, 4116697; 616203, 4116810; 616126, 4117005; 615933, 4117032; 615789, 4117099; 615722, 4117186; 615933, 4117280; 616097, 4117217; 616167, 4117292; 616030, 4117460; 615914, 4117446; 615683, 4117614; 615229, 4117907; 615099, 4117854; 615457, 4117510; 615390, 4117438; 615003, 4117751; 614469, 4118133; 613965, 4118481; 613890, 4118524; 613954, 4118666; 613790, 4118831; 613636, 4118894; 613636, 4119149; 613557, 4119283; 613403, 4119531; 613254, 4119651; 613077, 4119606; 612893, 4119620; 612832, 4119665; 612853, 4119708; 612847, 4119729; 612784, 4119705; 612770, 4119740; 612715, 4119760; 612640, 4119824; 612618, 4119872; 612583, 4119977; 612062, 4120400; 611707, 4120758; 611686, 4120748; 611631, 4120824; 611294, 4121127; returning to 611242, 4121203.

(ii) *Note*: Unit 5 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(11) Unit 6: Tulare Hill, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 610971, 4120478; 611134, 4120435; 611200, 4120245; 611116, 4120132; 611181, 4119977; 611212, 4119824; 611280, 4119743; 611293, 4119653; 611241, 4119512; 610967, 4119335; 610786, 4119391; 610392, 4119622; 610302, 4119674; 610057, 4119813; 610117, 4119846; 609929, 4120074; 609799, 4120229; 609915, 4120374; 609819, 4120430; 610113, 4120749; 610310, 4120833; 610459, 4120769; 610531, 4120847; 610797, 4120659; 610776, 4120464; 610843, 4120449; returning to 610971, 4120478.

(ii) *Note*: Unit 6 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

(12) Unit 7: Santa Teresa Hills, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 608447, 4119332; 608474, 4119309; 608576, 4119335; 608615, 4119330; 608689, 4119306; 608706, 4119356; 608749, 4119377; 608758, 4119360; 608746, 4119302; 608760, 4119230; 608722, 4119159; 608656, 4119124; 608669, 4119080; 608762, 4119101; 608846, 4119140; 608892, 4119222; 609000, 4119082; 609117, 4119040; 609190, 4119077; 609244, 4119107; 609509, 4119359; 609534, 4119358; 609548, 4119366; 609549, 4119393; 609568, 4119444; 609582, 4119466; 609606, 4119520; 609628, 4119547; 609656, 4119568; 610016, 4119783; 610228, 4119650; 610177, 4119543; 610143, 4119434; 610086, 4119368; 610019, 4119278; 609929, 4119219; 609928, 4119116; 609956, 4119070; 610001, 4119067; 610048, 4119044; 610138, 4119037; 610165, 4119006; 610240, 4118997; 610306, 4118956; 610325, 4118923; 610343, 4118915; 610381, 4118905; 610405, 4118877; 610414, 4118822; 610436, 4118812; 610464, 4118833; 610521, 4118824; 610564, 4118822; 610592, 4118815; 610612, 4118795; 610617, 4118776; 610617, 4118756; 610624, 4118735; 610650, 4118729; 610669, 4118717; 610700, 4118710; 610723, 4118718; 610757, 4118723; 610773, 4118706; 610780, 4118658; 610790, 4118646; 610787, 4118598; 610775, 4118570; 610773, 4118536; 610771, 4118519; 610782, 4118517; 610822, 4118530; 610842, 4118528; 610864, 4118520; 610880, 4118508; 610899, 4118501; 610915, 4118487; 610914, 4118461; 610906, 4118446; 610889, 4118430; 610886, 4118417; 610902, 4118393; 610900, 4118367; 610896, 4118340; 610912, 4118330; 610934, 4118310; 610940, 4118282; 610932, 4118260; 610935, 4118251; 610949, 4118231; 610955, 4118207; 610957, 4118181; 610964, 4118176; 610991, 4118168; 610989, 4118152; 610992, 4118113; 611000, 4118109; 611019, 4118109; 611041, 4118121; 611066, 4118127; 611096, 4118122; 611114, 4118125; 611160, 4118145; 611185, 4118147; 611220, 4118143; 611254, 4118124; 611259, 4118093; 611250, 4118046; 611250, 4118012; 611247, 4117972; 611255, 4117966; 611276, 4117974; 611292, 4117975; 611331, 4117963; 611374, 4117922; 611421, 4117919; 611446, 4117915; 611462, 4117908; 611475, 4117891; 611511, 4117839; 611533, 4117814; 611554, 4117805; 611567, 4117772; 611556, 4117741; 611560, 4117712; 611562, 4117677; 611517, 4117611; 611572, 4117536; 611578, 4117500; 611570, 4117478; 611547, 4117451; 611503, 4117429; 611458, 4117422; 611405, 4117439; 611323, 4117480; 611291, 4117518; 611268, 4117566; 611230, 4117618; 611169, 4117625; 611100, 4117637; 611072, 4117668; 611021, 4117766; 610962, 4117743; 610985, 4117678; 611007, 4117611; 610957, 4117563; 610836, 4117565; 610800, 4117537; 610773, 4117534; 610752, 4117518; 610733, 4117438; 610716, 4117404; 610610, 4117272; 610572, 4117243; 610501, 4117238; 610412, 4117262; 610370, 4117294; 610350, 4117341; 610281, 4117354; 610220, 4117381; 610179, 4117413; 610146, 4117441; 610127, 4117492; 610058, 4117531; 609819, 4117309; 609692, 4117372; 609593, 4117353; 609526, 4117409; 609460, 4117386; 609405, 4117409; 609091, 4117456; 608872, 4117364; 608840, 4117297; 608733, 4117262; 608502, 4117237; 608524, 4117204; 608603, 4117138; 608723, 4117081; 608830, 4117067; 608934, 4117066; 609071, 4117093; 609181, 4117210; 609225, 4117208; 609240, 4117159; 609163, 4117083; 609228, 4117009; 609303, 4116981; 609325, 4117003; 609303, 4117052; 609302, 4117087; 609324, 4117084; 609349, 4117043; 609401, 4117059; 609409, 4117162; 609430, 4117203; 609458, 4117190; 609471, 4117150; 609435, 4117016; 609506, 4116986; 609350, 4116852; 609333, 4116880; 609256, 4116873; 609228, 4116889; 609205, 4116873; 609163, 4116848; 609131, 4116849; 609102, 4116863; 609061, 4116836; 609011, 4116841; 608843, 4116838; 608804, 4116864; 608758, 4116878; 608714, 4116867; 608672, 4116827; 608625, 4116899; 608542, 4116933; 608489, 4117019; 608426, 4117079; 608382, 4117115; 608343, 4117134; 608305, 4117136; 608259, 4117127; 608216, 4117129; 608210, 4117170; 608197, 4117192; 608138, 4117197; 608062, 4117234; 608020, 4117241; 607997, 4117227; 607959, 4117228; 607963, 4117262; 607941, 4117301; 607896, 4117334; 607909, 4117377; 608067, 4117348; 608170, 4117343; 608289, 4117332; 608298, 4117392; 608239, 4117418; 608166, 4117436; 608066, 4117450; 608012, 4117453; 607942, 4117507; 607907, 4117572; 607938, 4117605; 607924, 4117642; 607848, 4117626; 607678, 4117759; 607397, 4117766; 607129, 4117689; 606990, 4117599; 606767, 4117931; 606643, 4118119; 606701, 4118302; 606742, 4118358; 606828, 4118289; 606858, 4118323; 606693, 4118461; 606644, 4118391; 606609, 4118328; 606542, 4118254; 606425, 4118183; 606179, 4118078; 605438, 4118128; 605263, 4118203; 605074, 4118293; 604975, 4118365; 605178, 4118600; 604548, 4118947; 604625, 4119145; 604788, 4119569; 604936, 4119955; 604817, 4119974; 604817, 4120089; 604555, 4120119; 604414, 4120139; 604283, 4120149; 604549, 4120858; 604561, 4120889; 604564, 4120912; 604561, 4120952; 604572, 4120972; 604606, 4120977; 604622, 4120963; 604624, 4120946; 604628, 4120920; 604645, 4120904; 604680, 4120899; 604729, 4120910; 604729, 4120867; 604787, 4120831; 604810, 4120814; 604844, 4120783; 604890, 4120765; 604924, 4120799; 604948, 4120835; 604970, 4120831; 604986, 4120786; 605003, 4120742; 605064, 4120714; 605093, 4120722; 605132, 4120760; 605163, 4120770; 605185, 4120744; 605219, 4120689; 605272, 4120656; 605329, 4120668; 605395, 4120706; 605405, 4120671; 605424, 4120642; 605452, 4120646; 605473, 4120657; 605509, 4120656; 605548, 4120664; 605588, 4120656; 605614, 4120682; 605643, 4120689; 605647, 4120649; 605679, 4120645; 605711, 4120633; 605746, 4120610; 605728, 4120571; 605712, 4120545; 605685, 4120526; 605653, 4120525; 605613, 4120522; 605608, 4120506; 605619, 4120496; 605645, 4120487; 605709, 4120480; 605729, 4120443; 605749, 4120426; 605775, 4120431; 605792, 4120456; 605809, 4120473; 605836, 4120498; 605864, 4120508; 605879, 4120512; 605904, 4120506; 605928, 4120490; 605945, 4120465; 605949, 4120449; 605945, 4120432; 605953, 4120401; 605971, 4120390; 606001, 4120399; 606040, 4120411; 606076,

4120422; 606105, 4120433; 606133, 4120448; 606158, 4120474; 606200, 4120494; 606241, 4120516; 606272, 4120540; 606310, 4120548; 606353, 4120567; 606378, 4120587; 606394, 4120604; 606407, 4120596; 606422, 4120586; 606474, 4120580; 606521, 4120577; 606553, 4120566; 606589, 4120544; 606625, 4120524; 606653, 4120496; 606653, 4120520; 606626, 4120579; 606625, 4120607; 606650, 4120613; 606703, 4120612; 606736, 4120611; 606751, 4120586; 606748, 4120556; 606762, 4120552; 606804, 4120566; 606861, 4120594; 606917, 4120615; 606968, 4120624; 607030, 4120627; 607084, 4120614; 607139, 4120594; 607197, 4120614; 607194, 4120598; 607195, 4120569; 607195, 4120549; 607188, 4120521; 607174, 4120507; 607179, 4120472; 607191, 4120455; 607214, 4120443; 607247, 4120427; 607277, 4120408; 607280, 4120373; 607298, 4120340; 607305, 4120307; 607332, 4120290; 607364, 4120276; 607395, 4120272; 607414, 4120266; 607434, 4120261; 607453, 4120267; 607461, 4120254; 607462, 4120237; 607458, 4120220; 607449, 4120201; 607437, 4120184; 607421, 4120162; 607397, 4120136; 607370, 4120088; 607327, 4120023; 607297, 4119983; 607182, 4119926; 607113, 4119874; 607064, 4119832; 607020, 4119802; 606938, 4119784; 606848, 4119768; 606800, 4119732; 606822, 4119719; 606891, 4119713; 606982, 4119681; 607021, 4119632; 607033, 4119550; 607049, 4119507; 607064, 4119439; 607068, 4119404; 607099, 4119389; 607118, 4119342; 607152, 4119323; 607181, 4119286; 607199, 4119244; 607188, 4119204; 607145, 4119123; 607167, 4119087; 607256, 4119070; 607355, 4119123; 607619, 4119104; 607673, 4119099; 607702, 4119117; 607733, 4119120; 607774, 4119125; 607775, 4119165; 607814, 4119200; 607861, 4119222; 607909, 4119212; 607985, 4119188; 608024, 4119217; 607998, 4119236; 608004, 4119270; 608048, 4119275; 608100, 4119228; 608157, 4119228; 608207, 4119263; 608269, 4119268; 608314, 4119280; 608363, 4119287; 608409, 4119297; 608425, 4119321; returning to 608447, 4119332.

(ii) *Note*: Unit 7 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

(13) Unit 8: Calero Reservoir, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 605493, 4116867; 605661, 4116896; 605718, 4116853; 605799, 4116844; 605856, 4116923; 605938, 4116906; 606045, 4116752; 606122, 4116520; 606156, 4116383; 606165, 4116288; 606051, 4116182; 606069, 4116127; 606132, 4116039; 606177, 4116025; 606230, 4116083; 606269, 4115997; 606336, 4116015; 606337, 4115938; 606300, 4115931; 606262, 4115861; 606326, 4115838; 606387, 4115849; 606433, 4115829; 606519, 4115734; 606574, 4115740; 606867, 4115901; 606937, 4115907; 606994, 4115890; 607043, 4115856; 607081, 4115818; 607068, 4115755; 607090, 4115693; 607144, 4115664; 607241, 4115643; 607290, 4115588; 607342, 4115554; 607159, 4115391; 607119, 4115368; 607073, 4115389; 607047, 4115495; 606903, 4115584; 606837, 4115586; 606861, 4115560; 606919, 4115549; 606944, 4115530; 606950, 4115482; 606978, 4115469; 606996, 4115393; 606975, 4115370; 606902, 4115402; 606901, 4115371; 606921, 4115339; 606904, 4115306; 606880, 4115337; 606861, 4115296; 606876, 4115251; 606935, 4115241; 606958, 4115263; 606986, 4115195; 607026, 4115199; 607027, 4115255; 607060, 4115266; 607082, 4115207; 607089, 4115149; 607179, 4115149; 607266, 4115115; 607415, 4115156; 607464, 4115136; 607555, 4115164; 607716, 4115136; 607712, 4115003; 607657, 4114850; 607604, 4114753; 607518, 4114686; 607611, 4114702; 607791, 4114919; 607826, 4114984; 607808, 4115366; 607972, 4115293; 608186, 4115186; 608470, 4115055; 608850, 4114830; 608992, 4114854; 609129, 4114812; 609117, 4115020; 608880, 4115233; 608512, 4115397; 608059, 4115492; 608029, 4115644; 607959, 4115592; 607880, 4115595; 607966, 4115726; 608052, 4115817; 608155, 4115878; 608258, 4115908; 608358, 4115910; 608437, 4115938; 608556, 4115906; 608545, 4115971; 608608, 4115990; 608682, 4115957; 608750, 4115901; 608776, 4115906; 608815, 4115934; 608892, 4115927; 608946, 4115873; 608948, 4115826; 608906, 4115731; 608967, 4115710; 609032, 4115647; 609481, 4115100; 609477, 4115025; 609577, 4114951; 609821, 4114856; 609866, 4114711; 609880, 4114582; 610030, 4114486; 610081, 4114398; 610120, 4114330; 610159, 4114322; 610155, 4114287; 610124, 4114240; 610287, 4114038; 610327, 4113965; 610319, 4113865; 610257, 4113742; 610202, 4113705; 610079, 4113729; 609993, 4113754; 609891, 4113813; 609798, 4113845; 609735, 4113885; 609737, 4113963; 609663, 4114035; 609563, 4114088; 609524, 4114248; 609455, 4114356; 609212, 4114403; 609004, 4114676; 608945, 4114439; 608774, 4114422; 608635, 4114302; 608547, 4114164; 608453, 4113729; 608135, 4113470; 608079, 4113433; 608043, 4113356; 608038, 4113230; 608012, 4113254; 607980, 4113238; 607947, 4113270; 607907, 4113243; 607855, 4113282; 607814, 4113362; 607802, 4113545; 607694, 4113606; 607526, 4113700; 607691, 4113754; 607691, 4114069; 607465, 4114176; 607326, 4114660; 606930, 4114755; 606709, 4114597; 606401, 4114641; 606250, 4114805; 605916, 4114924; 605715, 4115195; 605293, 4115604; 605224, 4115604; 605180, 4115755; 605224, 4115869; 605035, 4116101; 605042, 4116215; 605067, 4116309; 605123, 4116366; 605229, 4116454; 605338, 4116598; 605387, 4116705; returning to 605493, 4116867.

(ii) *Note*: Unit 8 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

(14) Unit 9: Kalana Hills, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Subunit 9A: Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 612463, 4115364; 612548, 4115283; 612611, 4115228; 612581, 4115190; 612560, 4115157; 612725, 4114962; 612697, 4114924; 612640, 4114916; 612512, 4114806; 612469, 4114770; 612456, 4114706; 612331, 4114635; 612276, 4114621; 612159, 4114668; 612036, 4114796; 611975, 4114842; 611928, 4114901; 611857, 4114927; 611811, 4114924; 611806, 4115198; 611735, 4115382; 611703, 4115487; 611772, 4115526; 611741, 4115600; 611742, returning to 4115605; 612028, 4115820; returning to 612463, 4115364.

(ii) Subunit 9B: Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 613292, 4114458; 613477, 4114328; 613645, 4114236; 613859, 4114112; 613800, 4114081; 613704, 4114080; 613628, 4114115; 613571, 4114099; 613525, 4114035; 613464, 4114059; 613430, 4114072; 613389, 4114098; 613269, 4114176; 613135, 4114270; 613043, 4114292; 612952, 4114245; 612882, 4114296; 612769, 4114341; 612771, 4114386; 612807, 4114455; 612779, 4114504; 612761, 4114557; 612827, 4114609; 612910, 4114621; 613020, 4114550; 613029, 4114509; 612967, 4114492; 612953, 4114422; 612990, 4114368; 613090, 4114360; 613112, 4114463; 613178, 4114499; returning to 613292, 4114458;

(iii) *Note*: Unit 9 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

(15) Unit 10: Hale, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Unit 10: Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 617448, 4111989; 617422, 4111978; 617343, 4111978; 617295, 4111947; 617252, 4111862; 617269, 4111828; 617405, 4111774; 617445, 4111797; 617501, 4111797; 617512, 4111746; 617589, 4111729; 617733, 4111766; 618083, 4111853; 618116, 4111766; 618023, 4111705; 617936, 4111647; 617899, 4111684; 617764, 4111596; 617933, 4111368; 617964, 4111303; 617953, 4111188; 617891, 4111138; 617937, 4111083; 617919, 4111040; 617865, 4111014; 617798, 4111069; 617586, 4110876; 617618, 4110838; 617504, 4110738; 617459, 4110704; 617380, 4110673; 617197, 4110835; 617009, 4111119; 616981, 4111133; 616936, 4111110; 616925, 4111147; 616908, 4111187; 616885, 4111204; 616843, 4111232; 616817, 4111274; 616809, 4111303; 616781, 4111297; 616758, 4111257; 616724, 4111221; 616713, 4111159; 616744, 4111088; 616724, 4111060; 616730, 4111037; 616789, 4110983; 616702, 4110933; 616668, 4110952; 616620, 4110952; 616611, 4110901; 616436, 4111062; 616394, 4111037; 616410, 4110989; 616472, 4110988; 616532, 4110930; 616523, 4110872; 616555, 4110831; 616077, 4110537; 616073, 4110327; 615914, 4110402; 615846, 4110431; 615912, 4110524; 615761, 4110576; 615745, 4110646; 615715, 4110728; 615645, 4110790; 615684, 4110906; 615779, 4110867; 615779, 4110825; 615918, 4110725; 616038, 4110856; 615936, 4110930; 615947, 4111077; 615894, 4111105; 615830, 4111216; 615902, 4111306; 615866, 4111429; 615933, 4111449; 616044, 4111449; 616147, 4111428; 616225, 4111410; 616275, 4111430; 616313, 4111483; 616368, 4111489; 616399, 4111520; 616394, 4111579; 616380, 4111625; 616430, 4111650; 616484, 4111622; 616498, 4111585; 616555, 4111562; 616671, 4111591; 616659, 4111653; 616685, 4111715; 616741, 4111780; 616846, 4111829; 616677, 4112120; 616760, 4112261; 616792, 4112343; 617011, 4112356; 617160, 4112394; 617286, 4112306; 617433, 4112045; returning to 617448, 4111989 .

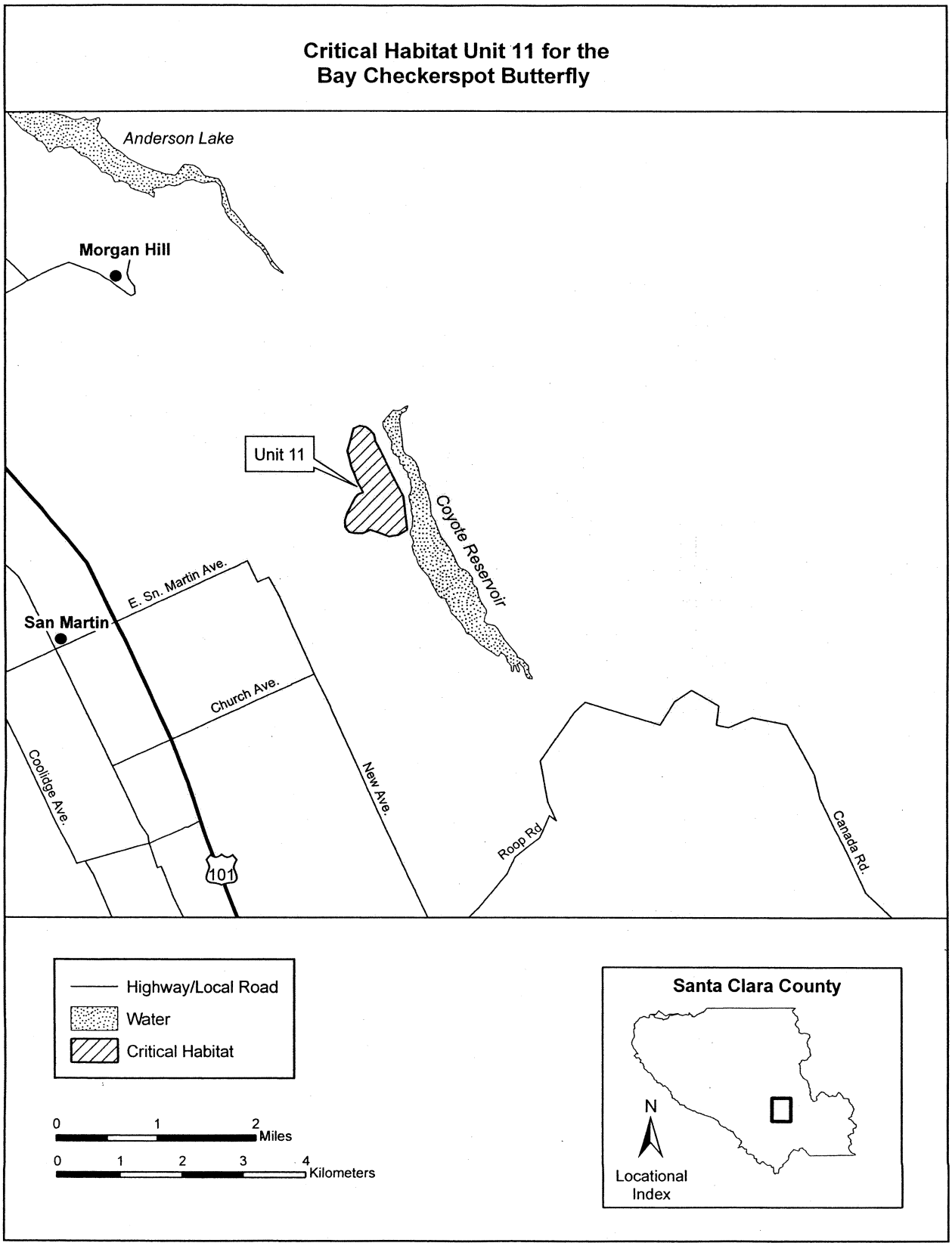
(ii) *Note*: Unit 10 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

(16) Unit 11: Bear Ranch, Santa Clara County, California. From USGS 1:24,000 scale quadrangle Gilroy.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 628304, 4108774; 628402, 4108819; 628507, 4108797; 628590, 4108729; 628635, 4108675; 628659, 4108564; 628747, 4108397; 628931, 4108012; 629104, 4107674; 629171, 4107133; 629022, 4107043; 628875, 4107022; 628732, 4107075; 628575, 4107128; 628449, 4107072; 628322, 4107074; 628234, 4107094; 628173, 4107173; 628166, 4107286; 628210, 4107426; 628327, 4107650; 628375, 4107703; 628458, 4107736; 628368, 4107898; 628263, 4108172; 628208, 4108414; returning to 628304, 4108774.

(ii) *Note*: Map of Unit 11 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



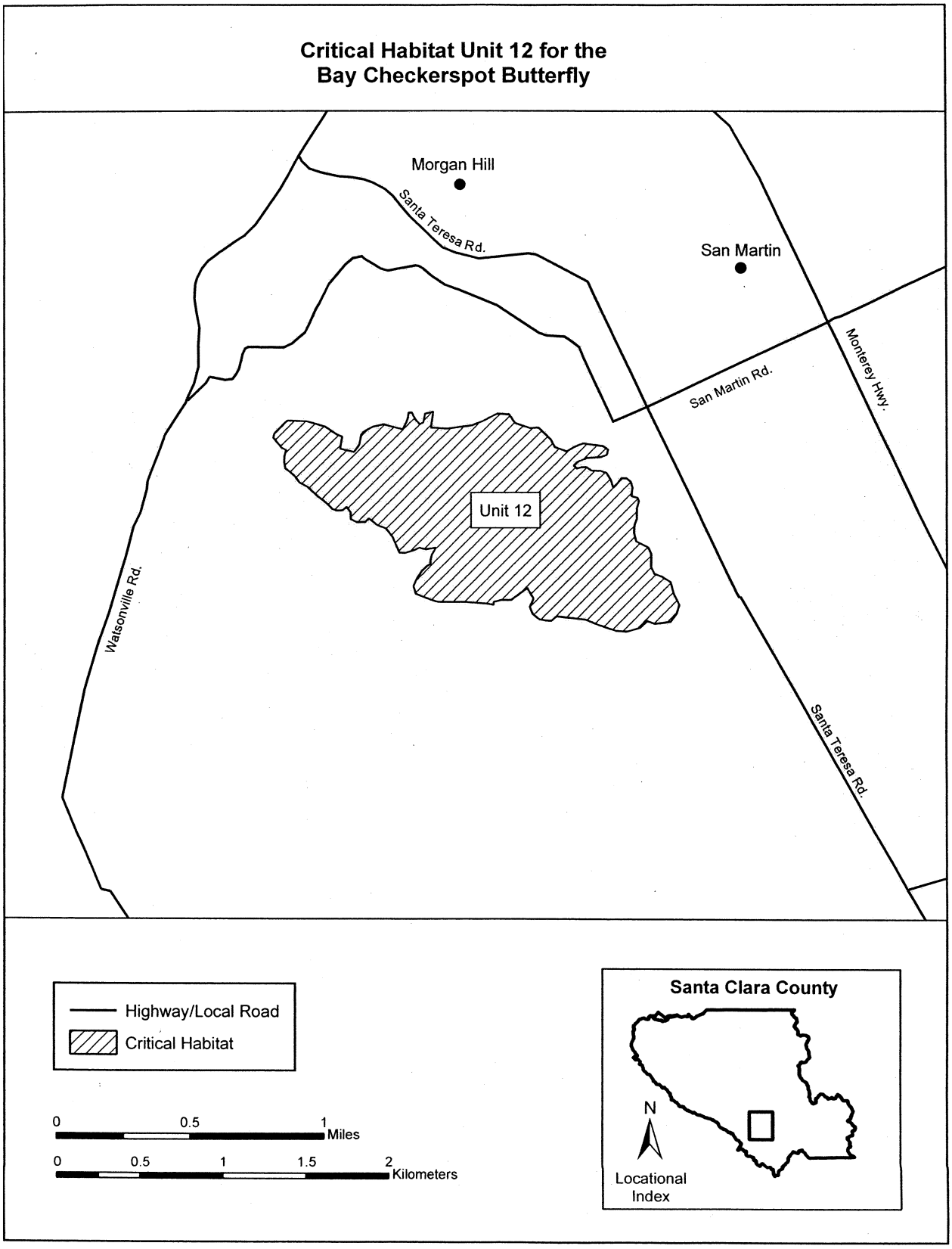
BILLING CODE 4310–55–C

(17) Unit 12: San Martin, Santa Clara County, California. From USGS 1:24,000 scale quadrangles Mt. Madonna and Gilroy.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 622150, 4104262; 622178, 4104216; 622192, 4104170; 622217, 4104195; 622241, 4104226; 622274, 4104226; 622296, 4104208; 622309, 4104171; 622302, 4104120; 622340, 4104110; 622347, 4104088; 622336, 4104047; 622334, 4103984; 622320, 4103948; 622317, 4103898; 622330, 4103845; 622404, 4103809; 622421, 4103769; 622421, 4103689; 622441, 4103649; 622487, 4103631; 622538, 4103599; 622557, 4103529; 622591, 4103461; 622575, 4103406; 622538, 4103358; 622441, 4103346; 622399, 4103363; 622352, 4103322; 622274, 4103300; 622206, 4103304; 622098, 4103341; 622020, 4103370; 621920, 4103382; 621843, 4103390; 621812, 4103362; 621779, 4103365; 621739, 4103372; 621700, 4103404; 621682, 4103449; 621705, 4103496; 621667, 4103560; 621569, 4103489; 621509, 4103489; 621463, 4103477; 621464, 4103459; 621411, 4103467; 621348, 4103472; 621288, 4103477; 621223, 4103476; 621183, 4103476; 621127, 4103476; 621079, 4103490; 621030, 4103508; 620988, 4103525; 620973, 4103571; 620996, 4103623; 621025, 4103666; 621055, 4103695; 621076, 4103707; 621079, 4103733; 621087, 4103764; 621112, 4103805; 621046, 4103796; 621009, 4103805; 620979, 4103791; 620922, 4103774; 620887, 4103775; 620871, 4103811; 620845, 4103873; 620806, 4103922; 620751, 4103944; 620702, 4103984; 620679, 4103961; 620627, 4103961; 620593, 4103979; 620591, 4104020; 620568, 4104053; 620542, 4104032; 620509, 4104030; 620482, 4104039; 620450, 4104073; 620393, 4104116; 620330, 4104174; 620283, 4104200; 620255, 4104240; 620230, 4104262; 620197, 4104288; 620191, 4104325; 620193, 4104362; 620203, 4104399; 620176, 4104412; 620126, 4104472; 620132, 4104499; 620211, 4104578; 620245, 4104578; 620329, 4104574; 620440, 4104541; 620510, 4104492; 620543, 4104480; 620529, 4104405; 620612, 4104386; 620646, 4104431; 620657, 4104489; 620672, 4104509; 620728, 4104541; 620794, 4104556; 620852, 4104539; 620909, 4104525; 620931, 4104568; 620942, 4104598; 620946, 4104627; 620968, 4104627; 620988, 4104586; 621013, 4104556; 621034, 4104566; 621046, 4104621; 621098, 4104634; 621083, 4104537; 621176, 4104528; 621262, 4104540; 621334, 4104549; 621398, 4104575; 621488, 4104622; 621559, 4104617; 621598, 4104563; 621688, 4104533; 621739, 4104536; 621811, 4104464; 621836, 4104417; 621908, 4104391; 621951, 4104417; 622007, 4104440; 622132, 4104423; 622160, 4104403; 622153, 4104371; 622118, 4104356; 622033, 4104350; 622004, 4104340; 621974, 4104326; 621951, 4104304; 621969, 4104286; 621996, 4104293; 622032, 4104294; 622060, 4104274; 622115, 4104272; returning to 622150, 4104262.

(ii) *Note:* Map of Unit 12 for Bay checkerspot butterfly follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(18) Unit 13: Kirby, Santa Clara County, California. From USGS 1:24,000 scale quadrangles San Jose East, Lick Observatory, Santa Teresa Hills, and Morgan Hill.

(i) Land bounded by the following UTM zone 10, NAD 1983 coordinates (E,N): 614073, 4122412; 613927, 4122313; 613818, 4122194; 613722, 4121982; 613609, 4121926; 613463, 4121895; 613322, 4121923; 613199, 4122005; 613063, 4121982; 612938, 4122012; 612845, 4121942; 612809, 4121823; 612723, 4121727; 612574, 4121711; 612435, 4121734; 612295, 4121716; 612154, 4121723; 612079, 4121699; 612017, 4121720; 611996, 4121655; 611902, 4121653; 611790, 4121695; 611662, 4121642; 611579, 4121554; 611512, 4121447; 611422, 4121445; 611365, 4121419; 611310, 4121420; 611247, 4121377; 610975, 4121590; 610770, 4121774; 610611, 4121899; 610472, 4122085; 610310, 4122006; 610106, 4122145; 610077, 4122227; 610126, 4122316; 610217, 4122395; 610179, 4122447; 610133, 4122430; 610089, 4122512; 610125, 4122559; 610156, 4122607; 610157, 4122653; 610128, 4122660; 610058, 4122641; 610016, 4122607; 609977, 4122674; 610091, 4122763; 610187, 4122847; 610220, 4122921; 610249, 4122977; 610374, 4123102; 610254, 4123181; 610015, 4123335; 609613, 4123583; 609641, 4123630; 609399, 4123790; 609324, 4123843; 609182, 4124041; 608934, 4123924; 608736, 4124027; 608538, 4124145; 608423, 4124256; 608167, 4124471; 608065, 4124633; 608059, 4124666; 607803, 4124871; 607677, 4124973; 607615, 4125109; 607637, 4125224; 607756, 4125351; 607593, 4125474; 607351, 4125490; 607272, 4125663; 607018, 4125820; 606980, 4125845; 606948, 4125876; 606896, 4125972; 606890, 4125996; 606845, 4125998; 606796, 4126045; 606753, 4126055; 606663, 4126127; 606595, 4126178; 606463, 4126353; 606314, 4126287; 606282, 4126331; 606153, 4126428; 605939, 4126505; 605841, 4126533; 605785, 4126693; 605832, 4126844; 605701, 4126851; 605621, 4127118; 605715, 4127161; 605847, 4127159; 605992, 4127130; 606076, 4127058; 606215, 4127099; 606422, 4127010; 606465, 4126897; 606699, 4126796; 606886, 4126695; 607019, 4126736; 607190, 4126796; 607356, 4126935; 607437, 4127065; 607306, 4127251; 607149, 4127421; 607062, 4127440; 606910, 4127537; 606714, 4127727; 606521, 4127943; 606345, 4128015; 606227, 4128006; 606179, 4127924; 606131, 4127779; 606097, 4127827; 606067, 4127868; 605982, 4127883; 605953, 4128027; 605857, 4127996; 605761, 4128001; 605703, 4128063; 605662, 4128160; 605702, 4128211; 605770, 4128251; 605842, 4128289; 605912, 4128287; 605946, 4128220; 605992, 4128138; 606059, 4128152; 606148, 4128174; 606210, 4128152; 606324, 4128056; 606410, 4128049; 606321, 4128171; 606343, 4128210; 606614, 4128290; 606611, 4128519; 606706, 4128535; 606802, 4128525; 607015, 4128424; 607079, 4128412; 607069, 4128316; 607125, 4128227; 607190, 4128215; 607202, 4128263; 607252, 4128252; 606865, 4127849; 607067, 4127789; 607267, 4127710; 607475, 4127729; 607713, 4127722; 607817, 4127626; 607733, 4127426; 607803, 4127314; 607825, 4127248; 607762, 4127173; 607740, 4127113; 607808, 4127063; 607894, 4127046; 608043, 4127019; 608116, 4126921; 608123, 4126707; 608000, 4126634; 607880, 4126543; 607769, 4126507; 607654, 4126497; 607668, 4126413; 607779, 4126408; 607805, 4126324; 608058, 4126129; 608255, 4125992; 608610, 4125722; 608893, 4125417; 609482, 4125417; 609838, 4125398; 610196, 4125396; 610302, 4125557; 610370, 4125506; 610487, 4125492; 610584, 4125439; 610692, 4125442; 610769, 4125405; 610827, 4125316; 610877, 4125249; 610937, 4125251; 610947, 4125345; 610759, 4125562; 610815, 4125701; 610858, 4125797; 610945, 4125841; 611101, 4125858; 611199, 4125833; 611308, 4125853; 611356, 4125884; 611424, 4125805; 611461, 4125744; 611542, 4125723; 611602, 4125671; 611673, 4125610; 611808, 4125456; 611970, 4125331; 612147, 4125249; 612322, 4125103; 612539, 4124931; 612515, 4124823; 612590, 4124756; 612648, 4124664; 612753, 4124575; 612773, 4124506; 612879, 4124335; 612972, 4124219; 613073, 4124178; 613129, 4124085; 613251, 4123917; 613206, 4123339; 613193, 4122893; 613280, 4122832; 613351, 4122715; 613426, 4122657; 613489, 4122657; 613563, 4122662; 613669, 4122607; 613741, 4122596; 614073, 4122412.

(ii) *Note*: Unit 13 for Bay checkerspot butterfly is depicted on the map in paragraph (10)(ii) of this entry.

Dated: August 13, 2008

David Verhey

Acting Assistant Secretary for Fish and Wildlife and Parks

[FR Doc. E8–19195 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–55–S

Federal Register

Tuesday,
August 26, 2008

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2007–0007; 92210–1117–0000–B4]

RIN 1018–AU86

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for *Acanthomintha ilicifolia* (San Diego thornmint) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 671 acres (ac) (272 hectares (ha)) of land in San Diego County, California, fall within the boundaries of the critical habitat designation.

DATES: This rule becomes effective on September 25, 2008.

ADDRESSES: The final rule, final economic analysis, and map of critical habitat are available on the Internet at *http://www.regulations.gov.* Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); telephone 760–431–9440; facsimile 760–431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for *Acanthomintha ilicifolia* in this final rule. For more information on the taxonomy, biology, and ecology of *A. ilicifolia,* refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938), and the proposed critical habitat rule published in the **Federal Register** on March 14, 2007 (72 FR 11946). We did not receive any new information pertaining to the species description, life history, distribution, ecology, or habitat of *A. ilicifolia* following the publication of the proposed designation of critical habitat for this species; therefore, please refer to the documents listed above for a complete detailed discussion of this species.

Acanthomintha ilicifolia is an annual member of the mint family in the genus *Acanthomintha.* This plant ranges in height from 2 to 6 inches (in) (5 to 15 centimeters (cm)) and has white, two-lipped, tubular flowers with rose-colored markings on the lower lip (Jokerst 1993, p. 713). Members of this genus have paired leaves and several sharp, spiny bracts (modified leaves) below whorled flowers. *Acanthomintha ilicifolia* can be distinguished from other members of the genus by its flower, which has hairless anthers and style.

Acanthomintha ilicifolia usually occurs on heavy clay soils in open areas surrounded by shrubby vegetation. These openings are generally found within coastal sage scrub, chaparral, and native grassland of coastal San Diego County and south to San Telmo in northern Baja California, Mexico (Beauchamp 1986, p. 175; Reiser 2001, pp. 3–5). *Acanthomintha ilicifolia* is frequently associated with gabbro soils, which are derived from igneous rock, and gray calcareous clays derived from soft calcareous sandstone (Oberbauer and Vanderwier 1991, pp. 208–209). This species is endemic to San Diego County, California, and northwestern Baja California, Mexico, and grows on open clay lenses described as friable, meaning that these soils have a loose, crumbly texture.

Previous Federal Actions

On August 10, 2004, the Center for Biological Diversity and California Native Plant Society challenged our failure to designate critical habitat for this species as well as four other plant species (*Center for Biological Diversity* v. *Norton,* C–04–3240 JL (N. D. Cal.)). In a settlement agreement dated December 21, 2004, we agreed to submit for publication in the **Federal Register** a proposed designation of critical habitat, if prudent and determinable, on or before February 28, 2007, and a final determination by February 28, 2008. We published a proposed critical habitat designation for *Acanthomintha ilicifolia* in the **Federal Register** on March 14, 2007 (72 FR 11946). As part of that 2007 proposed designation, we determined that it was prudent to designate critical habitat for this species (72 FR 11946; March 14, 2007). We accepted public comments on the proposed designation for 60 days, ending May 14, 2007.

On November 27, 2007, we published a notice announcing the availability of the draft economic analysis (DEA) and reopening the public comment period on the proposed rule (72 FR 66122). This comment period closed on December 27, 2007. In light of new information received, we requested an extension of the due date of the final critical habitat rule. On April 16, 2008, the extension request was granted allowing us to open an additional comment period. On May 13, 2008, we opened a third comment period on the DEA and the proposed rule. This comment period closed on June 12, 2008 (73 FR 27483). Please refer to the ''Previous Federal Actions'' section of the proposed critical habitat rule for *Acanthomintha ilicifolia*, which published in the **Federal Register** on March 14, 2007 (72 FR 11946), for a discussion of additional Federal actions that occurred prior to the proposed designation of critical habitat for this species. This final rule complies with the December 21, 2004, settlement agreement and April 16, 2008, extension.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Acanthomintha ilicifolia* in the proposed rule that published on March 14, 2007 (72 FR 11946), and in the notice of availability of the draft EA published in the **Federal Register** on November 27, 2007 (72 FR 66122). We received significant information during the second comment period; therefore, we opened a third comment period on the proposed rule and the draft EA. The third comment period opened on May 13, 2008, and closed June 12, 2008 (73 FR 27483). We contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and the draft EA.

During the comment period that opened on March 14, 2007, and closed on May 14, 2007, we received two comments directly addressing the proposed critical habitat designation. One comment was from a Federal agency and the other was from a non-governmental organization. During the second comment period open from November 27, 2007 to December 27, 2007, we received four comment letters. Of these latter comments, one was from a Federal agency, one was from a local government, one was from a peer

reviewer, and one was from an organization. We did not receive any additional comments during the third comment period. All comments received were grouped into general issue categories relating to the proposed designation of critical habitat for *Acanthomintha ilicifolia*, and are addressed in the following summary and incorporated into this final rule as appropriate. We did not receive requests for a public hearing or comments on the draft EA.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from five knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region where the species occurs, and conservation biology principles. We received a response from one peer reviewer. The peer reviewer agreed with our characterization of the known physical and biological features for *Acanthomintha ilicifolia*.

We reviewed all comments we received from the peer reviewer and the public for substantive issues and new information regarding critical habitat for *Acanthomintha ilicifolia*. The comments are addressed in the following summary.

Peer Reviewer Comments

Comment 1: The peer reviewer concurred with our characterization of the known physical and biological features that are essential to the conservation of this species based on extensive research on *Acanthomintha ilicifolia*. Additionally, the peer reviewer highlighted several areas of interest that have not been studied at this time, but may provide more information on the physical and biological features essential for the survival of *A. ilicifolia*. The topics that the peer reviewer indicated require further research include population genetics, pollinator studies, and additional soil studies. The peer reviewer stated that additional population genetics studies of *A. ilicifolia* could show that some populations display greater genetic diversity, or that some genetic characters are contained in only one or two populations. Additionally, the peer reviewer indicated that studies are needed to determine habitat requirements for pollinators and to understand the effect that habitat fragmentation may have on *A. ilicifolia*.

Our Response: We agree with the peer reviewer's assessment of information needs for *Acanthomintha ilicifolia*. We used the best available scientific and commercial data to designate critical habitat for this species. The peer reviewer's comments support the designation, and the peer reviewer did not identify any significant data that we did not consider. We look forward to working with stakeholders, researchers, and other organizations to study the important issues identified by the peer reviewer. The California Department of Fish and Game is funding a study on the pollinators of *A. ilicifolia*. This and other future projects will help us to better understand the conservation needs of this species.

Comment 2: The peer reviewer applauded and reiterated the importance of our inclusion of newly discovered populations of *Acanthomintha ilicifolia* in the proposed critical habitat. The peer reviewer also commented that our criterion for population stability is reasonable and further tracking of population dynamics may help refine this criterion. The peer reviewer supported our inclusion of up to 500 ft (152 m) of habitat adjacent to mapped occurrences where the habitat is contiguous with occupied habitat and supports the physical and biological features essential to the conservation of this species. The peer reviewer indicated these areas capture unmapped clay soil patches, minimize the effects of fragmentation, and help alleviate our lack of specific knowledge regarding pollinators for this species by minimizing the encroachment of irrigated areas that support nonnative insect fauna (which may compete with native insect pollinators or affect the hydrology that supports *A. ilicifolia*).

Our Response: We appreciate the peer reviewer's positive evaluation of our criteria used to identify critical habitat.

Comment 3: The peer reviewer commented that we should not exclude the area within the pending Encinitas subarea plan under the Multiple Habitat Conservation Plan (MHCP) as proposed. The peer reviewer indicated this plan has not progressed towards completion at a timely rate and that until a conservation plan has been developed, we should designate the area as critical habitat.

Our Response: Following the publication of the proposed rule, we reevaluated the City of Encinitas' pending habitat conservation plan (HCP) subarea plan under the MHCP in San Diego County, California. We concluded that, at this time, the City of Encinitas' subarea plan is not complete and progress on the completion has slowed. However, the majority of subunit 1C is part of the Manchester Avenue Mitigation Bank and is actively managed for *Acanthomintha ilicifolia* (Spiegelberg 2005, p. 1–33). Preservation and management of the Manchester Avenue Mitigation Bank is independent of the completion of the City of Encinitas' subarea plan. We determined that the benefits of excluding the lands within the Manchester Avenue Mitigation Bank outweigh the benefits of including these lands in a critical habitat designation and that their exclusion will not result in extinction of this species. Therefore, we excluded 70 ac (28 ha) of subunit 1C under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion), and we designated the remaining 9 ac (4 ha) of private lands outside the Manchester Avenue Mitigation Bank as critical habitat.

Public Comments

Comment 4: One commenter stated that at a minimum, all occupied habitat needs to be designated as critical habitat. The commenter stated the definitions of ''recovery'' and ''conservation'' are synonymous, and therefore, any critical habitat designation must include all areas the Service finds essential to the conservation (i.e., recovery) of the species. This commenter reiterated that *Acanthomintha ilicifolia* is widely scattered in a discontinuous distribution, and stated that this type of distribution can lead to a high level of within-species genetic diversity. The commenter stated that it is essential to conserve within-species diversity represented by occurrences on varying soil types as well as geographically distinct populations. The commenter stated that within-species diversity helps species preserve their ability to respond to diseases, climate change, pollution, and other current and future threats. The commenter concluded that in the face of uncertainty, designation of all occupied habitat, regardless of ownership, is legally necessary to conserve this species.

Our Response: We agree with the commenter that the term conservation is defined in the Act as using all methods and procedures necessary to bring any listed species to the point at which the measures provided under the Act are no longer necessary (i.e., recovery). The provisions within section 4 of the Act require the Secretary to determine whether a species is endangered or threatened based on threats to the species, and therefore, recovery is linked to the alleviation of threats to the species.

The Act defines critical habitat as the specific areas within the geographical area occupied by the species at the time it is listed 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; and specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. We believe that our proposed and final designations accurately capture all areas essential to the conservation of *Acanthomintha ilicifolia* as required by the Act. The areas delineated as critical habitat in this final rule: (1) Support populations that occur on rare or unique habitat within the species' range; (2) support the largest known populations of *A. ilicifolia*; and (3) support the most stable populations of *A. ilicifolia*. Further, this final designation identifies threats to the physical and biological features essential to the conservation of the species within each subunit and identifies special management considerations or protection needed to alleviate those threats and thereby will contribute to the recovery of *A. ilicifolia*. Although there is no recovery plan for this species, we believe that recovery for *A. ilicifolia* can be achieved through the implementation of conservation measures to protect the physical and biological features on the areas occupied by this species that meet the definition of critical habitat (see the ''Special Management Considerations or Protection'' section for details about the type of management needed for this species).

The commenter stated that we need to include all occupied habitat in order to conserve the species' geographic and genetic diversity. Species and plant communities that are protected across their ranges are expected to have lower likelihoods of extinction (Soule and Simberloff 1986; Scott *et al.* 2001, pp. 1297–1300); our criteria identified multiple locations across the entire range of the species as essential habitat to prevent range collapse. Genetic variation in plants can result from the effects of population isolation and adaptation to locally distinct environments (Lesica and Allendorf 1995, pp. 754–757; Fraser 2000, pp. 49–51; Hamrick and Godt 1996, pp. 291–295); and our criteria identified populations that occur on rare or unique habitat within the species' range in order to capture the range of plant communities, soil types, and environmental gradients in which *Acanthomintha ilicifolia* is found to preserve the genetic variation that may result from adaptation to local environmental conditions, as documented in other plant species (e.g., see Hamrick and Godt 1996, pp. 299–301; Millar and Libby 1991, pp. 150, 152–155). Locations that possess unique ecological characteristics are those that represent the full range of environmental variability where *A. ilicifolia* have evolved, and, therefore, are likely to promote the adaptation of this species to different environmental conditions. We believe we captured the within-species diversity that the commenter is referring to by including areas that support populations on rare or unique habitat types, the largest known populations of *A. ilicifolia*, and the most stable populations of *A. ilicifolia*. At this time, no one has investigated the genetic structure of this species; however, if such genetic studies are conducted for this species in the future, we may revise this critical habitat designation if we determine that this final designation does not adequately represent the species' range of genetic diversity.

Our designation relies on the best available scientific information to capture the geographic range of the species. The commenter did not specifically identify any geographically distinct populations that we did not capture in our designation. Our criteria do not capture populations where we had information indicating that the habitat had been lost to development and, therefore, the populations were likely extirpated. Furthermore, our criteria limited the designation to areas where we had data indicating the location of a known population and demographic or specific habitat data to assess its importance to the overall conservation of this species. As described above, our designation includes areas that support populations of *Acanthomintha ilicifolia* on rare or unique habitat types, the largest known populations of *A. ilicifolia*, and the most stable populations of *A. ilicifolia*, thereby capturing species' diversity. We determined that designating these areas, each of which was occupied at the time of listing and contains the physical and biological features essential to the conservation of *A. ilicifolia* fulfills the plant's biological needs and is adequate to conserve this species (for a more detailed discussion see the ''Criteria Used To Identify Critical Habitat'' section). We concluded that there are no areas outside the geographical area occupied by the species at the time of listing essential to the conservation of the species and, therefore, consistent with section 3(5)(c) of the Act, we did not include the entire geographical area currently occupied by this species.

We recognize that our designation does not encompass all known occurrences of this species; however, we believe that our criteria and the designation are adequate to provide for the conservation and recovery of this species throughout its extant range. Although there is no recovery plan for this species, we believe that recovery for *A. ilicifolia* can be achieved through the implementation of conservation measures to protect the physical and biological features in the areas occupied by this species that meet the definition of critical habitat (see the ''Special Management Considerations or Protection'' section for details about the type of management needed for this species).

The commenter expressed concern that the proposed designation may not capture all areas necessary to allow *Acanthomintha ilicifolia* to respond to diseases, climate change, pollution, and other current and future threats. As stated above, the designation identifies all known threats to the physical and biological features essential to the conservation of the species in each individual subunit and identifies special management considerations or protection needed to alleviate those threats. We recognize these threats may change in the future; however, we base our critical habitat designations on the information available at the time of the designation and do not speculate as to what areas may be found essential if better information became available or what areas may become essential over time. The commenter did not include any specific data on future threats to the features essential to this species nor are we aware of any studies that include additional information that we did not consider. Should additional data become available concerning future threats, we may revise this critical habitat designation if it is determined that the designation did not capture an area essential to the conservation of the species based on the identification of additional threats.

Comment 5: One commenter stated that the Act specifically allows critical habitat designations to include areas both within and outside the geographical area occupied by the species at the time it is listed as well as currently unoccupied habitat in order to capture all areas essential to the recovery of listed species. The commenter continued to state that the proposed designation of critical habitat

for *Acanthomintha ilicifolia* fails to meet the government's legal requirements to promote recovery of *A. ilicifolia*.

Our Response: We agree with the commenter that the Act does provide the flexibility to include areas within the designation that were not occupied at the time a species was listed (including currently unoccupied habitat) if those areas are determined to be essential to the conservation of the species. We evaluated all known occurrences of *Acanthomintha ilicifolia* for inclusion in our proposed critical habitat designation and identified two subunits in the proposed rule, 3E and 4D, for inclusion in the designation that were not known to be occupied at the time the species was listed. We now consider subunits 3E and 4D to be occupied at the time of listing. Even though these occurrences were not discovered until after the species was listed in 1998, over 1,000 plants were recorded at each of these sites when they were first discovered. We believe the large population size indicates that the occurrences were established for several years because the seeds of *A. ilicifolia* do not disperse in large numbers and any new population of *A. ilicifolia* would likely start out small and take several years to reach a population size greater than 1,000 plants. In our proposed rule, we did not identify any areas outside the geographical area occupied by *A. ilicifolia* as essential for the conservation of this species. As discussed in response to comment 4, we believe our proposed rule and this final designation of critical habitat meet the requirements of the Act and are consistent with 50 CFR 424.12(e). We are not designating any areas outside the geographical area occupied by this species as we believe this designation is adequate to ensure the conservation of the species.

We recognize the designation of critical habitat may not include all habitat areas that may eventually be determined to be necessary for the species' recovery. Critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act. Critical habitat designations based on 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.

Comment 6: One commenter stated that the proposed exclusions, which if finalized will exclude over 67 percent of occupied habitat, violate the principles of the Act, and are not legal because excluding areas from a critical habitat designation will not promote the recovery of this species as is required by the Act. The commenter noted that, because all the units identified in the proposed rule are described as requiring special management considerations to conserve the primary constituent elements, that all units must be designated.

Our Response: Section 4(a)(3)(A) of the Act generally mandates that the Secretary designate any habitat which is considered to be critical habitat, as defined in section 3(5)(A), concurrently with listing and provides that such designations may be revised thereafter as appropriate. Section 4(b)(2) of the Act further requires that in making critical habitat designations, the Secretary take into account the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned. Therefore, consistent with the Act, we must consider the relevant impacts of designation on those areas that are determined to meet the definition of critical habitat using the best scientific data available prior to finalizing a critical habitat designation.

After determining all areas that meet the definition of critical habitat under section 3(5)(A) of the Act, we considered the economic impact, the impact on national security, and other relevant impacts of specifying any particular area as critical habitat. In this final designation, we recognize that designating critical habitat in areas where we have partnerships with landowners that have led to conservation and management of *Acanthomintha ilicifolia* on non-Federal lands has a relevant perceived impact to those landowners and a relevant impact to future partnership and conservation efforts on non-Federal lands. Based on these relevant impacts, we evaluated the benefits of designating those particular areas as critical habitat against the benefits of excluding the areas from the designation, and we determined that the benefits of excluding a portion of subunits 1A and 1C and all of subunits 1B, 2A, 2B, 2C, 2D, 3A, 3B, 4A, 4B, 4C, and 4D outweigh the benefits of including these areas in the final critical habitat designation and that the exclusion of these areas will not result in extinction of this species. Therefore, these exclusions are in full compliance with the Act. We also concluded that the conservation and management that will occur on the non-Federal lands we are excluding will contribute to the recovery of this species even though the Act does not require that areas excluded from a critical habitat designation contribute to recovery of a species, but rather that the benefits analysis demonstrate that the benefits of exclusion outweigh the benefits of inclusion and that the exclusion will not result in the extinction of the species. For a complete analysis and discussion of the exclusions, please refer to the ''Exclusions Under Section 4(b)(2) of the Act'' section below.

Comment 7: One commenter specifically questioned the ability of the San Diego Multiple Habitat Conservation Program (MHCP) and the San Diego Multiple Species Conservation Program (MSCP) to prevent extinction of this species, therefore questioning our determination that excluding these areas would not lead to the extinction of *Acanthomintha ilicifolia*. The commenter stated that habitat conservation plans (HCPs), like the MHCP and MSCP, are often ineffective conservation vehicles. The commenter listed three studies and stated that the studies conclude that species covered by multiple-species HCPs may be less likely to be recovered than those outside such HCPs. The commenter goes on to state that the MHCP and MSCP are in relatively early stages of implementation and are untested. The commenter states there are substantial questions as to whether these HCPs will provide sufficient habitat or species conservation for *A. ilicifolia*. The commenter stated that designating critical habitat in areas covered by the MHCP and MSCP would not undermine those HCPs and that the additional protection that a critical habitat designation provides would be especially beneficial if project proponents in those areas elect not to follow the guidelines set forth in the HCPs, suggesting that designating critical habitat would provide a useful and needed ''safety net.'' The commenter requested that we reconsider

our proposed exclusion of non-Federal lands covered by the MHCP and MSCP.

Our Response: We reevaluated our proposed exclusions of non-Federal land covered by the MHCP and MSCP. Although the commenter grouped the two HCPs together, we evaluated the proposed exclusion of each HCP separately in relation to the comments.

We reevaluated our proposed exclusion of non-Federal land covered by the MHCP under the approved Carlsbad Habitat Management Plan (HMP) and the draft Encinitas subarea plan. The MHCP is a framework plan that has been in place for 5 years and is structured to be implemented through the approval of individual, constituent subarea plans.

The City of Carlsbad received an incidental take permit based on the Carlsbad HMP, an individual subarea plan under the MHCP framework plan on November 9, 2004. All 59 ac (24 ha) of land that meet the definition of critical habitat within the boundaries of the Carlsbad HMP are already conserved under the Carlsbad HMP. In addition to the two areas that we proposed as critical habitat in the Carlsbad HMP, there are other populations of *A. ilicifolia* that are conserved under the subarea plan. Not all areas placed in conservation are actively managed under the plan at this time; however, we believe the Carlsbad HMP conserves *A. ilicifolia* within its boundaries. According to the Service's biological opinion for the Carlsbad HMP, coverage of *Acanthomintha ilicifolia* under this plan is contingent upon compliance with the conservation measures outlined in the HMP (i.e., a funded management plan in place) and the completion of the San Marcos subarea plan under the MHCP. However, we did not identify any lands in San Marcos that meet the definition of critical habitat as described in the ''Criteria Used to Identify Critical Habitat'' section. As a result, we analyzed the exclusion of subunits 1A and 1B in more detail and concluded that exclusion is appropriate because the essential habitat under the Carlsbad HMP is conserved. Management plans were developed and are being implemented for conserved lands in both of these subunits, although some management differs between these two areas because these management plans were developed over different periods of time (i.e., the management plan for subunit 1A was developed after the Carlsbad HMP was completed, whereas the management plan for lands within subunit 1B was developed prior to development of the Carlsbad HMP). Regardless, conservation and management of *A. ilicifolia* in these subunits is occurring and we believe it is contributing to the conservation of the species. Overall, the extent of habitat preservation and management that has taken place through implementation of the Carlsbad HMP since it was permitted in 2004 is significant, and demonstrates the City of Carlsbad's commitment to fully implement this HCP.

A detailed accounting of preservation, conservation, and management requirements of the Carlsbad HMP can be found in the ''Exclusions Under Section 4(b)(2) of the Act'' section. The comprehensive framework of the subarea plan and area-specific management plans developed as areas are preserved under the subarea plan contain requirements to conserve and adaptively manage *Acanthomintha ilicifolia* habitats and provide for the conservation of this species' primary constituent elements (PCEs), thereby contributing to the recovery of this species. The Carlsbad HMP provides for management and monitoring for *A. ilicifolia* at several sites, including habitat in subunit 1A that is currently actively managed by the Center for Natural Lands Management. Activities that benefit *A. ilicifolia* in subunit 1A include mapping and census projects, removal of nonnative invasive species, and the restoration of areas degraded by past human use (Tierra Data, Inc. 2005, p. 34–63; Carlsbad HMP 2004, p. D–97). Land in subunit 1B was permanently preserved prior to the creation of the HMP. Management of the conserved land in subunit 1B is the responsibility of the homeowners' associations who own the open space in this subunit. These lands are signed and fenced and considered part of Carlsbad's habitat preserve.

The Encinitas subarea plan under the MHCP is not complete, and significant progress has not occurred towards its completion. Therefore, we are not excluding from the final designation essential habitat within the draft Encinitas subarea plan.

We also reevaluated our proposed exclusion of non-Federal land covered by approved subarea plans under the MSCP. The MSCP is a framework plan that has been in place for 10 years. Both the City and the County of San Diego received incidental take permits for their individual subarea plans under the MSCP framework plan. Approximately 948 ac (383 ha) of land that meet the definition of critical habitat are within the City and County subarea plan boundaries under the MSCP. The MSCP subarea plans provide for the conservation of *Acanthomintha ilicifolia* through the establishment of preserve lands within the Multi-Habitat Planning Area (MHPA) (City) and Pre-Approved Mitigation Areas (PAMA) (County). In 10 years of implementing the subarea plans, approximately 787 ac (319 ha), or 83 percent, of lands that meet the definition of critical habitat are conserved. Although some areas placed in conservation are not yet fully managed under the plans, we believe the subarea plans under the MSCP will conserve essential habitat of *A. ilicifolia within the subarea plan boundaries.* The extent of habitat preservation and management that has taken place through implementation of the MSCP subarea plans is significant, and demonstrates the City's and County's commitments to fully implement their subarea plans.

The commenter indicated concern that species may more likely recover outside of HCPs and questioned the habitat and species conservation provided by the MSCP for *Acanthomintha ilicifolia.* The subarea plans under the MSCP contain requirements to monitor and adaptively manage *A. ilicifolia* habitats and provide for the conservation of this species' PCE. The framework and area-specific management plans required under the subarea plans are comprehensive and address a broad range of management needs at the preserve and species levels that are intended to reduce the threats to covered species and thereby contribute to the recovery of the species. These plans include the following: (1) Fire management; (2) public access control; (3) fencing and gates; (4) ranger patrol; (5) trail maintenance; (6) visitor/interpretive and volunteer services; (7) hydrological management; (8) signage and lighting; (9) trash and litter removal; (10) access road maintenance; (11) enforcement of property and/or homeowner requirements; (12) removal of invasive species; (13) nonnative predator control; (14) species monitoring; (15) habitat restoration; (16) management for diverse age classes of covered species; (17) use of herbicides and rodenticides; (18) biological surveys; (19) research; and (20) species management conditions (MSCP 1998).

Eight major populations of *Acanthomintha ilicifolia* are included within preserve lands under the approved MSCP subarea plans, each of which will be conserved from 80 to 100 percent, with 85 percent overall coverage. A detailed accounting of preservation, conservation, and management requirements can be found in the ''Exclusions Under Section 4(b)(2) of the Act'' section. In sum, all but 89 ac (36 ha) of the total 948 ac (383 ha)

of lands that meet the definition of critical habitat within the MSCP plan area are conserved or otherwise assured of conservation. Consistent with the narrow endemics requirements of the MSCP, the remaining 89 ac (36 ha) will be surveyed for *A. ilicifolia* prior to any development occurring on these lands. Under the City of San Diego's subarea plan, impacts to narrow endemic plants, including *A. ilicifolia,* inside the MHPA will be avoided and outside the MHPA will be protected by: (1) Avoidance; (2) management; (3) enhancement; and/or (4) transplantation to areas identified for preservation (City of San Diego 1997, p. 105–106; Service 1997, p. 15). Under the County of San Diego's subarea plan, narrow endemic plants, including *A. ilicifolia,* will be conserved under the Biological Mitigation Ordinance using a process that: (1) Requires avoidance to the maximum extent feasible; (2) allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible; and (3) requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property (County of San Diego (BMO) 1997, p. 11; Service 1998, p. 12). These measures will ameliorate any habitat loss within the 89 ac (36 ha) of lands that are not currently preserved or otherwise assured of conservation under the MSCP, by requiring in situ conservation or mitigation of impacts to *A. ilicifolia and its habitat.* Although some losses may occur to this species, the preservation, conservation, and management of *A. ilicifolia* required under the City and County MSCP subarea plans ensures the long-term conservation of this species and its habitat within the plan areas.

We evaluated the relevant impacts of designating critical habitat within areas covered by the City and County MSCP subarea plans and determined that the benefits of excluding non-Federal lands covered by the MSCP outweigh the benefits of specifying those areas as critical habitat and determined that excluding these lands will not lead to the extinction of *Acanthomintha ilicifolia.* Therefore, we excluded all non-Federal lands covered by the City and County subarea plans under the MSCP from this final designation (please see ''Exclusions Under Section 4(b)(2) of the Act'' section below for a detailed analysis).

The commenter also expressed concern that HCPs are ineffective conservation vehicles. We respectfully disagree. Numerous processes are incorporated into HCPs that provide for Service oversight of implementation to ensure compliance with the provisions to protect *Acanthomintha ilicifolia.* For example, the MSCP imposes annual reporting requirements and provides for Service review and approval of proposed subarea plan amendments and preserve boundary adjustments and for Service review and comment on projects during the California Environmental Quality Act review process. The Service also chairs the MSCP Habitat Management Technical Committee and the Monitoring Subcommittee (MSCP 1998, p. 5–11—5–23). The Carlsbad HMP also incorporates many processes to ensure the Service an active role in implementation of the HCP. For example, Habitat Management Plans, reviewed and approved by the Service, must be developed for each preserve area within the Carlsbad HMP, and monitoring and management objectives must be established for each preserve. Progress towards meeting these objectives is measured through the submission of annual reports. There are also regular coordination meetings between the Service and the City of Carlsbad to discuss on-going conservation issues. Both the MSCP subarea plans and the Carlsbad HMP must account annually for the progress they are making in assembling conservation areas. The Service must receive annual reports that include, both by project and cumulatively, the habitat acreage destroyed and conserved within the HCPs. This accounting process ensures that habitat conservation proceeds in rough proportion to habitat loss and in compliance with the MSCP subarea plans and, the Carlsbad HMP, and the plans' associated implementing agreements.

The commenter did not provide copies of the citations that they stated conclude that multi-species HCPs are not likely to contribute to the recovery of listed species, nor did the commenter identify any examples of projects that may not comply with the Carlsbad HMP or the City and County MSCP subarea plans by impacting *Acanthomintha ilicifolia.* In light of our summary above, we continue to believe that implementation of the Carlsbad HMP and the City and County MSCP subarea plans will benefit *A. ilicifolia* recovery, and we believe there is adequate oversight of these plans to ensure compliance.

Comment 8: One commenter supported our exclusion of lands covered by the MSCP and requested that we exclude proposed critical habitat areas within the pending North County MHCP in San Diego County. The commenter stated that the designation of critical habitat in these areas may have a negative effect on entities pursuing the MHCP and deter the completion of the plan.

Our Response: At this time, the HCP for northern San Diego County (North County MHCP) is being developed and a draft plan is not available for public review. We understand the commenters' concern that a designation of critical habitat in areas that may be addressed in the future by the North County MHCP may have a negative effect on entities pursuing the HCP and deter its completion. This concern is consistent with our discussion of conservation partnerships in the ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule. However, we also recognize that there is a regulatory and recovery benefit to designating critical habitat in areas that are not protected through existing management or conservation plans. Exclusions under section 4(b)(2) of the Act must be considered on a case-by-case basis. Because a draft of the northern San Diego County MHCP has not been released for public comment or formally evaluated by the Service, it is not clear that this framework plan will adequately address the conservation and recovery needs of *Acanthomintha ilicifolia. Nor is it clear* which areas will actively develop subarea plans under the North County MHCP. Therefore, we cannot presently determine that the regulatory and recovery benefits of a critical habitat designation in these areas would be minimized by the measures provided under this future plan. Therefore, we did not exclude lands that may be covered under this plan from critical habitat (the portion of subunit 1A owned by the County of San Diego). However, if this designation is revised in the future, we will re-evaluate for potential exclusion areas conserved under the plan. In the meantime, we are committed to continue working with all partners to the North County MHCP to minimize any additional regulatory burden attributable to this critical habitat designation.

Comment 9: One commenter questioned discussion in the proposed rule concerning critical habitat designations and public perceptions, stating that we did not present any empirical or quantitative evidence to support our claim that landowners fear a decline in property value due to real or perceived restrictions on land-use options and that participants in pending HCPs or other conservation plans may abandon the planning process in part due to perceived additional regulatory compliance with a critical habitat designation. The commenter noted that the MSCP and MHCP and their

respective subarea plans were presumably approved only after a public education program that would have explained the consequences of having listed species on private property. The commenter further stated that if the MSCP and MHCP function as promised by the proposed rule, critical habitat designation should create few or no additional burdens for permittees and finally that the Service inappropriately considers an exclusion as an ''either-or'' situation with regard to HCP implementation. The commenter stated that critical habitat and habitat conservation plans can coexist.

Our Response: The proposed designation cites several studies that have examined the issue of conservation of threatened and endangered species on private lands to support our discussion of the impacts to non-Federal landowners (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). As discussed in detail in the ''Conservation Partnerships on Non-Federal Lands'' section below, at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Although many non-Federal landowners derive satisfaction from contributing to listed species recovery, many private landowners are wary of the possible consequences of attracting endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal Government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found (Main *et al.* 1999; Brook *et al.* 2003). According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). Such voluntary conservation actions may be particularly important for listed plant species that are not subject to the take prohibition under section 9 of the Act or the incidental take permitting requirements of section 10(a)(1)(B) of the Act. For this reason, we actively encourage participants developing HCPs under section 10 of the Act to include measures that address the conservation of listed plant species in their plans even though such measures are not required. Designating critical habitat for plant species on lands voluntarily protected in an HCP or other conservation management plan could undermine our efforts. Therefore, we believe the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

Furthermore, our proposed critical habitat designations often draw significant public comment on the real and perceived impacts of the designation to Federal and non-Federal landowners. We received significant comments on multiple rules concerning impacts to private and non-Federal lands covered by HCPs and other land management conservation plans, including comment on this rule stating that the designation of critical habitat in areas covered by HCPs may have a negative effect on entities pursuing an HCP and may deter the completion of pending subarea plans under either the MSCP or MHCP (see Comment 8). As discussed in response to Comment 7 above and in the ''Conservation Partnerships on Non-Federal Lands'' section below, we continue to recognize that designating critical habitat in areas where we have partnerships with landowners that have led to conservation or management of listed species on non-Federal lands has a relevant perceived impact to landowners and a relevant impact to future partnership and conservation efforts on non-Federal lands.

Finally, we agree with the commenter that implementing a signed and permitted HCP is not an ''either-or'' situation when determining whether to designate an area that meets the definition of critical habitat as critical habitat. Rather, as stated in section 4(b)(2) of the Act, the Secretary shall designate critical habitat, or make revisions thereto, on the basis of the best available data *and after* (emphasis added) taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. We agree with the commenter that designation of an area covered by an HCP should create few or no additional regulatory burdens for permittees, and our analyses of the benefits of including areas covered by an HCP demonstrates how the regulatory benefit of inclusion is small. And while we agree that critical habitat and habitat conservation plans can coexist, we recognize that the designation has a relevant real impact to future partnerships and conservation efforts on non-Federal lands and a perceived impact to those landowners already in partnership with us. We consider that impact in weighing the benefits of inclusion against the benefits of exclusion on a case-by-case basis to determine if exclusion of those lands is appropriate.

Comment 10: One commenter objected to the discussion in the proposed rule concerning the inundation of lawsuits relative to critical habitat and suggested that litigation would be unnecessary or unsuccessful if the Service complied with the law. The commenter suggested that policymakers make choices that avoid compliance with the Act's critical habitat requirements and underfund species and habitat conservation programs, starving the Service of funds and staff. The commenter concluded that compliance with the law would be a more fiscally, biologically, and legally responsible choice.

Our Response: We removed the discussion of litigation-driven workload from this final rule. We believe this final rule is scientifically sound and compliant with the Act and our implementing regulations.

Comment 11: One commenter indicated that portions of subunit 1A are developed or used for agriculture and do not have the potential to support *Acanthomintha ilicifolia*. The commenter provided a map depicting the areas they believe do not support this species and requested that we remove these lands from critical habitat.

Our Response: We reassessed the areas described by the commenter. We removed the lands in subunit 1A that do not contain the PCE, including active agricultural fields, navigational aids associated with McClellen-Palomar Airport, a dirt maintenance road, and development areas in the City of Carlsbad. We remapped the boundary of subunit 1A, and verified that the revised subunit contains the features essential to the conservation of species which may require special management considerations or protection. As a result of the changes described above, we removed 26 ac (11 ha) that do not support *A. ilicifolia* and do not contain the PCE, resulting in 62 ac (25 ha) designated as critical habitat within subunit 1A.

Comment 12: One commenter provided information on the management of lands owned by the

Center for Natural Lands Management (CNLM). The commenter indicated that portions of subunits 1A and 1C are owned by the CNLM, and are managed and monitored for *Acanthomintha ilicifolia* on an annual basis. Funding for the perpetual management of these sites is obtained from a monetary endowment. The CNLM prepared a Property Analysis Record (PAR) to determine how much money is needed to manage and monitor *A. ilicifolia* on these lands. The commenter indicated that the CNLM reduces the threats to *A. ilicifolia* by managing weeds, erecting fences, closing trails, and distributing educational literature to the public. Additionally, the commenter indicated that high school students are involved with annual monitoring for this species and that an entomologist is working to determine potential pollinators for *A. ilicifolia* on lands in subunit 1C.

Our Response: We appreciate the detailed information provided by the commenter, and we incorporated this information as appropriate into the final rule.

Comments From Other Federal Agencies

Comment 13: The U.S. Forest Service (USFS) commented that laws, regulations, policies, and current Land Management Plan (LMP) direction currently in place provide protection at least equivalent to the protection that critical habitat designation would provide. The agency stated that the LMP in place at the Cleveland National Forest (CNF) incorporates management direction that provides sufficient protection and management for *Acanthomintha ilicifolia* and its habitat, and that the section 7 consultation on the LMP resulted in the Service coming to a similar conclusion, resulting in the issuance of a non-jeopardy biological opinion. Additionally, the Cleveland National Forest (CNF) has a Species Management Guide for *A. ilicifolia* that provides for exclusion of grazing, recreation, development, and soil disturbance (USFS 1991). The USFS commented that due to management and conservation standards, there should not be any reason to adversely modify the habitat's primary constituent elements for *A. ilicifolia* on the CNF. Furthermore, they commented that designation of critical habitat on CNF lands would not provide any additional benefit to the conservation of the species or its habitat since all site-specific projects proposed by the CNF are subject to section 7(a)(2) consultation with the Service and that designation would unnecessarily add to their analysis burden by requiring CNF to make a determination of effect regarding critical habitat when consulting under section 7 of the Act. The USFS acknowledged their responsibility to conserve and recover listed species and that they will continue to provide necessary management, regardless of critical habitat designation.

Our Response: We determined that the lands identified on the CNF contain the physical and biological features essential to the conservation of *Acanthomintha ilicifolia* and meet the definition of critical habitat (see ''Criteria Used to Identify Critical Habitat'' section below). We acknowledge that the LMP for CNF will benefit *A. ilicifolia* and its habitat, and that the CNF has completed many of the actions outlined in the 1991 Management Guide (USFS 1991) to avoid and minimize impacts to *A. ilicifolia*. The LMP contains general provisions for conservation of this species and the Management Guide suggests specific management and conservation actions that should address known threats to this species on USFS lands. However, the LMP is a guidance document and does not require or assure funding for management actions outlined in the plan. Additionally, the LMP does not preclude projects from occurring outside of the framework of the plan that could negatively impact areas designated as critical habitat.

The Secretary has the discretion to exclude an area from critical habitat under section 4(b)(2) of the Act after taking into consideration the economic impact, the impact on national security, and any other relevant impact if he determines that the benefits of such exclusion outweigh the benefits of specifying such area, unless he determines that the exclusion would result in the extinction of the species concerned. We considered the request from the USFS that we exclude their lands because it would unnecessarily add work in the future to determine the effect regarding critical habitat for actions on their lands and the fact that they already completed consultation under Section 7(a)(2) of the Act on the LMP.

As part of our section 7 consultation with the USFS on the LMP, the USFS already consulted on various activities carried out on national forest lands including: Roads and trail management; recreation management; special use permit administration; administrative infrastructure; fire and fuels management; livestock grazing and range management; minerals management; and law enforcement. In our 2005 biological opinion on the LMP, we determined that implementation of the plan was not likely to jeopardize the continued existence of *Acanthomintha ilicifolia*. Since critical habitat has not been previously proposed or designated for this species, it is anticipated that consultation with the USFS regarding the LMP will be reinitiated. However, because the USFS has already consulted with us on potential impacts to the species related to activities outlined in the LMP, the USFS can supplement its analysis for those activities already analyzed in the LMP with the additional analysis required for critical habitat areas. We do not believe that this additional analysis would place an undue burden on the USFS in this case.

Based on the record before us, we elected not to exclude these lands and are designating lands identified on the CNF that meet the definition of critical habitat and are essential to the conservation of *Acanthomintha ilicifolia*. We will continue to consider on a case-by-case basis in future critical habitat rules whether to exclude specific lands from such designation when we determine that the benefits of such exclusion outweigh the benefits of their inclusion.

Comment 14: One commenter indicated that the critical habitat proposal, if finalized, may adversely affect the Federal Aviation Administration's (FAA's) and San Diego County's ability to continue to operate McClellan-Palomar Airport in a safe and efficient manner because navigational aides (e.g., lights, maintenance road to access navigational aides) are within the area proposed as subunit 1A.

Our Response: As stated above in our response to comment 11 above, we removed the lands in subunit 1A that do not contain the PCE, including all active agricultural fields, lands containing navigational aides associated with McClellen-Palomar Airport, a dirt maintenance road, and development areas in the City of Carlsbad. We remapped the boundary of subunit 1A, and we have verified that this area meets the definition of critical habitat. Based on currently available information, we believe that we have removed all existing navigational aides from the designated critical habitat. Additionally, we do not believe that regular maintenance of any navigational aides that we are currently unaware of, but have been inadvertently included in the designation, will adversely modify critical habitat. We are committed to working with the FAA and staff of McClellen-Palomar Airport to ensure that the designation of critical habitat does not impact the future safe and efficient operation of the airport.

Summary of Changes From the Proposed Rule

In our March 14, 2007, proposed rule we identified 1,936 acres (ac) (783 hectares (ha)) of essential habitat for *Acanthomintha ilicifolia* in four units and seventeen subunits (72 FR 11946). At that time we proposed to exclude 1,302 ac (527 ha) under section 4(b)(2) of the Act (72 FR 11946; March 14, 2007). As we continued work on the proposed designation, we made two types of changes that affected the total area considered to meet the definition of critical habitat (what we will refer to as ''essential habitat''). First, we corrected simple mapping errors; for example, in one case we tallied a single piece of land twice in calculating the total number of acres thought to be essential habitat. Second, we removed areas that did not qualify as essential habitat either because they were developed and degraded or because they did not contain the PCE and were not otherwise considered essential. Table 1 depicts the changes made to the proposed rule published on March 14, 2007, and indicates how much area was removed (or added as was the case for some of the corrections) for each of the two reasons discussed above. As we continued work on the designation, we notified the public of new information we were using to make changes to the critical habitat (72 FR 66122, November 27, 2007; 73 FR 27483, May 13, 2008). However, Table 1 and this discussion focus on the changes from the March 14, 2007, proposed rule (72 FR 11946) to this final rule. The details related to these changes are explained below.

TABLE 1—AREAS PROPOSED AS CRITICAL HABITAT (72 FR 11946, MARCH 14, 2007), AREA REMOVED OR ADDED AS A CORRECTION, AREA REMOVED AS NON-ESSENTIAL HABITAT, AND FINAL CRITICAL HABITAT DESIGNATION

Critical habitat unit/subunit	Essential habitat in the March 14, 2007 proposed rule *	Area subtracted or added as a correction *	Area removed because it was not essential habitat *	Essential habitat as of this final rule *
Unit 1: Northern San Diego County:				
1A. Palomar Airport	88 ac (36 ha)		26 ac (11 ha)	62 ac (25 ha).
1B. Southeast Carlsbad	73 ac (29 ha)		16 ac (6 ha)	57 ac (23 ha).
1C. Manchester	92 ac (37 ha)		13 ac (5 ha)	79 ac (32 ha).
Unit 2: Central San Diego County:				
2A. Los Peñasquitos Canyon	63 ac (25 ha)			63 ac (25 ha).
2B. Sabre Springs	52 ac (22 ha)	Subtracted: 0 ac (1 ha)		52 ac (21 ha).
2C. Sycamore Canyon	306 ac (124 ha)			306 ac (124 ha).
2D. Slaughterhouse Canyon	77 ac (31 ha)			77 ac (31 ha).
Unit 3: Viejas Mountain and Poser Mountain:				
3A. Viejas Mountain	33 ac (13 ha)		1 ac (<1 ha)	32 ac (13 ha).
3B. Viejas Mountain	208 ac (84 ha)		15 ac (6 ha)	193 ac (78 ha).
3C. Viejas Mountain	318 ac (128 ha)		42 ac (16 ha)	276 ac (112 ha).
3D. Viejas Mountain	82 ac (33 ha)			82 ac (33 ha).
3E. Poser Mountain	34 ac (14 ha)			34 ac (14 ha).
3F. Poser Mountain	163 ac (66 ha)		8 ac (3 ha)	155 ac (63 ha).
Unit 4: Southern San Diego County:				
4A. McGinty Mountain	18 ac (7 ha)	Added: 2 ac (1 ha)		20 ac (8 ha).
4B. McGinty Mountain	220 ac (89 ha)	Subtracted: 72 ac (29 ha).		148 ac (60 ha).
4C. McGinty Mountain	27 ac (11 ha)	Added: 1 ac (0 ha)		28 ac (11 ha).
4D. Hollenbeck Canyon	84 ac (34 ha)			84 ac (34 ha).
Total	1,936 ac (783 ha) **	Subtracted: 69 ac (29 ha).	121 ac (48 ha)	1,748 ac (707 ha).

* The values in this table do not represent an actual conversion of acres to hectares.

** The sum of the values in this column is 1,938 ac (783 ha), whereas the value given for the total in the Table 1 of the March 14, 2007, **Federal Register** notice was 1,936 ac (783 ha). This difference is due to rounding and the conversion of values from acres to hectares on a subunit-by-subunit basis rather than for the critical habitat as a whole.

(1) In the proposed rule (72 FR 11946; March 14, 2007), we proposed to exclude a total of 95 ac (38 ha) of private lands in subunits 3C, 3D, and 3F from the final critical habitat designation under section 4(b)(2) of the Act. We believed these lands were within the planning boundary for the County of San Diego approved subarea plan under the San Diego MSCP. However, the private lands in subunits 3C, 3D, and 3F are not within the planning boundary for the County of San Diego subarea plan under the MSCP; therefore, consideration for exclusion under that HCP was inappropriate. All lands that meet the definition of critical habitat in subunits 3C, 3D, and 3F are now designated as critical habitat.

(2) In the proposed rule (72 FR 11946; March 14, 2007), the maps and boundary descriptions of subunits 4A and 4B were delineated correctly; however, the area estimates were incorrect. The correct area for subunit 4A is 20 ac (8 ha) rather than 18 ac (7 ha), and the correct area for subunit 4B is 148 ac (60 ha) rather than 220 ac (89 ha) (see Table 1). Non-Federal lands in subunits 4A and 4B are excluded from critical habitat, and the federally owned lands in subunit 4A are designated as critical habitat.

(3) In the proposed rule (72 FR 11946; March 14, 2007), we did not identify that subunit 4A contained 2 ac (1 ha) of federally owned land, and subunit 4C contained 1 ac (<1 ha) of federally owned land. Both of these subunits include land in the Service's San Diego National Wildlife Refuge (SDNWR). We proposed to exclude all non-Federal lands in subunits 4A and 4C from the final designation based on the benefits provided to *Acanthomintha ilicifolia* by the County of San Diego subarea plan under the MSCP. While we are excluding all private and non-Federal public lands covered by the subarea plan in this final rule, this exclusion

does not apply to Federal lands; therefore, we are designating 3 ac (1 ha) on the SDNWR in Unit 4.

(4) We re-evaluated the areas proposed as critical habitat based on more up-to-date aerial imagery, field visits, and the most recent version of the HabiTrak database (i.e., a database that shows areas lost to development in the area covered by the MSCP). We determined that some areas proposed as critical habitat no longer contain the PCE. Therefore, we removed these areas from critical habitat. Below we describe the specific areas that we removed from critical habitat:

(a) Subunit 1A, Palomar Airport—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 88 ac (36 ha). After re-evaluating this area, we found that approximately 26 ac (11 ha) do not contain the PCE, including all active agricultural fields, lands containing navigational aides associated with McClellen-Palomar Airport, a dirt maintenance road, and development areas in the City of Carlsbad (see Table 1). As a result, we determined that 62 ac (25 ha) meet the definition of critical habitat in subunit 1A. Of the 62 ac (25 ha), we are designating 60 ac (24 ha) as critical habitat, and we are excluding 2 ac (1 ha) from critical habitat under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(b) Subunit 1B, Southeast Carlsbad—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 73 ac (30 ha). After re-evaluating this area, we found that approximately 16 ac (7 ha) are regularly maintained wildland-urban interface and do not support the PCE for *Acanthomintha ilicifolia*; therefore, we removed these 16 ac (7 ha) from critical habitat (see Table 1). As a result, we determined that 57 ac (23 ha) meet the definition of critical habitat in subunit 1B. We are excluding all of the 57 ac (7 ha) from critical habitat under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(c) Subunit 1C, Manchester—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 92 ac (37 ha). After re-evaluating this area, we found that approximately 13 ac (5 ha) are fragmented by suburban development or are too steep to support the PCE for *Acanthomintha ilicifolia*; therefore, we removed these 13 ac (5 ha) from critical habitat (see Table 1). As a result, we determined that 79 ac (32 ha) meet the definition of critical habitat in subunit 1C. Of the 79 ac (32 ha) that meet the definition of critical habitat, we are designating 9 ac (4 ha) as critical habitat, and we are excluding 70 ac (28 ha) from critical habitat under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(d) Subunit 3A, Viejas Mountain—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 33 ac (13 ha). After re-evaluating this area, we found that approximately 1 ac (<1 ha) is developed and no longer supports the PCE for *Acanthomintha ilicifolia*; therefore, we removed this 1 ac (<1 ha) from critical habitat (see Table 1). As a result, we determined that 32 ac (13 ha) meet the definition of critical habitat in subunit 3A. We are excluding all of the 32 ac (13 ha) from critical habitat under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(e) Subunit 3B, Viejas Mountain—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 208 ac (84 ha). After re-evaluating this area, we found that approximately 15 ac (6 ha) are developed and no longer support the PCE for *Acanthomintha ilicifolia*; therefore, we removed these 15 ac (6 ha) from critical habitat (see Table 1). As a result, we determined that 193 ac (78 ha) meet the definition of critical habitat in subunit 3B. Of the 193 ac (78 ha) that meet the definition of critical habitat in subunit 3B, we are designating 52 ac (21 ha) as critical habitat, and we are excluding 141 ac (57 ha) from critical habitat under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(f) Subunit 3C, Viejas Mountain—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 318 ac (128 ha). After re-evaluating this area, we found that approximately 42 ac (16 ha) are impacted by rural development and do not contain the PCE; therefore, we removed these 42 ac (16 ha) from critical habitat (see Table 1). As a result, we determined that 276 ac (112 ha) meet the definition of critical habitat in subunit 3C. We are designating all of the 276 ac (112 ha), which are federally owned, as critical habitat.

(g) Subunit 3F, Poser Mountain—In the proposed rule (72 FR 11946; March 14, 2007), we indicated that this subunit contained 163 ac (66 ha). After re-evaluating this area, we found that approximately 8 ac (3 ha) are impacted by rural development or agricultural activities and do not contain the PCE; therefore, we removed these 8 ac (3 ha) from critical habitat (see Table 1). As a result, we determined that 155 ac (63 ha) meet the definition of critical habitat in subunit 3F. We are designating the 155 ac (63 ha), all of which are federally owned, as critical habitat.

(5) In the proposed rule (72 FR 11946; March 14, 2007), we proposed the exclusion of lands in subunit 1A and 1B covered by the Carlsbad Habitat Management Plan (HMP) under the MHCP from the designation of critical habitat under section 4(b)(2) of the Act. Upon further analysis of the Carlsbad HMP, we found that coverage of *Acanthomintha ilicifolia* under this HCP is contingent on compliance with the conservation measures outlined in the HMP (i.e., a funded management plan in place) and the completion of the San Marcos subarea plan under the MHCP. We announced that we were reconsidering this exclusion in our May 13, 2008, **Federal Register** notice (73 FR 27483); we did not receive public comments on this subject. However, we did not identify any lands in San Marcos that meet the definition of critical habitat as described in the ''Criteria Used to Identify Critical Habitat'' section. Therefore, we analyzed the exclusion of subunit 1A and 1B in more detail and concluded that exclusion is appropriate because the essential habitat under the Carlsbad HMP is conserved and has management in place (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion). We are designating the remaining 60 ac (24 ha) of land owned by the County of San Diego in subunit 1A because it is not covered by the Carlsbad HMP.

(6) In the proposed rule (72 FR 11946; March 14, 2007), we proposed the exclusion of lands in subunit 1C covered by the pending Encinitas subarea plan under the MHCP from the designation of critical habitat under section 4(b)(2) of the Act. At this time, the Encinitas subarea plan under the MHCP has not been completed. However, the majority of subunit 1C is part of the Manchester Avenue Mitigation Bank and is actively managed for *Acanthomintha ilicifolia* (Spiegelberg 2005, p. 1–33). We determined that the benefits of excluding lands within the conservation bank area from critical habitat designation outweigh the benefits of including the area, and that their exclusion will not result in extinction of this species. Therefore, we are excluding 70 ac (28 ha) of subunit 1C under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion),

and we are designating the remaining 9 ac (4 ha) of private lands outside the Manchester Avenue Mitigation Bank as critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

(7) In the proposed rule (72 FR 11946; March 14, 2007), we proposed the exclusion of non-Federal lands covered by the City of San Diego subarea plan under the MSCP in subunits 2A and 2B and the exclusion of non-Federal lands covered by the County of San Diego subarea plan under the MSCP in subunits 2C, 2D, 3A, 3B, 4A, 4B, 4C, and 4D from the designation of critical habitat under section 4(b)(2) of the Act. In this final rule, we determined that the benefits of exclusion outweigh the benefits of inclusion of these lands and that their exclusion will not result in extinction of this species. Therefore, we excluded all non-Federal lands in subunits 2A and 2B covered by the City of San Diego subarea plan and all non-Federal lands in subunits 2C, 2D, 3A, 3B, 4A, 4B, 4C, and 4D covered by the County of San Diego subarea plan, under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion). Federally owned lands in subunits 3B, 4A, and 4C are designated as critical habitat.

(8) In our March 14, 2007, proposed rule (72 FR 11946), we indicated that all subunits except 3E and 4D were known to be occupied by the species at the time of listing (October 13, 1998). We now consider subunits 3E and 4D to have been occupied at the time of listing. Even though these occurrences were not discovered until after the species was listed in 1998, over 1,000 plants were recorded at each of these sites when they were first discovered in 2000 and 2001, respectively. We believe the large population size indicates that the occurrences were established for several years prior to their discovery and were established at the time the species was listed. *Acanthomintha ilicifolia* seeds do not disperse in large numbers and any new population of *A. ilicifolia* would likely start out small and take several years to reach a population size greater than 1,000 plants. Therefore, since these large populations were discovered 2 to 3 years after listing, we consider all subunits proposed or designated as critical habitat to have been occupied at the time of listing (see ''Criteria Used To Identify Critical Habitat'' section). We designated critical habitat in subunit 3E, and we excluded subunit 4D as discussed above.

(9) We made two corrections to our description of the PCE. First, in the proposed rule (72 FR 11946; March 14, 2007), we omitted grassland vegetation as one of the vegetation types in which *Acanthomintha ilicifolia* is commonly found. This information was discussed in the proposed rule, but was inadvertently left out of the PCE. We included it in the PCE in this final rule. Second, in the proposed rule (72 FR 11946; March 14, 2007), we indicated that deep fissures in the clay soils associated with *A. ilicifolia* are approximately 2 feet (60 cm) deep. However, there are only observational discussions and no formal studies on this topic. We broadened the statement on this habitat feature in the PCE to state that the fissures in the soil range in depth from approximately 1 to 2 feet (30 to 60 cm).

As a result of the removals and corrections outlined above, a total of approximately 1,748 ac (707 ha) meets the definition of critical habitat and is considered essential habitat for *Acanthomintha ilicifolia*. We are excluding approximately 1,077 ac (435 ha) of essential habitat under section 4(b)(2) of the Act because we determined that the benefits of excluding those lands from the critical habitat designation outweigh the benefits of including them in the designation (see ''Exclusions Under Section 4(b)(2) of the Act'' section) . In conclusion, we are designating 671 ac (272 ha) of land in San Diego County as critical habitat for *A. ilicifolia* in this final rule.

Critical Habitat

Critical habitat is defined in section 3 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

(a) Essential to the conservation of the species and

(b) Which 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, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, or transplantation.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical or biological features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found those physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species).

Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection.

Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the

Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. In the case of *Acanthomintha ilicifolia*, several botanists and land managers conducted field assessments and management experiments that were helpful in identifying the areas that meet the definition of critical habitat. There is no recovery plan for *A. ilicifolia*.

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 we may eventually determine, based on scientific data not now available to the Service, are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designations, will continue to be subject to conservation actions we implement under section 7 of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the Federal agency 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 (HCPs), or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied by the species at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species that may require special management considerations or protection to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These physical and biological features include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We derived the specific primary constituent element required for *Acanthomintha ilicifolia* from its biological needs, as described in the proposed critical habitat rule published in the **Federal Register** on March 14, 2007 (72 FR 11946), and below.

Space for Individual and Population Growth and Normal Behavior

Acanthomintha ilicifolia occurs on isolated patches of clay soils derived from gabbro and soft calcareous sandstone substrates (Oberbauer and Vanderwier 1991, pp. 208–209). The soils derived from gabbro substrates are red to dark brown clay soils, and those derived from soft calcareous sandstone are gray clay soils. These patches of clay soils are called ''clay lenses.'' In San Diego County, California, and northern Baja California, Mexico, clay lenses are known to support a variety of narrow endemic (restricted to a specific geographic area) plants. Clay lenses tend to have an open or unpopulated look because many common species cannot tolerate living on these clay soils. Clay lenses are typically devoid of woody, perennial shrubs (Oberbauer and Vanderwier 1991, pp. 208–209) (PCE). Shrubs have difficulty surviving on these soils because in the rainy winter months these soils become saturated with water and the large root systems of shrubs are not able to get oxygen (Oberbauer and Vanderwier 1991, pp. 208–209). Another reason it is difficult for shrubs to take root and become established on the clay soil is because as the soils become saturated with water they expand and when the soils dry they contract and crack. The harsh conditions that clay soils exhibit make clay lenses a difficult microhabitat for annual native plants to grow on, which limits the number and density of common native plants on clay lenses. Due to the absence of most common native vegetation from clay lenses, the areas where *A. ilicifolia* occurs appear as open areas surrounded by areas populated by denser vegetation.

In addition to the characteristics discussed above, the texture and structure of the clay lenses are essential for supporting the seedling establishment and growth of *Acanthomintha ilicifolia*. This soil provides many small pockets and deeper fissures where seeds from *A. ilicifolia* become lodged as they fall from decomposing plants (Bauder and Sakrison 1999, p. 28). The seeds stay in the soils until the temperatures become cooler in the winter months and the soil becomes saturated with the winter rains (Bauder and Sakrison 1997, p. 28–29). The seedlings then germinate and grow to mature plants. These plants do best when they are not crowded or shaded by other plants (Bauder and Sakrison 1999, p. 12). The loose, crumbly texture of the soil provides the proper substrate to hold the seed bank and allow for root growth.

Clay lenses are generally inhabited by a specific flora that consists of forbs, native grasses, and geophytes (perennial plants propagated by buds on underground bulbs, tubers, or corms, such as lilies, iris, and onions) (Oberbauer and Vanderwier 1991, pp. 208–209), which are better adapted to the harsh conditions mentioned above. Native plant species that characterize the vegetation found with *Acanthomintha ilicifolia* on clay lenses include *Hesperevax sparsiflora* var. *sparsiflora* (erect evax), *Harpagonella palmeri* (Palmer's grappling-hook), *Convolvulus simulans* (bindweed), *Apiastrum angustifolium* (mock parsley), and *Microseris douglasii* ssp. *platycarpha* (small flowered microseris) (Bauder *et al.* 1994, pp. 9–10; McMillan 2006, p. 1; Vinje 2006b, pp. 1–2).

Clay lenses generally form on gentle slopes. An analysis of 20 sites where

Acanthomintha ilicifolia was observed found that the slopes range from 0 to 25 degrees, with the majority of the sites having slopes below 20 degrees (Bauder *et al.* 1994, pp. 10–11). This study found that many thriving, natural populations were on slopes that faced southeast, south, southwest, and west (Bauder *et al.* 1994, pp. 10–11). Using GIS, we found that the known populations of *A. ilicifolia* range in elevation from sea level to 3,000 ft (914 m). *Acanthomintha ilicifolia* occurs on soils mapped as Las Posas, Olivenhain, Redding, Huerhuero, Altamont, Cieneba, and Linne (Service GIS database; soils described by Bowman 1973, pp. 22–24, 38–40, 54–55, 61–64, 67–68, and 71–72).

Water and Hydrology

The loose, crumbly clay soils that support *Acanthomintha ilicifolia* act like a sponge and are saturated by winter rains. The saturation of these soils allows for seeds of *A. ilicifolia* to imbibe with water and germinate in the cool winter months of the Mediterranean-type climate (Bauder and Sakrison, 1997, p. 32). As such, the species requires a natural hydrological regime to reproduce. However, we do not have specific information on the hydrological regime that this species requires, other than the general characteristics of a Mediterranean-type climate; therefore, we did not include hydrological regime as a primary constituent element.

Reproduction and Pollination

The breeding system of *Acanthomintha ilicifolia* has not been studied, but it has been determined that other members of the genus *Acanthomintha* are self-compatible (Steeck 1995, pp. 27–33). A 1996 study (Bauder and Sakrison 1997, p. 38) found that several insect species visited the flowers and moved from plant to plant. These insects represented possible pollinators of *A. ilicifolia*; however, none were thought to represent species-specific pollinators (Bauder and Sakrison 1997, p. 39). Since we do not have information on any species-specific pollinators that visit *A. ilicifolia*, we did not include pollinators as a primary constituent element.

Primary Constituent Element for Acanthomintha ilicifolia

Within the geographical area known to be occupied by *Acanthomintha ilicifolia, at the time of listiing we must identify the physical and biological features that may require* special management considerations or protection.

In this case, we identified one PCE with multiple parts. All areas designated as critical habitat for *Acanthomintha ilicifolia* are occupied, occur within the species' historic geographic range, and contain the PCE required to support at least one life history function. The data provided in the PCE is summarized from existing scientific data. It is important to note that the variable amounts and timing of precipitation in southern California do not result in favorable conditions for *A. ilicifolia* in every year.

Based on the above needs and 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 determined that the PCE for *Acanthomintha ilicifolia* is:

Clay lenses that provide substrate for seedling establishment and space for growth and development of *Acanthomintha ilicifolia* that are:

(a) Within chaparral, grassland, and coastal sage scrub;

(b) On gentle slopes ranging from 0 to 25 degrees;

(c) Derived from gabbro and soft calcareous sandstone substrates with a loose, crumbly structure and deep fissures approximately 1 to 2 feet (30 to 60 cm); and

(d) Characterized by a low density of forbs and geophytes, and a low density or absence of shrubs.

This designation encompasses those areas containing the PCE necessary to support one or more of the species' life history functions laid out in the appropriate quantity and spatial arrangement for the conservation of the species. All units and subunits in this designation contain the PCE and support multiple life processes. As stated in the ''Criteria Used To Identify Critical Habitat'' section of this rule, we believe that we can conserve *Acanthomintha ilicifolia* through the designation of critical habitat within its extant range and are not including any areas outside of the geographical area occupied by the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the occupied areas contain features that are essential to the conservation of the species and that may require special management considerations or protection.

As stated in the final listing rule, threats to *Acanthomintha ilicifolia* include trampling and grazing, the presence of exotic plant species, off-road vehicles (ORVs), mining, and urbanization (63 FR 54938). Through our review of the existing data on *A. ilicifolia*, we conclude that the threats listed in the final listing rule continue to impact this species and its essential physical and biological features.

Urban development near *Acanthomintha ilicifolia* populations may alter the habitat characteristics required by this species. The destruction of habitat can change the slope and aspect of a site, making it uninhabitable for *A. ilicifolia* (PCE 1(b)). The close proximity of development to populations of *A. ilicifolia* may affect other aspects of the site. For example, increased water runoff from developments may erode the clay lense and change the topography of the site (Bauder *et al.* 1994, p. 23) (PCE 1(b and c)).

The introduction of exotic plant species such as *Centaurea melitensis* can drastically change the species present in (PCE 1(a)), and eliminate the open character of, the clay lense habitat (PCE 1(d)). *Centaurea melitensis* has been shown, in field and greenhouse experiments, to negatively effect the biomass (growth) and seed production (reproduction) of *Acanthomintha ilicifolia* (Bauder and Sakrison 1999, p. 16). Populations of *A. ilicifolia* that are close to urbanized areas or in areas that are heavily grazed generally have a high density of exotic plant species (PCE 1(a)). In disturbed soils, *C. melitensis* is a common weed. When this and other exotic plant species become established, they can out-compete *A. ilicifolia* for light, water, nutrients, and space. *Acanthomintha ilicifolia* often grows larger and at a higher density when competition with exotic weeds is reduced (Bauder and Sakrison 1999, pp. 12–16; Vinje 2007, p. 10).

The final listing rule (63 FR 54938) discusses the impacts of ORV activity and trampling. In recent years, the impacts associated with the use of mountain bikes have been documented to cause similar impacts (Vinje 2006a, p. 1). Trampling, ORV activity, and mountain bike use in *Acanthomintha ilicifolia* habitat can compact the loose, crumbly soils (PCE 1(c)). Repeated travel over a trail or track degrades the habitat of *A. ilicifolia* in two ways: (1) By displacing soil; and (2) by compacting soil. These activities, in turn, can destroy individual plants and can reduce the amount of water that can percolate into the soil, thus reducing the plant's ability to grow and reproduce.

Mining is documented as a threat at two sites known to support *Acanthomintha ilicifolia* (63 FR 54938; Bauder *et al.* 1994, p. 17). Mining can alter many aspects of *A. ilicifolia*

habitat. Heavy machinery can compact or remove clay lenses (PCE 1(c)) or alter the slope of an area (PCE 1(b)). The grading of large areas adjacent to *A. ilicifolia* habitat can make those areas vulnerable to invasion by exotic plant species and lead to the subsequent crowding and shading of *A. ilicifolia* habitat (PCE 1(d)). These impacts may in turn lead to the disruption of the growth and reproduction of *A. ilicifolia*.

The protection of habitat for *Acanthomintha ilicifolia* from development is the first measure of protection needed for populations of this species (PCE 1(a)). The control of exotic plant species, the maintenance and enhancement of clay lense habitat, the control of incompatible and often illegal activities such as off-road vehicle use and other unauthorized recreational impacts, and careful oversight of adjacent activities such as mining, will help to ensure the long-term conservation for *A. ilicifolia* and the physical and biological features essential for the conservation of the species.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining the specific occupied areas that contain the features essential to the conservation of species which may require special management considerations or protection, as well as when determining if any specific areas outside the geographical area occupied by the species are essential to the conservation of the species. We only designate areas outside the geographical area occupied by a species when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)).

Species and plant communities that are protected across their ranges are expected to have lower likelihoods of extinction (Soule and Simberloff 1986; Scott *et al.* 2001, pp. 1297–1300); therefore, essential habitat should include multiple locations across the entire range of the species to prevent range collapse and contribute to recovery of the species. Conserving habitat variability throughout the range of this species is important to capture the range of habitat diversity and, potentially, genetic variability, the preservation of which is likely to ensure the conservation of those *Acanthomintha ilicifolia* occurrences that are most likely to persist under future environmental conditions and to contribute to species recovery. Genetic variation generally results from the effects of population isolation and adaptation to locally distinct environments (Lesica and Allendorf 1995, pp. 754–757; Fraser 2000, pp. 49–51; Hamrick and Godt 1996, pp. 291–295). We sought to include the range of ecological conditions in which *A. ilicifolia* is found to preserve the genetic variation that may result from adaptation to local environmental conditions, as documented in other plant species (e.g., see Hamrick and Godt 1996, pp. 299–301; Millar and Libby 1991, pp. 150, 152–155). Locations that possess unique ecological characteristics are those that represent the full range of environmental variability where *A. ilicifolia* has evolved, and therefore, are likely to promote the adaptation of the species to different environmental conditions and contribute to species recovery.

All critical habitat subunits discussed in this designation are occupied by the species. Occupied areas were determined from survey data and element occurrence data in the California Natural Diversity Database (CNDDB) (CNDDB 2006). For the purpose of this designation, we assumed that each element occurrence represents a population of *Acanthomintha ilicifolia*, except in cases where there are several element occurrences located within 1 mile (1.6 km) of each other and the habitat is not fragmented by manmade features. In these cases, we considered the group of element occurrences as a single population. Examples of this include the Manchester Avenue Mitigation Bank in Encinitas (element occurrence (EO) 28, EO 42, and EO 54), McGinty Mountain near Jamul (EO 21, EO 22, and EO 30), and Viejas and Poser Mountains near Alpine (EO 12, EO 50, EO 51, EO 62, EO 73, EO 74, and EO 75).

Using GIS data in the areas identified as occupied by this species as a guide, we identified the areas that contained the physical and biological features essential to the conservation of *Acanthomintha ilicifolia* (the PCE). To map the areas that meet the definition of critical habitat, we identified areas that contain the PCE in the quantity and spatial distribution essential for the conservation of this species using the following criteria: (1) Support populations that occur on rare or unique habitat within the species' range; (2) support the largest known populations of *A. ilicifolia;* or (3) support the most stable populations of *A. ilicifolia*. These criteria are explained in greater detail below. Areas containing the PCE and that meet at least one of the above criteria were considered to meet the definition of critical habitat. We included adjacent areas up to 500 ft (128 m) that contained habitat for *A. ilicifolia* to capture the full extent of each population including the seed bank, as this species fluctuates annually in population density and spatial distribution. Data from past survey efforts and recent field work conducted by Service biologists frequently found occurrences of *A. ilicifolia* located outside the exact areas where this species was mapped (Bauder et al. 1994, pp. 14–15; CNDDB 2006, pp. 11, 28–29, and 70; Service unpublished data 2006).

The resulting areas meet the definition of critical habitat. To evaluate locations occupied by this species we used the CNDDB (CNDDB 2006, pp. 1–74), a survey of *A. ilicifolia* habitat and populations by Bauder *et al.* (1994, pp. 7–23), biological surveys (City of San Diego 2000, pp 2–6; City of San Diego 2001, pp. 1–10; City of San Diego 2003, pp. 1–11; City of San Diego 2004, pp. 1–7; City of San Diego 2005, pp. 1–5; Conservation Biology Institute 2002, p. A3–1; County of San Diego 2002, p. 17; Dudek and Associates, Inc. 2006, Appendix A, pp. 3–4; Helix Environmental Planning, Inc. 2002, p. 6; REC Consultants, Inc. 2004, figure 5), and interviews with botanists working on this species (Kelley 2005, p. 1; McMillan 2006, p. 1; Vinje 2006b, pp. 1–2).

The first criterion we used to identify critical habitat is any area that supports a population in rare or unique habitat within the species' range. The majority of areas that currently support *Acanthomintha ilicifolia* are on dark brown to reddish brown clay soils derived from gabbro substrates. Historically, *A. ilicifolia* also occurred on gray clay soils that are derived from soft calcareous sandstone substrates. Conserving unique habitats for *A. ilicifolia* may help to reduce the risk of extinction for this species as it may capture remaining ecological diversity within the range of the species and contribute to the recovery of this species. This ecological diversity may be reflected in genetic diversity; however, at this time, no one has investigated the genetic structure of this species. The only remaining population on the calcareous clay soil type is northeast of the intersection of Palomar Airport Road and El Camino Real, in the City of Carlsbad.

The second criterion we used to identify critical habitat is any area that supports one of the largest known populations of *Acanthomintha ilicifolia*. The CNDDB includes data for this species that date back to 1978. Populations of this species range from

just a few individuals to several thousand plants. The majority of the known populations range from 50 to 2,000 plants. Yet, there are four populations that stand out as the largest, each having greater than 25,000 plants. These large populations are vital for the conservation of this species and occur within large blocks of open space that are less likely to be impacted by edge effects associated with the smaller populations in highly urbanized areas. Therefore, the conservation of these large populations will increase the persistence of the species across its range and the overall recovery of this species. The four largest populations and the estimated population at each location are: Sycamore Canyon, 31,000 plants; Slaughterhouse Canyon, 60,000 plants; Viejas and Poser Mountains, 29,650 plants; and Hollenbeck Canyon, 100,000 plants. These four populations represent approximately 75 percent of the total known plants of this species.

The third criterion we used to identify critical habitat is any area that supports one of the most stable populations of *Acanthomintha ilicifolia*. For the purpose of this critical habitat designation, we defined the most stable populations as those that contained more than 1,000 plants at least once during the period for which we have survey data. We evaluated the population data from the CNDDB and determined that populations with more than 1,000 plants at some time had the ability to rebound following years with low population numbers. Therefore, we considered populations with more than 1,000 plants to have a high probability of persisting into the future and contributing to the conservation of the species. Although these areas are not free from exotic plant competitors, these populations have persisted over time without being out-competed by the exotic plant species present. This may partially be a result of the low density of exotic plant species at these locations and, in some cases, the management of exotic plant species. All of the areas that meet criterion two also meet criterion three. Five additional areas have populations of *A. ilicifolia* that meet criterion three: the southeast portion of the City of Carlsbad; the Manchester Avenue Mitigation Bank; Los Peñasquitos Canyon; Sabre Springs; and McGinty Mountain. These areas support the most stable populations of *A. ilicifolia*.

All 10 areas that we identified as meeting the criteria for critical habitat contain the PCE essential for the conservation of this species. These areas support the only population on calcareous clay soil, the largest populations, and the most stable populations of *Acanthomintha ilicifolia*. Application of these criteria captures the physical and biological features essential to the conservation of the species in the appropriate quantity and spatial arrangement and represents the range of environmental variability for this species. Although a genetic analysis of *A. ilicifolia* is not available, these criteria likely capture the full breadth of important habitat types and are expected to protect the genetic variability of this species. The identified habitat areas, if managed for threats to the physical and biological features, are adequate to ensure the conservation of *A. ilicifolia*.

When determining the critical habitat boundaries for this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the PCE for *Acanthomintha ilicifolia*. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this critical habitat rule have been excluded by text in this final rule. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action may affect adjacent critical habitat.

Final Critical Habitat Designation

We are designating approximately 671 ac (272 ha) of critical habitat for *Acanthomintha ilicifolia* in three of the four units proposed as critical habitat with a total of 10 subunits. Table 2 outlines the areas that meet the definition of critical habitat, the areas excluded from this final critical habitat, and the area designated as critical habitat. Table 2 also shows a breakdown of the critical habitat based on the ownership of these areas. The critical habitat areas we describe below constitute our current best assessment of areas designated as critical habitat for *A. ilicifolia*. In this section, we did not discuss the details of the areas that are excluded from critical habitat under section 4(b)(2) of the Act. For more information on the areas that are excluded, please see the ''Exclusions Under Section 4(b)(2) of the Act'' section.

TABLE 2—AREAS THAT MEET THE DEFINITION OF CRITICAL HABITAT FOR ACANTHOMINTHA ILICIFOLIA, AREAS EXCLUDED FROM THIS FINAL CRITICAL HABITAT, AND AREAS DESIGNATED AS CRITICAL HABITAT; INCLUDING THE OWNERSHIP OF EACH AREA

Critical habitat unit	Land ownership	Area that meets the definition of critical habitat	Area excluded from final critical habitat	Area designated as critical habitat
Unit 1: Northern San Diego County:				
1A. Palomar Airport	Private	2 ac (1 ha)	2 ac (1 ha)	0 ac (0 ha).
	State/Local	60 ac (24 ha)	0 ac (0 ha)	60 ac (24 ha).
1B. Southeast Carlsbad	Private	57 ac (23 ha)	57 ac (23 ha)	0 ac (0 ha).
1C. Manchester	Private	79 ac (32 ha)	70 ac (28 ha)	9 ac (4 ha).
Unit 2: Central San Diego County:				
2A. Los Peñasquitos Canyon	State/Local	63 ac (25 ha)	63 ac (25 ha)	0 ac (0 ha).
2B. Sabre Springs	Private	1 ac (<1 ha)	1 ac (<1 ha)	0 ac (0 ha).
	State/Local	51 ac (21 ha)	51 ac (21 ha)	0 ac (0 ha).
2C. Sycamore Canyon	Private	30 ac (12 ha)	30 ac (12 ha)	0 ac (0 ha).
	State/Local	276 ac (112 ha)	276 ac (112 ha)	0 ac (0 ha).
2D. Slaughterhouse Canyon	Private	77 ac (31 ha)	77 ac (31 ha)	0 ac (0 ha).
Unit 3: Viejas Mountain and Poser Mountain:				
3A. Viejas Mountain	Private	32 ac (13 ha)	32 ac (13 ha)	0 ac (0 ha).
3B. Viejas Mountain	Private	141 ac (57 ha)	141 ac (57 ha)	0 ac (0 ha).

TABLE 2—AREAS THAT MEET THE DEFINITION OF CRITICAL HABITAT FOR ACANTHOMINTHA ILICIFOLIA, AREAS EXCLUDED FROM THIS FINAL CRITICAL HABITAT, AND AREAS DESIGNATED AS CRITICAL HABITAT; INCLUDING THE OWNERSHIP OF EACH AREA—Continued

Critical habitat unit	Land ownership	Area that meets the definition of critical habitat	Area excluded from final critical habitat	Area designated as critical habitat
	Federal	52 ac (21 ha)	0 ac (0 ha)	52 ac (21 ha).
3C. Viejas Mountain	Federal	276 ac (112 ha)	0 ac (0 ha)	276 ac (112 ha).
3D. Viejas Mountain	Private	50 ac (20 ha)	0 ac (0 ha)	50 ac (20 ha).
	Federal	32 ac (13 ha)	0 ac (0 ha)	32 ac (13 ha).
3E. Poser Mountain	Federal	34 ac (14 ha)	0 ac (0 ha)	34 ac (14 ha).
3F. Poser Mountain	Federal	155 ac (63 ha)	0 ac (0 ha)	155 ac (63 ha).
Unit 4: Southern San Diego County:				
4A. McGinty Mountain	Private	18 ac (7 ha)	18 ac (7 ha)	0 ac (0 ha).
	Federal	2 ac (1 ha)	0 ac (0 ha)	2 ac (1 ha).
4B. McGinty Mountain	Private	141 ac (57 ha)	141 ac (57 ha)	0 ac (0 ha).
	State/Local	7 ac (3 ha)	7 ac (3 ha)	0 ac (0 ha).
4C. McGinty Mountain	Private	27 ac (11 ha)	27 ac (11 ha)	0 ac (0 ha).
	Federal	1 ac (<1 ha)	0 ac (0 ha)	1 ac (<1 ha).
4D. Hollenbeck Canyon	Private	23 ac (9 ha)	23 ac (9 ha)	0 ac (0 ha).
	State Local	61 ac (25 ha)	61 ac (25 ha)	0 ac (0 ha).
Total		1,748 ac (707 ha)*	1,077 ac (435 ha)*	671 ac (272 ha)*.

*Values in this table may not sum due to rounding and the conversion of values from acres to hectares.

Unit Descriptions

Unit 1: Northern San Diego County

Unit 1 is located in northern San Diego County, California. The area was occupied at the time of listing, is currently occupied, and contains the features essential to the conservation of *Acanthomintha ilicifolia* that may require special management considerations or protection for *A. ilicifolia*. The habitat in Unit 1 is gently sloping and occurs in the north coastal portion of San Diego County. The habitat included in this unit provides for the conservation of populations of this species that are at the lowest elevations where this species is found. These areas represent coastal terrace terrain and, therefore, are edaphically and ecologically distinct from the other units of critical habitat (subunit 1A) (see ''Criteria Used to Identify Critical Habitat'' section criterion 1). This unit contains some of the most stable populations of *A. ilicifolia* (subunits 1B and 1C) (see ''Criteria Used to Identify Critical Habitat'' section criterion 3). Below, we present a brief description of subunits designated as critical habitat in this unit.

Subunit 1A, Palomar Airport

Subunit 1A is located in Carlsbad, California, northeast of the intersection of Palomar Airport Road and El Camino Real. Subunit 1A consists of 60 ac (24 ha) of land owned by the County of San Diego. Subunit 1A meets our selection criteria because it supports a population on a unique soil type (see ''Criteria Used to Identify Critical Habitat'' section criterion 1). This is the only area where *A. ilicifolia* is still known to occupy calcareous clay soils. The features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from exotic plant species and unauthorized recreational activities.

A portion of the land that meets the definition of critical habitat in this area (2 ac (1 ha)) is covered by the Carlsbad HMP of the San Diego MHCP. We excluded the portion of critical habitat covered by the Carlsbad HMP from critical habitat because we determined the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation. Furthermore, exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 1B, Southeast Carlsbad

Subunit 1B is located in Carlsbad, California, east of Calle Acervo and west of Paseo Esmerado. All lands within this subunit (57 ac (23 ha)) are covered by the Carlsbad HMP of the San Diego MHCP. We excluded the lands covered by the Carlsbad HMP under the MHCP in this subunit because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation. Furthermore, exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 1C, Manchester

Subunit 1C is located in Encinitas, California, northeast of the intersection of Manchester Avenue and South El Camino Real. Subunit 1C consists of 9 ac (4 ha) of private land. Subunit 1C meets our selection criteria because it supports one of the most stable populations of *Acanthomintha ilicifolia* (criterion 3). The features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from exotic plant species and unauthorized recreational activities.

The majority of the land that meets the definition of critical habitat in this area (70 ac (28 ha)) is in the Manchester Avenue Mitigation Bank. The Manchester Avenue Mitigation Bank is owned and managed by the Center for Natural Lands Management (CNLM). There is long-term management in place on this site to conserve several sensitive species, including *Acanthomintha ilicifolia* (Spiegelberg 2005, p. 1). We excluded the portion of critical habitat covered by the Manchester Habitat Conservation Area Management Plan (Spiegelberg 2005) from critical habitat because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation; exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2)

of the Act'' section of this final rule for a detailed discussion of this exclusion).

Unit 2: Central San Diego County

Unit 2 is located in an east-west line starting in the County of San Diego on private land east of the Sycamore Canyon/Goodan Ranch Preserve (subunit 2D), occurring on County-owned open space in the Sycamore Canyon/Goodan Ranch Preserve (subunit 2C), occurring on City of San Diego-owned land in Los Peñasquitos Canyon near the border or the City of San Diego and the City of Poway (subunit 2B), and occurring in Peñasquitos Canyon Preserve (subunit 2A). The unit was occupied at the time of listing, is currently occupied, and contains the features essential to the conservation of *Acanthomintha ilicifolia* that may require special management considerations or protection for *A. ilicifolia*. This unit contains some of the largest populations of *A. ilicifolia* (subunits 2C and 2D) (criterion 2) and some of the most stable populations of *A. ilicifolia* (subunits 2A and 2B) (criterion 3). All lands that meet the definition of critical habitat in Unit 2 are covered by either the City of San Diego subarea plan (subunits 2A and 2B) or the County of San Diego subarea plan (subunits 2C and 2D) under the San Diego MSCP and are excluded from the designation. We determined that the benefits of excluding these lands outweigh the benefits of including these lands in the designation and that exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Unit 3: Viejas Mountain and Poser Mountain

Unit 3 is located in San Diego County, California, on Viejas Mountain and Poser Mountain. The area was occupied at the time of listing, is currently occupied, and contains the features essential to the conservation of *Acanthomintha ilicifolia* that may require special management considerations or protection for *A. ilicifolia*. Unit 3 is divided into six subunits, five of which are designated as critical habitat. Due to the proximity of the occurrences in this area and the fact that the habitat is not fragmented by any manmade barriers, we consider these occurrences to be a single population of *A. ilicifolia*. Unit 3 is designated as critical habitat because it supports one of the largest recorded populations of the species (criterion 2). This population is estimated to have greater than 25,000 plants based on the maximum number of plants observed at the different CNDDB element occurrences (EO 12, 6,650 plants in 1991 (subunit 3F); EO 50, 5,600 plants in 1994 (subunit 3B); EO 51, 8,300 plants in 2003 (subunit 3C); EO 62, 1,115 plants in 2000 (subunit 3C); EO 73, 8,750 plants in 1997; and EO 74, 2,000 plants in 2000 (subunit 3E)). The habitat in unit 3 is more mountainous than the other units and provides for the conservation of this species at the highest elevations where this species is found. Therefore, this unit is ecologically distinct from the other units of critical habitat and provides for the largest population of *A. ilicifolia* as measured by the area occupied by the species. Below, we present a brief description of subunits designated as critical habitat in this unit.

Subunit 3A, Viejas Mountain

Subunit 3A is located east of Peutz Valley Road on the western flank of Viejas Mountain. All lands that meet the definition of critical habitat in this area (32 ac (13 ha)) are covered by the County of San Diego subarea plan of the San Diego MSCP. We excluded the lands covered by the County of San Diego subarea plan in this subunit because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation. Furthermore, exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 3B, Viejas Mountain

Subunit 3B is located east of Alpine, California, and north of Interstate 8 on the western slope Viejas Mountain. Subunit 3B consists of 52 ac (21 ha) of land in the Cleveland National Forest (CNF) owned by the U.S. Forest Service (USFS). This subunit was occupied by the species at the time of listing and is currently occupied. Subunit 3B meets our selection criteria because this subunit is part of one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). The features essential to the conservation of the species in this subunit may require special management considerations or protection to address the threat from exotic plant species and recreational activities.

The privately owned lands that meet the definition of critical habitat in this area (141 ac (57 ha)) are covered by the County of San Diego subarea plan of the San Diego MSCP. We excluded the lands covered by the County of San Diego subarea plan in this subunit because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation and that exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 3C, Viejas Mountain

Subunit 3C is located east of Alpine, California, and north of Interstate 8 on southern slope of Viejas Mountain. Subunit 3C consists of 276 ac (112 ha) of land in the CNF owned by the USFS. This subunit was occupied by the species at the time of listing and is currently occupied. Subunit 3C meets our selection criteria because this subunit is part of one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). The features essential to the conservation of the species in this subunit may require special management considerations or protection to address the threat from exotic plant species and recreational activities.

Subunit 3D, Viejas Mountain

Subunit 3D is located east of Alpine, California, and north of Interstate 8 on the eastern slope of Viejas Mountain. Subunit 3D consists of 32 ac (13 ha) of land in the CNF owned by the USFS and 50 ac (20 ha) of private land. This subunit was occupied by the species at the time of listing and is currently occupied. Subunit 3D meets our selection criteria because this subunit is part of one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). The features essential to the conservation of the species in this subunit may require special management considerations or protection to address the threat from exotic plant species and recreational activities.

Subunit 3E, Poser Mountain

Subunit 3E is located east of Alpine, California, and north of Interstate 8 on western slope of Poser Mountain. Subunit 3E consists of 34 ac (14 ha) of land in the CNF owned by the USFS. This subunit was occupied by the species at the time of listing and is currently occupied. Subunit 3E meets our selection criteria because this subunit is part of one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). The features essential to the conservation of the species in this subunit may require

special management considerations or protection to address the threat from exotic plant species and recreational activities.

Subunit 3F, Poser Mountain

Subunit 3F is located east of Alpine, California, and north of Interstate 8 on southern slope of Poser Mountain. Subunit 3F consists of 155 ac (63 ha) of land in the CNF owned by the USFS. This subunit was occupied by the species at the time of listing and is currently occupied. Subunit 3F meets our selection criteria because this subunit is part of one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). The features essential to the conservation of the species in this subunit may require special management considerations or protection to address the threat from exotic plant species and recreational activities.

Unit 4: Southern San Diego County

Unit 4 is located in southern San Diego County, California near the City of Jamul. The area was occupied at the time of listing, is currently occupied, and contains the features essential to the conservation of *Acanthomintha ilicifolia* that may require special management considerations or protection. This critical habitat unit contains some of the largest populations of *A. ilicifolia* (subunit 4D) (criterion 2) and some of the most stable populations of *A. ilicifolia* (subunits 4A, 4B, and 4C) (criterion 3). The habitat for *A. ilicifolia* in southern San Diego County is located in proximity to rural residential development and in relatively undeveloped areas. Below, we present a brief description of subunits designated as critical habitat in this unit.

Subunits 4A and 4C, McGinty Mountain

Subunits 4A and 4C are located east of Jamul, California, on the southwestern slope of McGinty Mountain. The land designated is part of the San Diego National Wildlife Refuge (SDNWR) and is owned by the Service. We are designating 3 ac (1 ha) of critical habitat in subunits 4A and 4C for *Acanthomintha ilicifolia*. These subunits were occupied by the species at the time of listing and are currently occupied. Subunits 4A and 4C meet our selection criteria because these subunits are part of one of the most stable populations of *A. ilicifolia* (criterion 3). The features essential to the conservation of the species in subunits 4A and 4C may require special management considerations or protection to address the threat from exotic plant species and recreational activities.

The non-Federal lands that meet the definition of critical habitat in this area (18 ac (7 ha) in subunit 4A and 27 ac (11 ha) in subunit 4C) are covered by the County of San Diego subarea plan of the San Diego MSCP. We excluded the lands covered by the County of San Diego subarea plan under the MSCP in this subunit because we have determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation and that exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 4B, McGinty Mountain

All of the lands in subunit 4B that meet the definition of critical habitat in this area (148 ac (60 ha)) are non-Federal and are covered by the County of San Diego subarea plan of the San Diego MSCP. We excluded the lands covered by the County of San Diego subarea plan under the MSCP in this subunit because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in the critical habitat designation, and that exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Subunit 4D, Hollenbeck Canyon

All of the lands in subunit 4D that meet the definition of critical habitat in this area (84 ac (34 ha)) are non-Federal and are covered by the County of San Diego subarea plan of the San Diego MSCP. We excluded the lands in this subunit because we determined that the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation, and that exclusion of these lands will not result in the extinction of this species (see Table 3 and ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Table 3 below provides approximate areas (ac (ha)) of lands that meet the definition of critical habitat, but are excluded from this final critical habitat designation. Table 3 provides our reason for the exclusion. Also see the ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for detailed discussion of the exclusions listed in Table 3.

TABLE 3—EXCLUSIONS UNDER SECTION 4(b)(2) OF THE ACT BY CRITICAL HABITAT SUBUNIT

Critical habitat unit and subunit description	Reason for exclusion under section 4(b)(2) of the act	Areas meeting the definition of critical habitat	Areas excluded from critical habitat
Unit 1: Northern San Diego County:			
1A. Palomar Airport *	Carlsbad HMP under the MHCP	62 ac (25 ha)	2 ac (1 ha).*
1B. Southeast Carlsbad	Carlsbad HMP under the MHCP	57 ac (23 ha)	57 ac (23 ha).
1C. Manchester *	Manchester Avenue Mitigation Bank	79 ac (32 ha)	70 ac (28 ha).*
Unit 2: Central San Diego County:			
2A. Los Peñasquitos Canyon	City of San Diego subarea plan under the MSCP	63 ac (25 ha)	63 ac (25 ha).
2B. Sabre Springs	City of San Diego subarea plan under the MSCaP	52 ac (21 ha)	52 ac (21 ha).
2C. Sycamore Canyon	County of San Diego subarea plan under the MSCP.	306 ac (124 ha)	306 ac (124 ha).
2D. Slaughterhouse Canyon	County of San Diego subarea plan under the MSCP.	77 ac (31 ha)	77 ac (31 ha).
Unit 3: Viejas Mountain and Poser Mountain:			
3A. Viejas Mountain	County of San Diego subarea plan under the MSCP.	32 ac (13 ha)	32 ac (13 ha).
3B. Viejas Mountain *	County of San Diego subarea plan under the MSCP.	193 ac (78 ha)	141 ac (57 ha).*
Unit 4: Southern San Diego County:			

TABLE 3—EXCLUSIONS UNDER SECTION 4(b)(2) OF THE ACT BY CRITICAL HABITAT SUBUNIT—Continued

Critical habitat unit and subunit description	Reason for exclusion under section 4(b)(2) of the act	Areas meeting the definition of critical habitat	Areas excluded from critical habitat
4A. McGinty Mountain *	County of San Diego subarea plan under the MSCP.	20 ac (8 ha)	18 ac (7 ha).*
4B. McGinty Mountain	County of San Diego subarea plan under the MSCP.	148 ac (60 ha)	148 ac (60 ha).
4C. McGinty Mountain *	County of San Diego subarea plan under the MSCP.	28 ac (11 ha)	27 ac (11 ha).*
4D. Hollenbeck Canyon	County of San Diego subarea plan under the MSCP.	84 ac (34 ha)	84 ac (34 ha).

* A portion of these subunits have been designated as critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''Reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action;
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction;
- Are economically and technologically feasible; and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Acanthomintha ilicifolia* or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the primary constituent elements to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCE to an extent that appreciably reduces the conservation value of critical habitat for *Acanthomintha ilicifolia*. Generally, the conservation role of *A. ilicifolia* critical habitat units is to support viable core populations of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or those activities that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and

therefore should result in consultation for *Acanthomintha ilicifolia* include, but are not limited to:

(1) Actions that disturb or remove the clay soils (PCE 1(c)) within a subunit of critical habitat. Such activities include, but are not limited to, clearing areas for development and roads, creation of trails, and installation of pipelines or other underground infrastructure. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of *Acanthomintha ilicifolia*.

(2) Actions that introduce exotic plant species or alter the natural habitat in a way that increases the likelihood for the invasion of exotic plant species (PCE 1(d)). Such activities include, but are not limited to, the introduction of fill dirt to development sites adjacent to *Acanthomintha ilicifolia* critical habitat, grading areas for agriculture, clearing native vegetation, and the use of mountain bikes and off-highway vehicles. These activities could create space for populations of exotic plants to grow and then invade *A. ilicifolia* habitat or bring the seeds of exotic plants into *A. ilicifolia* habitat, thus filling the open space needed for the growth and reproduction (PCE 1(b)) of this species with exotic plant competitors.

(3) Actions that alter the hydrology of critical habitat subunits. Such activities include, but are not limited to, runoff from developed streets, runoff from irrigated landscapes, and increased flow or erosion from storm drains. These activities could alter the timing and amount of water that *Acanthomintha ilicifolia* plants receive, altering their phenology and fecundity. These activities could also cause the erosion of the clay soils (PCE 1(b and c)) that are necessary for the growth of *A. ilicifolia*. Please see the ''Special Management Considerations or Protection'' section for a more detailed discussion on the impacts of these actions to the listed species.

We consider all of the subunits designated as critical habitat, as well as those that are excluded from the final designation, to contain the features essential to the conservation of *Acanthomintha ilicifolia*. All subunits are within the geographic area occupied by the species at the time of listing and are currently occupied by *A. ilicifolia* (see ''Summary of Changes From Proposed Rule'' section of this final rule and the proposed rule (72 FR 11946; March 14, 2007) for more information on the occupied subunits). Federal agencies already consult with us on activities in areas occupied by *A. ilicifolia* or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of *A. ilicifolia*.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis we make this determination, then we can exclude the area only if such exclusion would not result in the extinction of the species.

In the following sections, we address a number of general issues that are relevant to the exclusions we consider. Additionally, the Service conducted a draft economic analysis (draft EA) of the impacts of the proposed critical habitat designation and related factors. The draft EA was made available for public review and comment from November 27, 2007, to December 27, 2007 (72 FR 66122). We then reopened the comment period on the draft EA from May 13, 2008, to June 12, 2008 (73 FR 27483). We did not receive any comments on the draft EA during these open comment periods. Based on the draft EA, the proposed critical habitat, and the information in this revised final designation of critical habitat, we excluded areas from critical habitat under the provisions of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19; however, we did not exclude any areas for economic reasons.

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those lands on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential to the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the habitat that is identified, if managed or protected, could provide for the survival and recovery of the species.

The identification of areas that contain features essential for the conservation of the species, which if managed or protected, will provide for the recovery of a species, is beneficial. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine the physical and biological features essential for conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential to the conservation of the species. The designation process includes peer review and public comment on the identified physical and biological features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not be included in the Service's determination of essential habitat.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of the species. Thus, the analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on

the species. However, the regulatory standard is different, as the jeopardy analysis looks at the action's impact on survival and recovery of the species and the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater regulatory benefits to the recovery of a species than would listing alone.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands itself does not restrict actions that destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species or of unoccupied areas that are essential to the conservation of the species are not appreciably reduced. Critical habitat designation alone, however, does not require private property owners to undertake specific steps toward recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

For critical habitat, a biological opinion that concludes in determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not suggest the implementation of any reasonable and prudent alternative. We suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation is initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species and/or adverse modification of its critical habitat, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans institute proactive actions over the lands they encompass and are put in place to remove or reduce known threats to a species or its habitat; therefore, implementing recovery actions. We believe that in many instances the regulatory benefit of critical habitat is low when compared to the conservation benefit that can be achieved through implementing Habitat Conservation Plans (HCPs) under section 10 of the Act or other habitat management plans. The conservation acheived through such plans is typically greater than what we achieve through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection for particular habitat for at least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to preventing adverse modification of critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed action. Thus, implementation of an HCP or management plan that incorporates enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation.

Another benefit of including lands in critical habitat is that 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 promote conservation efforts by other parties by clearly delineating areas of high conservation value for *Acanthomintha ilicifolia*. In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefits of a critical habitat designation. Including lands in critical habitat also informs State agencies and local governments about areas that could be conserved under State laws or local ordinances.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and necessary for us to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996).

Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting

evidence that some regulatory actions by the Federal Government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, and control of invasive species) are necessary for species conservation (Bean 2002). We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus the benefits of excluding areas that are covered by partnerships or voluntary conservation efforts can often be high.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans

The benefits of excluding lands with HCPs or other approved long-term management plans from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Most HCPs and other conservation plans take years to develop, and upon completion, are consistent with recovery objectives for listed species that are covered within the plan area. Many also provide conservation benefits to unlisted sensitive species. Although the Act does not prohibit the take of listed plant species (so there is no requirement to cover listed plant species in an HCP), we encourage non-Federal public and private landowners to include protections for listed plants in their plans. Imposing an additional regulatory review as a result of the designation of critical habitat of a listed plant species, in particular, may undermine our efforts to encourage inclusion of plant species in HCPs and undermine other conservation efforts and partnerships as well. Our experience in implementing the Act has found that designation of critical habitat within the boundaries of management plans that provide conservation measures for a species is a disincentive to many entities which are either currently developing such plans, or contemplating doing so in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species will be affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning. In fact, designating critical habitat for a plant species in areas covered by a pending HCP or conservation plan could result in the loss of some species' benefits if participants abandon the planning process or elect to exclude the plant species from the plan, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in developing plans targeting listed species' conservation.

A related benefit of excluding lands covered by approved HCPs and management plans that cover listed plant species from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Designating lands within approved management plan areas as critical habitat would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of plant species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Both HCPs and Natural Communities Conservation Plan (NCCP)–HCP applications require consultation, which would review the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification, even without the critical habitat designation. Additionally, all other Federal actions that may affect the listed species still require consultation under section 7(a)(2) of the Act, and we review these actions for possibly significant habitat modification in accordance with the jeopardy standard under Section 7.

The information provided in the previous section applies to all the following discussions of benefits of inclusion or exclusion of critical habitat.

Areas Considered for Exclusion Under Section 4(b)(2) of the Act

At the request of the USFS, we evaluated the appropriateness of excluding Federal lands in the CNF from the final designation of critical habitat for *Acanthomintha ilicifolia* under section 4(b)(2) of the Act based on management provided under the USFS LMP and specifically under the Species Management Guide developed for the CNF (USFS 1991). As indicated in our response to Comment 13 in the ''Public Comments'' section above, we have concluded based on the record before us not to exclude Forest Service lands in this instance. Therefore, as previously discussed we are designating approximately 549 ac (222 ha) of Forest Service lands in subunits 3B, 3C, 3D, 3E, and 3F as critical habitat for *A. ilicifolia*.

Exclusions Under Section 4(b)(2) of the Act

After considering the following areas under section 4(b)(2) of the Act, we are excluding them from the critical habitat designation for *Acanthomintha ilicifolia*. We are excluding approximately 59 ac (24 ha) of non-Federal lands from the *A. ilicifolia* critical habitat designation in subunits 1A and 1B that are covered by the Carlsbad HMP within the San Diego Multiple Species Habitat Program (MHCP) plan area. We are excluding approximately 948 ac (383 ha) of non-Federal lands from the *A. ilicifolia* critical habitat designation in subunits 2A; 2B; 2C; 2D; 3A; 3B; 4A; 4B; 4C; and

4D that are within San Diego Multiple Species Conservation Program (MSCP) plan area. These lands are covered by the City of San Diego subarea plan under the MSCP and the County of San Diego subarea plan under the MSCP. Additionally, we are excluding 70 ac (28 ha) of private land from the *A. ilicifolia* critical habitat designation in subunit 1C that is within the Manchester Avenue Mitigation Bank. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided in the paragraphs below.

We excluded these areas because we believe that:

(1) Their value for conservation will be preserved for the foreseeable future by existing protective actions; or

(2) They are appropriate for exclusion under the ''other relevant impact'' provisions of section 4(b)(2) of the Act.

In the paragraphs below, we provide a detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act.

Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act

In reviewing approved HCPs for potential exclusion under section 4(b)(2) of the Act, we consider (in addition to the general partnership relationships identified above) whether the plan provides for protection and appropriate management, if necessary, of essential habitat within the plan area and whether the plan incorporates conservation management strategies and actions consistent with currently accepted principles of conservation biology.

We believe the framework plans and associated subarea plans discussed in the paragraphs below fulfill these criteria. Therefore, we are excluding lands covered by these subarea plans that provide for the conservation of *Acanthomintha ilicifolia* from the final designation of critical habitat.

Carlsbad HMP Under the San Diego Multiple Habitat Conservation Program (MHCP)

The San Diego MHCP is a comprehensive, multi-jurisdictional planning program designed to create, manage, and monitor an ecosystem preserve in northwestern San Diego County. The MHCP is a framework plan that has been in place for 5 years. It is also a regional subarea plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). The MHCP is designed to be implemented through approved individual subarea plans. The MHCP preserve system is intended to protect viable populations of native plant and animal species and their habitats in perpetuity, while accommodating continued economic development and quality of life for residents of northern San Diego County. The MHCP includes an approximately 112,000-ac (45,324-ha) study area within the cities of Carlsbad, Encinitas, Escondido, San Marcos, Oceanside, Vista, and Solana Beach.

Under the MHCP framework plan, the majority of all known *Acanthomintha ilicifolia* populations fall within Focused Planning Areas (FPA) (core areas and linkages important for conservation of sensitive species) and will be conserved at levels of 95 to 100 percent. According to the MHCP, 91 percent of the major populations and critical locations of *Acanthomintha ilicifolia* (as identified in the MHCP) in the study area will be conserved under the FPA design. In addition to the conserved populations, an estimated 3,403 acres of potentially suitable habitat will be conserved as a result of the existing preserve design and preserve policies. Any populations that fall outside of FPAs will be conserved at a minimum 80 percent level based on the Narrow Endemic Plant Policy. The Narrow Endemic Policy requires the conservation of new populations of narrow endemic species (80 percent outside of FPAs) and mitigation for unavoidable impacts as well as management practices designed to achieve no net loss of narrow endemic populations. Additionally, cities that apply for subarea permits cannot permit more than 5 percent gross cumulative loss of narrow endemic populations or occupied acreage within the FPAs and no more than 20 percent cumulative loss of narrow endemic locations, population numbers, or occupied acreage outside of FPAs (AMEC Earth and Environmental, Inc. 2003).

The City of Carlsbad received a permit on their individual subarea plan under the MHCP framework plan on November 9, 2004. Approximately 2 ac (1 ha) of land in subunit 1A and all of the approximately 57 ac (23 ha) of land in subunit 1B are protected by the Carlsbad subarea plan also known as the Carlsbad Habitat Management Plan (HMP). *Acanthomintha ilicifolia* is a conditionally covered species under the Carlsbad HMP. ''Conditional'' coverage means that the City of Carlsbad receives coverage for this species as identified in the associated biological opinion, as long as the City complies with the conservation measures outlined in the HMP. Under the HMP, coverage for *Acanthomintha ilicifolia* is also conditional until the City of San Marcos completes their subarea plan under the MHCP. However, in developing this critical habitat rule we did not identify any lands in San Marcos that meet the definition of critical habitat as described in the ''Criteria Used to Identify Critical Habitat'' section. Therefore, we believe it is appropriate to exclude essential habitat protected by the Carlsbad HMP where the City of Carlsbad has demonstrated compliance with the conservation measures for *A. ilicifolia* required to be implemented by the City under the HMP.

Consistent with the framework provided under the MHCP, the Carlsbad HMP contains requirements to conserve and adaptively manage *Acanthomintha ilicifolia* habitats and provide for the conservation of this species' PCE, thereby contributing to the recovery of this species. The Carlsbad HMP will provide management and monitoring for *A. ilicifolia* at several sites, including approximately 2 ac (1 ha) of habitat in subunit 1A managed by the Center for Natural Lands Management. All of the land in subunit 1A addressed by the Carlsbad HMP is actively managed; activities that benefit *A. ilicifolia* in subunit 1A include mapping and census projects, removal of nonnative invasive species, and the restoration of areas degraded by past human use (Tierra Data, Inc. 2005, pp. 34–63; Carlsbad HMP 2004, p. D–97). All of the approximately 57 ac (23 ha) of land in subunit 1B was preserved in perpetuity prior to the creation of the Carlsbad HMP. These lands are signed and fenced and are a component of Carlsbad's habitat preserve. Management of the conserved land in subunit 1B remains the responsibility of the private owner of the open space area; however, the future management of this area will be bolstered by the inclusion of this area in the Carlsbad HMP. The management approaches developed for *Acanthomintha ilicifolia* in other areas will be easily applied to subunit 1B because the area is part of the Carlsbad HMP.

The Carlsbad HMP also incorporates many processes to ensure that the Service has an active role in proper implementation of the HCP. For example, Habitat Management Plans, reviewed and approved by the Service, must be developed for each preserve area within the Carlsbad HMP, and monitoring and management objectives must be established for each preserve. Progress towards meeting these objectives is measured through the submission of annual reports. There are also regular coordination meetings

between the Service and the City of Carlsbad to discuss on-going conservation issues. Under the Carlsbad HMP the City must account annually for the progress it is making in assembling conservation areas. The City is required to provide the Service with an annual report that includes, both by project and cumulatively, the habitat acreage destroyed and conserved within the HMP. This accounting process ensures that habitat conservation proceeds in rough proportion to habitat loss and is in compliance with the Carlsbad HMP and associated implementing agreement.

All of the lands that meet the definition of critical habitat within the boundaries of the Carlsbad HMP are already conserved under the plan. Consistent with the Narrow Endemic Policy and FPA design of the MHCP framework plan, additional populations of *A. ilicifolia* beyond the two areas we identified that meet the definition of critical habitat are also conserved under Carlsbad's subarea plan. Conservation of these additional populations will contribute to the ultimate recovery of this species. Although not all areas placed in conservation are actively managed under the plan at this time, we believe the Carlsbad HMP will conserve *A. ilicifolia* within its boundaries because *A. ilicifolia* is one of the focus species for this plan and the City of Carlsbad has an interest to conserve this species throughout the Carlsbad HMP area. The extent of habitat preservation and management that has taken place due to implementation of the Carlsbad HMP since it was permitted in 2004 is significant, and demonstrates the City of Carlsbad's commitment to fully implement this HCP.

In the 1998 final rule listing this species as threatened (63 FR 54938; October 13, 1998), we identified habitat destruction and fragmentation from urban development; off-road vehicle activity; non-native, invasive plant species; livestock trampling and grazing; and mining as primary threats to the species. The Carlsbad HMP incorporates conservation measures to address these threats into the management of its preserve area, which will include the entire preserve area including subunits 1A and 1B. The Carlsbad HMP provides protection and appropriate management for *Acanthomintha ilicifolia*, its habitat, and its PCE through implementation of conservation strategies that are consistent with generally accepted principles of conservation biology. The Carlsbad HMP preserves habitat that supports identified core populations of this species and provides for its recovery.

Benefits of Inclusion—Carlsbad HMP

The inclusion of approximately 2 ac (1 ha) of land in subunit 1A and all of the approximately 57 ac (23 ha) of land in subunit 1B could be beneficial because it identifies lands to be managed for the conservation and recovery of *Acanthomintha ilicifolia*. The process of proposing and finalizing a critical habitat provided the Service with the opportunity to determine the features or PCEs essential for conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential to the conservation of the species. The designation process includes peer review and public comment on the identified features and areas. This process is valuable to landowners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. However, identification of important habitat for *A. ilicifolia* within the City of Carlsbad and efforts to conserve the species and its habitat were initiated through development of the Carlsbad HMP prior to the proposed critical habitat rule and will continue into the future.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts already in place or underway on the 2 ac (1 ha) of land in subunit 1A and all of the approximately 57 ac (23 ha) of land in subunit 1B that are protected under the Carlsbad HMP. The process of developing the MHCP and Carlsbad HMP has involved extensive public review and impute and the involvment of several Federal, state, and local government partners including (but not limited to): The City of Carlsbad; California Department of Fish and Game; the Service; and other Federal agencies. Therefore, the educational benefits of designating the private lands in Unit 1 (Pan Hot Springs Meadow) as critical habitat are minimal.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of designating lands as critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. However, all of the approximately 57 ac (23 ha) of land in subunit 1B that is being excluded is protected open space on private property, with no expected Federal nexus for future consultation for *Acanthomintha ilicifolia*. Therefore, designating this area as critical habitat is unlikely to provide a regulatory benefit under section 7(a) of the Act. The approximately 2 ac (1 ha) of land in subunit 1A is also privately owned and protected from future development with no expected Federal nexus for future consultation; therefore, we do not anticipate a regulatory benefit result from designation of such lands.

Benefits of Exclusion—Carlsbad HMP

The City of Carlsbad HMP provides substantial protection and management for *Acanthomintha ilicifolia* and its essential habitat features in contrast to designation of critical habitat, which only precludes destruction or adverse modification. Moreover, the educational benefits that result from critical habitat designation, including informing the public of areas that are necessary for the long-term conservation of the species, are already in place both as a result of material provided on our Web site and through public notice-and-comment procedures required to establish the MHCP and the Carlsbad HMP. Finally, we have not identified a likely Federal nexus for future section 7 consultations on lands in subunit 1A and subunit 1B because the lands are privately owned and already protected from development; therefore, we do not anticipate a regulatory benefit from designation.

In contrast to the lack of an appreciable benefit of including these lands as critical habitat, the exclusion of these lands from critical habitat will help preserve the partnerships that we developed with the City of Carlsbad in the development of the MHCP and Carlsbad subarea plan. As discussed above, many landowners perceive critical habitat as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing complex regional and jurisdiction-wide HCPs, such as the MHCP and Carlsbad HMP. For these reasons, we believe that designating critical habitat has little benefit in the City of Carlsbad, and such minor benefit is outweighed by the benefit of maintaining partnerships with the City and private landowners covered by the Carlsbad HMP.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Carlsbad HMP

We reviewed and evaluated the benefits of inclusion and the benefits of exclusion of lands covered by the Carlsbad HMP as critical habitat for *Acanthomintha ilicifolia*. Based on this evaluation, we find that the benefit of excluding lands in areas covered by the City of Carlsbad HMP under the MHCP

outweighs the benefit of including those lands as critical habitat for *A. ilicifolia*.

Exclusion Will Not Result in Extinction of the Species—Carlsbad HMP

Exclusion of these 59 ac (24 ha) of non-Federal lands from the final designation of critical habitat will not result in the extinction of *Acanthomintha ilicifolia* because these lands are permanently conserved and are or will be managed for the benefit of this species under the Carlsbad HMP under the MHCP. The jeopardy standard of section 7 and routine implementation of habitat protection through the section 7 process also provide assurances that the species will not go extinct. The protections afforded to *A. ilicifolia* under the jeopardy standard will remain in place for the areas excluded from critical habitat.

San Diego Multiple Species Conservation Program (MSCP)—City and County Subarea Plans

The MSCP is a framework plan that has been in place for more than 10 years. The plan area encompasses 582,243 ac (235,626 ha) (County of San Diego 1997, p. 1–1; MSCP 1998, pp. 2–1, 4–2—4–4) and provides for the conservation of 85 federally listed and sensitive species (''covered species''), including *Acanthomintha ilicifolia*, through the establishment of approximately 171,920 ac (69,574 ha) of preserve lands within the Multi-Habitat Planning Area (MHPA) (City of San Diego) and Pre-Approved Mitigation Areas (PAMA) (County of San Diego). The MSCP was developed in support of applications for incidental take permits for several covered species by 12 participating jurisdictions and many other stakeholders in southwestern San Diego County. Under the umbrella of the MSCP, each of the 12 participating jurisdictions is required to prepare a subarea plan that implements the goals of the MSCP within that particular jurisdiction. Four of the 12 jurisdictions include areas that support *A. ilicifolia*: The City of San Diego, the City of Chula Vista, the County of San Diego, and the City of Poway, all of which have approved subarea plans. Areas that we determined meet the definition of critical habitat are within the subarea plans for the City of San Diego and the County of San Diego. The Service issued permits to the City of San Diego on June 6, 1997 (Service 1997), and to the County of San Diego on March 12, 1998 (Service 1998), based on their subarea plans.

Upon completion of preserve assembly, approximately 171,920 ac (69,574 ha) of the 582,243 ac (235,626 ha) MSCP plan area will be preserved (MSCP 1998, pp. 2–1, 4–2—4–4). The City of San Diego's preserve is delineated by mapped preserve boundaries referred to as ''hardline'' boundaries (i.e., MHPA). County of San Diego preserve areas do not have ''hardline'' boundaries, but the County's subarea plan identifies areas where mitigation activities should be focused to assemble its preserve areas (i.e., PAMA). Those areas of the MSCP preserve that are already conserved as well as those areas that are designated for inclusion in the preserve under the plan are referred to as the ''preserve area'' in this final designation. When the preserve is completed, the public sector (i.e., Federal, State, and local government, and general public) will have contributed 108,750 ac (44,010 ha) (63.3 percent) to the preserve, of which 81,750 ac (33,083 ha) (48 percent) was existing public land when the MSCP was established and 27,000 ac (10,927 ha) (16 percent) will have been acquired. At completion, the private sector will have contributed 63,170 ac (25,564 ha) (37 percent) to the preserve as part of the development process, either through avoidance of impacts or as compensatory mitigation for impacts to biological resources outside the preserve. Federal and State governments, local jurisdictions and special districts, and managers of privately owned lands currently, and in the future will manage and monitor their lands in the preserve for species and habitat protection (MSCP 1998, pp. 2–1, 4–2—4–4).

Private lands within the MHPA and PAMA are subject to special restrictions on development, and lands that are dedicated to the preserve must be legally protected and permanently managed to conserve the covered species. Public lands owned by the City, County, State of California, and the Federal Government that are identified for conservation under the MSCP must also be protected and permanently managed to protect the covered species.

Numerous processes are incorporated into the MSCP that allow for Service oversight of the MSCP implementation. For example, the MSCP imposes annual reporting requirements and provides for Service review and approval of proposed subarea plan amendments and preserve boundary adjustments and for Service review and comment on projects during the California Environmental Quality Act review process. The Service also chairs the MSCP Habitat Management Technical Committee and the Monitoring Subcommittee (MSCP 1998, pp. 5–11—5–23. Each MSCP subarea plan must account annually for the progress it is making in assembling conservation areas. The Service must receive annual reports that include, both by project and cumulatively, the habitat acreage destroyed and conserved within the subareas. This accounting process ensures that habitat conservation proceeds in rough proportion to habitat loss and in compliance with the MSCP subarea plans and the plans' associated implementing agreements.

The subarea plans under the MSCP contain requirements to monitor and adaptively manage *Acanthomintha ilicifolia* habitats and provide for the conservation of this species' PCE. The framework and area-specific management plans are comprehensive and address a broad range of management needs at the preserve and species levels that are intended to reduce the threats to covered species and thereby contribute to the recovery of the species. These plans include the following: (1) Fire management; (2) public access control; (3) fencing and gates; (4) ranger patrol; (5) trail maintenance; (6) visitor/interpretive and volunteer services; (7) hydrological management; (8) signage and lighting; (9) trash and litter removal; (10) access road maintenance; (11) enforcement of property and/or homeowner requirements; (12) removal of invasive species; (13) nonnative predator control; (14) species monitoring; (15) habitat restoration; (16) management for diverse age classes of covered species; (17) use of herbicides and rodenticides; (18) biological surveys; (19) research; and (20) species management conditions (MSCP 1998).

Eight major populations of *Acanthomintha ilicifolia* are included within preserve lands under the MSCP, each of which will be conserved from 80 to 100 percent, with 85 percent overall coverage. In 10 years of implementing the City and County of San Diego's subarea plans, approximately 787 ac (319 ha), or 83 percent, of lands that meet the definition of critical habitat for *A. ilicifolia* have already been conserved. An additional 72 ac (28 ha) are inside the PAMA and MHPA, and, although they have not yet been formally committed to the preserve, these lands are reasonably assured of conservation for *A. ilicifolia* (see Table 4) in accordance with the subarea plans. Similarly, although some areas placed in conservation are not yet fully managed, such management will occur over time as the subarea plans continue to be implemented. The extent of habitat preservation and management that has taken place to date through implementation of the MSCP and its subarea plans in the City and County of

San Diego is significant, and demonstrates the City and County of San Diego's commitment to fully implement the MSCP.

TABLE 4—NON-FEDERAL LANDS WITHIN THE MSCP PLAN AREA EXCLUDED FROM CRITICAL HABITAT DESIGNATION AND THE CONSERVATION OF THESE LANDS UNDER THE MSCP *

Critical habitat unit	Land ownership	Currently conserved	Lands within the PAMA or MHPA; not yet conserved	Lands at risk of development
2A. Los Peñasquitos Canyon.	State/Local	63 ac (25 ha).		
2B. Sabre Springs	Private		1 ac (<1 ha).	
	State/Local	45 ac (19 ha)	1 ac (<1 ha)	5 ac (2 ha).
2C. Sycamore Canyon	Private		30 ac (12 ha).	
	State/Local	276 ac (112 ha).		
2D. Slaughterhouse Canyon.	Private	77 ac (31 ha).		
3A. Viejas Mountain	Private	25 ac (10 ha)		7 ac (3 ha).
3B. Viejas Mountain	Private	80 ac (32 ha)		61 ac (25 ha).
4A. McGinty Mountain	Private	17 ac (7 ha)	1 ac (<1 ha).	
4B. McGinty Mountain	Private	139 ac (56 ha)	2 ac (1 ha).	
	State/Local	7 ac (3 ha).		
5+7+61+164C. McGinty Mountain.	Private	22 ac (9 ha)	5 ac (2 ha).	
4D. Hollenbeck Canyon	Private		7 ac (3 ha)	16 ac (6 ha).
	State Local	61 ac (25 ha).		
Total		787 ac (319 ha)	72 ac (28 ha)	89 ac (36 ha).

* Values in this table may not sum due to rounding and the conversion of values from acres to hectares.

Approximately 166 ac (67 ha) of lands that meet the definition of critical habitat are outside the PAMA and MHPA boundaries (preserve areas) (see Table 4); however, of these 166 ac (67 ha), 77 ac (31 ha) in subunit 2D are currently being conserved under an ''existing-use permit'' issued by the County of San Diego to the landowner in this subunit for the continued operation of an adjacent sand and gravel mining operation. As part of the ''existing-use permit'' the landowner is required to keep portions of the property as open space. Therefore, we believe that only 89 ac (36 ha), or 9 percent of the total 948 ac (383 ha) that meet the definition of critical habitat within the plan area of the MSCP, could potentially be developed. Consistent with the narrow endemics requirements of the MSCP, the remaining 89 ac (36 ha) will be surveyed for *Acanthomintha ilicifolia* prior to any development occurring on these lands. Under the City of San Diego's subarea plan, impacts to narrow endemic plants, including *A. ilicifolia*, inside the MHPA will be avoided and outside the MHPA will be protected as appropriate by: (1) Avoidance; (2) management; (3) enhancement; and/or (4) transplantation to areas identified for preservation (City of San Diego 1997, pp. 105–106; Service 1997, p. 15). Under the County of San Diego's subarea plan, narrow endemic plants, including *A. ilicifolia*, are conserved under the Biological Mitigation Ordinance using a process that: (1) Requires avoidance to the maximum extent feasible; (2) allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible; and (3) requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property (County of San Diego (BMO) 1997, p. 11; Service 1998, p. 12). These measures help protect *A. ilicifolia* and its essential habitat whether located on lands targeted for preserve status within the MHPA and PAMA or located outside of those areas. The narrow endemic policy for both the City of San Diego and County of San Diego subarea plans require in situ conservation of *A. ilicifolia* or mitigation to ameliorate any habitat loss. Therefore, although some losses may occur to this species within the 89 ac (36 ha) of lands that are not currently preserved or otherwise designated for conservation under the MSCP, the preservation, conservation, and management of *A. ilicifolia* provided under the City and County MSCP subarea plans ensures the long-term conservation of this species and its habitat within all areas addressed by the subarea plans under the MSCP.

We are excluding from the final critical habitat designation for *Acanthomintha ilicifolia* all non-Federal lands (i.e., approximately 948 ac (383 ha) of lands that meet the definition of critical habitat) within the City of and County of San Diego's subarea plans under section 4(b)(2) of the Act (see Table 4). The non-Federal lands we are excluding include: 63 ac (25 ha) public lands in the City of San Diego's Los Peñasquitos Canyon Preserve (subunit 2A); 52 ac (21 ha) of public and private lands in Los Peñasquitos Canyon east of Interstate 15 near Sabre Springs (subunit 2B); 306 ac (124 ha) of public and private lands in and adjacent to the Goodan Ranch and Sycamore Canyon Open Space County Park (subunit 2C); 77 ac (31 ha) of private lands in Slaughterhouse Canyon (subunit 2D); 32 ac (13 ha) of private lands on the western flank of Viejas Mountain (subunit 3A); 141 ac (57 ha) of private lands on the southwestern flank of Viejas Mountain (subunit 3B); 18 ac (7 ha) of private lands on the northern portion of McGinty Mountain (subunit 4A); 148 ac (60 ha) of public and private lands on the central portion of McGinty Mountain (subunit 4B); 27 ac (11 ha) of private lands on the southern portion of McGinty Mountain (subunit 4C); and 84 ac (34 ha) of public and private lands in and adjacent to the Hollenbeck Wildlife Area (subunit 4D).

In the 1998 final rule listing this species as threatened (63 FR 54938; October 13, 1998), we identified habitat destruction and fragmentation from urban development, off-road vehicle activity, nonnative invasive plant species, livestock trampling and grazing, and mining as primary threats to the species. As described above, the MSCP provides protection and appropriate management for *Acanthomintha*

ilicifolia, its habitat, and its PCE through implementation of conservation strategies that are consistent with generally accepted principles of conservation biology. The MSCP preserves habitat that supports identified core populations of this species and provides for its recovery.

Benefits of Inclusion—MSCP

The inclusion of approximately 948 ac (383 ha) of non-Federal lands within the MSCP could be beneficial because it identifies lands to be managed for the conservation and recovery of *Acanthomintha ilicifolia*. The process of proposing and finalizing a critical habitat rule provided the Service with the opportunity to determine the features or PCEs essential for conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential to the conservation of the species. The designation process includes peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. Identification of important habitat and habitat features for *A. ilicifolia* within the City of San Diego and the County of San Diego and efforts to conserve the species and its habitat were initiated prior to the proposed critical habitat rule through the development of the MSCP framework plan and the City and County MSCP subarea plans and will continue into the future.

We believe that some losses may occur to *Acanthomintha ilicifolia* within the 89 ac (36 ha) of lands that are not currently preserved or otherwise designated for conservation under the MSCP. Therefore, the benefits of inclusion of these lands within designated critical habitat are higher than for those lands within the PAMA or MHPA because the protections are less.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts already in place or underway on the approximately 948 ac (383 ha) of non-Federal lands within the MSCP subarea plans. The process of developing the MSCP has involved several partners including (but not limited to) the 12 participating jurisdictions, California Department of Fish and Game, the Service and other Federal agencies. Therefore, the educational benefits of designating the non-Federal lands in subunits 2A, 2B, 2C, 2D; 3A; 3B; 4A, 4B, 4C, and 4D as critical habitat are minimal

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of designating land as critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. However, all of the approximately 948 ac (383 ha) of non-Federal lands in subunits 2A, 2B, 2C, 2D; 3A; 3B; 4A, 4B, 4C, and 4D that is being excluded is on non-Federal land and lacks an expected Federal nexus for future section 7 consultation on *Acanthomintha ilicifolia*. Therefore, designating these areas as critical habitat is unlikely to provide a regulatory benefit under section 7(a) of the Act

Benefits of Exclusion—City and County Subarea Plans

The City and County MSCP subarea plans provide for protection and active management of the features essential to the conservation of *Acanthomintha ilicifolia* on lands in subunits 2A, 2B, 2C, 2D; 3A; 3B; 4A, 4B, 4C, and 4D, in contrast to the designation of critical habitat, which only precludes destruction or adverse modification of essential habitat. Moreover, the educational benefits that result from critical habitat designation, including informing state and local governments, landowners and the public of areas that are necessary for the long-term conservation of the species, are already in place both as a result of material provided on our Web site and through public notice-and-comment procedures required to establish the MSCP and City and County subarea plans. Finally, we did not identify a likely regulatory benefit from designation of the City or County lands because the lands are non-Federal and we are not aware of a Federal nexus that would trigger future section 7 consultation for *A. ilicifolia* on these lands.

We acknowledge that there are 89 acres of private and State lands that contain essential habitat features that are located outside of the City MHPA and County PAMA lands identified for conservation under the MSCP subarea plans, and are potentially at risk of development. However, as discussed above, these lands are subject either to City of San Diego's the narrow endemic species requirements or to the County's Biological Mitigation Ordinance, both of which provide substantial protection for *A. ilicifolia* and its habitat. While there could be some additional benefits to designating the 89 acres as critical habitat, we continue to believe the potential benefits would be minor. As discussed above, the development of the MSCP and subarea plans has already resulted in public identification of lands important to the conservation of *A. ilicifolia. Additionally, development of the MSCP and subarea plans* resulted in the creation and implementation of conservation measures identified in the subarea plans to protect the species and its essential habitat, both within and outside of the City and County preserve areas, thus minimizing any additional educational benefit from designation. Further, as is the case for all of the other MSCP lands excluded from the designation, none of the 89 acres is Federal land, and we are not aware of a Federal nexus that would trigger future section 7 consultation with regard to the lands. Therefore, we do not anticipate a regulatory benefit from designation of these lands.

We developed and continue to maintain close partnerships with the City of San Diego, the County of San Diego, other local jurisdictions, and several other stakeholders through the development of the MSCP, a plan that incorporates appropriate protections and management for *Acanthomintha ilicifolia*, its habitat, and the features essential for the conservation of this species. Those protections are consistent with statutory mandates under section 7 of the Act to avoid adverse modification or destruction of critical habitat, and go beyond that prohibition by including active management and protection of essential habitat areas. As we discussed above under ''Benefits of Excluding Lands With HCPs or Other Approved Management Plans'', by excluding these lands from designation, we are helping to preserve our ongoing partnerships with the City and County permittees and to encourage new partnerships with other landowners and jurisdictions. Those partnerships, and the landscape level, multiple-species conservation planning efforts they promote, are critical for the conservation of *A. ilicifolia*.

Benefits of Exclusion Outweigh the Benefits of Inclusion—City and County Subarea Plans

We reviewed and evaluated the exclusion of approximately 948 ac (383 ha) of non-Federal lands within the MSCP from the designation of final critical habitat. We determined that the regulatory benefit of designating non-Federal lands in subunits 2A, 2B, 2C, 2D, 3A, 3B, 4A, 4B, 4C, and 4D is minimal because none of the excluded

lands have an expected Federal nexus that would trigger a future section 7 consultation for *Acanthomintha ilicifolia* or its essential habitat. Furthermore, any potential regulatory benefits would be small because 91 percent of essential *A. ilicifolia* habitat within the plan area is assured of conservation and management under the MSCP and the 89 acres of essential habitat for *A. ilicifolia* within the City and County that occur outside of the MHPA and PAMA and are subject to possible future development, receive substantial protection under City and County subarea plan measures established to protect this species. The educational benefits of critical habitat designation are also small. Those benefits, which include informing the public of areas that are necessary for the long-term conservation of the species, are already in place both as a result of material provided on our Web site and through public notice-and-comment procedures required to establish the MSCP and City and County subarea plans. The minimal educational and potential regulatory benefits of including non-Federal lands covered by the City and County MSCP subarea plans are small when compared to the impact such a designation could have on our current and future partnerships. Designation of lands covered by the MSCP may discourage other partners from seeking or completing subarea plans under the MSCP framework plan or from pursing other HCPs. Therefore, we determined that the minor benefits of critical habitat designation are outweighed by benefits of exclusion in consideration of the relevant impact to current and future partnerships as summarized above, and in the ''Conservation Partnerships on Non-Federal Lands'' section. As discussed above, the City and County MSCP subarea plans will provide for significant preservation and management of habitat for *A. ilicifolia* and will help reach the recovery goals for this species.

Exclusion Will Not Result in Extinction of the Species—City and County MSCP Subarea Plans

Exclusion of these 948 ac (383 ha) of non-Federal lands from the final designation of critical habitat will not result in the extinction of *Acanthomintha ilicifolia* because virtually all of the lands determined to contain the features essential to the conservation of this species either are already or will be permanently conserved and managed for the benefit of this species and its PCE under the approved MSCP subarea plans. Currently, the majority of these lands are part of the preserve area and are receiving management that benefits the species. Importantly, as we stated in our biological opinion for the City of San Diego subarea plan under the MSCP (Service 1997) and the County of San Diego subarea plan under the MSCP, while some loss of habitat for *A. ilicifolia* is anticipated due to implementation of the MSCP, implementation of the plan will not jeopardize the continued existence of this species.

The jeopardy standard of section 7(a)(2) of the Act and routine implementation of habitat protection through the section 7(a)(2) process also provide assurances that the species will not go extinct. The protections afforded to *Acanthomintha ilicifolia* under the jeopardy standard will remain in place for the areas excluded from critical habitat.

Other Lands With Management That Benefits Acanthomintha ilicifolia—Exclusions Under Section 4(b)(2) of the Act

Manchester Habitat Mitigation Bank Area

The Manchester Avenue Mitigation Bank encompasses 123 ac (50 ha) in Encinitas, California. The Manchester Avenue Mitigation Bank was approved by the Service and CDFG in 1996. The primary goal of creating the Manchester Avenue Mitigation Bank was to protect the federally listed coastal California gnatcatcher (*Polioptila californica californica*), *Arctostaphylos glandulosa* ssp. *crassifolia* (Del Mar manzanita), and *Acanthomintha ilicifolia*, as well as 15 other plant and animal species that are known to be ''sensitive'' or ''rare'' species in the area. The Manchester Avenue Mitigation Bank overlaps with 70 ac (28 ha) of subunit 1C and is covered by the 2005–2010 Management Plan, developed by the Center for Natural Lands Management (CNLM) when they took responsibility for the ownership and management of the Manchester Avenue Mitigation Bank (Spiegelberg 2005, pp. 1–33).

Ongoing management and monitoring activities conducted by the CNLM on the Manchester Avenue Mitigation Bank benefit *Acanthomintha ilicifolia*, its habitat, and the features essential for the conservation of this species. Specifically, the CNLM conducts annual monitoring of the population of *A. ilicifolia* within the Manchester Avenue Mitigation Bank and uses adaptive management techniques to support this species and its PCE. CNLM has fenced areas where this species occurs to exclude adverse impacts from recreation. The CNLM conducts annual removal of nonnative, invasive species from the areas where *A. ilicifolia* occurs. The CNLM also facilitates the recovery of this species by providing educational opportunities for students from La Costa Canyon High School and Rancho Santa Ana Botanic Garden to use the preserve for field trips and research. Local residents are educated about the conservation occurring on the Manchester Avenue Mitigation Bank through information about this species and other rare species that the CNLM posts at kiosks throughout the Manchester Avenue Mitigation Bank on trails open to the public. The CNLM works with the Service and CDFG to implement research projects funded under section 6 of the Act. The Manchester Avenue Mitigation Bank is an important part of the City of Encinitas' open space areas and future habitat preserve under the City of Encinitas draft subarea plan under the MHCP. The CNLM regularly meets with representatives from the City of Encinitas to ensure the City's cooperation in preservation of the Manchester Avenue Mitigation Bank. The partnerships that exist on the Manchester Avenue Mitigation Bank result in the conservation of *A. ilicifolia* and its essential habitat and help increase knowledge of this species through ongoing education and research programs facilitated by the CNLM.

Benefits of Inclusion—Manchester Habitat Mitigation Bank Area

The inclusion of 70 ac (28 ha) of land in the Manchester Avenue Mitigation Bank could be beneficial because it identifies lands to be managed for the conservation and recovery of *Acanthomintha ilicifolia*. The process of proposing and finalizing a critical habitat rule provided the Service with the opportunity to determine the features or PCEs essential for conservation of the species. The designation process includes peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. However, identification of important habitat and habitat features for *A. ilicifolia* within the area covered by Manchester Avenue Mitigation Bank and efforts to conserve the species and its habitat were initiated prior to the proposed critical habitat rule through the development of the

mitigation bank and will continue into the future. The educational benefits of designation are largely redundant to those derived from ongoing conservation efforts already being implemented on the 70 ac (28 ha) of non-Federal lands within the Manchester Avenue Mitigation Bank. Therefore, the educational benefits of designating the private lands in subunit 1C as critical habitat are minimal.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Because all of the mitigation bank lands are permenently protected from development and dedicated to the protection of *Acanthomintha ilicifolia and other sensitive species, the likelihood of a Federal action occuring on these lands that could result in an adverse modification of the species essential habitat feature is extremely small. Moreover,* all of the 70 ac (28 ha) of non-Federal lands within the Manchester Avenue Mitigation Bank that is being excluded is on private property, *and we are not aware of a Federal nexus that would trigger future section 7 consultation in this area. Therefore, we do not* anticipate a regulatory benefit under Section 7(a)(2) from designation of lands within the Manchester Avenue Mitigation Bank.

Benefits of Exclusion—Manchester Avenue Mitigation Bank Area

The 2005–2010 Management Plan for the Manchester Avenue Mitigation Bank (Spiegelberg 2005, pp. 1–33) provides for conservation of bank lands in a coordinated, integrated manner. The protection and active management of *Acanthomintha ilicifolia* and its essential habitat features on Manchester Avenue Mitigation Bank lands conserves *A. ilicifolia* at this site and directly contributes to the survival and recovery of this species in contrast to designation of critical habitat, which only precludes destruction or adverse modification of essential habitat. Moreover, the educational benefits that result from critical habitat designation, including informing the public of areas that are necessary for the long-term conservation of the species, are already in place both as a result of the development of the Manchester Avenue Mitigation Bank and the ongoing, substantial public outreach that is conducted by CNLM manager of the bank, and the involvement of the public and local government representatives in the day-to-day operation of the bank.

Finally, we did not identify a likely Federal nexus for future section 7 consultations on lands within the Manchester Avenue Mitigation Bank because the lands are privately owned and already protected from development; therefore, we do not anticipate a regulatory benefit from designation.

In contrast to the lack of an appreciable educational or regulatory benefit of including these lands as critical habitat, the exclusion of these lands from critical habitat will help preserve the partnerships that we developed with CNLM, the California Department of Fish and Game, and the City of Encinitas, all of which were involved with the creation and remain involved with the management of the Manchester Avenue Mitigation Bank. As discussed above, many landowners and local jurisdictions perceive critical habitat as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing conservation plans such as the Manchester Avenue Mitigation Bank. The exclusion of this area signals to other private landowners that if they take steps to put their lands into conservation, they may avoid an additional layer of regulation, which, as we described above in the ''Conservation Partnerships on Non-Federal Lands'' section, sometimes acts as a disincentive for private landowners.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Manchester Habitat Conservation Area Management Plan

We reviewed and evaluated the proposed designation of essential habitat in the Manchester Avenue Mitigation Bank and determined that the benefits of excluding critical habitat on 70 ac (28 ha) of land in the Manchester Avenue Mitigation Bank outweigh the benefits of designating these lands as critical habitat. This area, now owned by the CNLM, is protected by a conservation easement and the permanent management of this area is funded by an endowment supported by a Property Analysis Record (PAR). These measures provide assurance that the features essential to the conservation of *Acanthomintha ilicifolia* at the Manchester Avenue Mitigation Bank site will be permanently protected and managed to conserve this species. In light of the conserved status of the lands and the absence of an expected Federal nexus for future section 7 consultation on these privately owned lands, we conclude that the potential regulatory benefit of designating this area as critical habitat is minimal. Likewise, educational benefit of designation is also small and largely redundant to the educational benefit already provided though CNLM's ongoing environmental education programs to promote public understanding and appreciation of the natural resources on the Manchester Avenue Mitigation Bank as summarized above. The minimal educational and potential regulatory benefits of including the privately owned Manchester Avenue Mitigation Bank in critical habitat are small when compared to the impact such a designation could have on our current and future partnerships. Designation of lands covered by the bank may discourage other private landowners from seeking or completing similar conservation efforts. Therefore, we conclude that the minor benefits of critical habitat designation are outweighed by benefits of exclusion in consideration of the relevant impact to current and future partnerships as summarized above, and in the ''Conservation Partnerships on Non-Federal Lands'' section. As discussed above, Manchester Avenue Mitigation Bank will provide for significant preservation and management of habitat for *A. ilicifolia* and will help reach the recovery goals for this species.

Exclusion Will Not Result in Extinction of the Species—Manchester Habitat Conservation Area Management Plan

The exclusion of 70 ac (28 ha) of private lands in the Manchester Avenue Mitigation Bank from the final critical habitat designation will not result in the extinction of *Acanthomintha ilicifolia* because these lands are permanently conserved and managed for the benefit of this species under the agreements in place for the Manchester Avenue Mitigation Bank. The management activities implemented on the Manchester Avenue Mitigation Bank provide for the enhancement and preservation of the features essential to the conservation of *A. ilicifolia*.

The jeopardy standard of section 7(a)(2) of the Act and routine implementation of habitat protection through the section 7(a)(2) process also provide assurances that the species will not go extinct. The protections afforded to *Acanthomintha ilicifolia* under the jeopardy standard will remain in place for the areas excluded from critical habitat.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information

available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if the Secretary determines that the benefits of such exclusions exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft economic analysis (draft EA) was made available for public review on November 27, 2007 (72 FR 66122). We accepted comments and information on the draft analysis until December 27, 2007. A final economic analysis was completed on January 24, 2008.

The primary purpose of the final economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Acanthomintha ilicifolia*. 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. The economic analysis separates the costs associated with conservation measures and economic impacts that occurred pre-designation from those that are likely to occur as a result of the designation. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. The economic analysis separated the costs associated with the areas that we proposed to exclude from the areas that we proposed to designate at the time of the March 14, 2007, proposed rule (72 FR 11946). 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.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are ''reasonably foreseeable'' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20-year time frame from when the proposed rule became available to the public (72 FR 11946; March 14, 2007). The 20-year time frame was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects become increasingly speculative.

Based on our analysis, we concluded that the designation of critical habitat would not result in a significant economic impact. The total future potential economic impact is estimated to be $0.6 to $2.8 million in undiscounted dollars over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $0.4 to $2.1 million ($25,000 to $137,000 annualized); applying a 7 percent discount rate, it is $0.3 to $1.5 million ($25,000 to $136,000 annualized). Impacts associated with development represent the largest proportion of future impacts, accounting for 96 percent of forecasted impacts in the areas proposed for final designation. Impacts from recreation management and exotic plant species management make up the remaining 4 percent. Under the final designation scenario, approximately 98 percent of the anticipated post-designation impacts are forecast to occur in subunits 3D (71 percent), 3C (17 percent), and 3F (11 percent). The remaining 2 percent of forecasted impacts are expected to occur in subunits 3B, 1A, and 3E. Impacts associated with development, recreation, and exotic plant species management are quantified for the areas that we proposed as critical habitat. Although we do not find the economic costs to be significant, they were considered in balancing the benefits of including and excluding areas from critical habitat. We did not exclude any areas from this designation of critical habitat based on economic impacts.

A copy of the final economic analysis, with supporting documents, may be obtained by contacting U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or for downloading from the Internet at *http://www.regulations.gov* or *http://www.fws.gov/carlsbad*.

Required Determinations

In our March 14, 2007, proposed rule (72 FR 11946), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the economic analysis. In this final rule, we affirm the information contained in the proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951).

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small

entities. SBREFA amended RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for *Acanthomintha ilicifolia* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

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 rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect *Acanthomintha ilicifolia* (see Section 7 Consultation section). Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see Application of the ''Adverse Modification'' Standard section).

In our final economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Acanthomintha ilicifolia* and the proposed designation of critical habitat. The analysis is based on the estimated impacts associated with the proposed rulemaking as described in Chapters 2 through 4 and Appendices A, B, C, and F of the analysis and evaluates the potential for economic impacts related to three categories: Development and HCP implementation; recreation management; and invasive, nonnative plant management.

The U.S. Forest Service (USFS), the California Department of Fish and Game (CDFG), and the U.S. Fish and Wildlife Service are not considered small entities by the Small Business Administration. Two non-profit organizations, The Nature Conservancy (TNC) and the Center for Natural Lands Management (CNLM), are involved with conservation activities for *Acanthomintha ilicifolia*; however, the primary mission of both of these organizations is to preserve, restore, and protect natural resources. Therefore, impacts from species conservation on these organizations are not considered in the small business impacts analysis.

Additionally, the boundaries of four city governments encompass portions of the proposed critical habitat—Carlsbad, Encinitas, San Diego, and Poway—with the remainder of the proposed critical habitat located within unincorporated San Diego County. All four cities and the County exceed the criteria to be considered a ''small entity'' under the RFA.

The final economic analysis identified 18 privately owned, undeveloped parcels within areas proposed as critical habitat. The 18 parcels are owned by nine individual landowners. For the nine individual landowners that may be affected by the proposed designation of critical habitat, the final economic analysis could not determine if any of these landowners qualify as small businesses. For the two landowners of proposed subunits 3D, 3E, and 3F, the final economic analysis estimates annualized impacts associated with conservation activities for *Acanthomintha ilicifolia* could range from a low of $700 to $35,700, with an average range of annualized impact of $5,300 to $42,300 per landowner over the next 20 years. The remaining seven landowners of the 14 parcels in subunits we excluded from the final designation, annualized impacts are estimated to range from a low of $300 in subunit 4D up to $18,700 in subunit 2C, with an average annualized impact ranging from $17,000 to $84,000.

We determined that nine individual private landowners do not constitute a substantial number of small entities according to the SBA. However, even if the landowners were to represent small development businesses, nine small businesses would not be a significant number of businesses for San Diego County. Additionally, any developer directly impacted by the designation of critical habitat would not be expected to bear the additional cost of conservation measures for *Acanthomintha ilicifolia*; it is anticipated that additional costs that could arise from the designation would be passed on to individual homebuyers if the parcels were to be developed. Please refer to our final economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we considered whether this would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for *Acanthomintha ilicifolia* will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the final economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination (*see* **ADDRESSES** for information on obtaining a copy of the final economic analysis).

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued Executive Order 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. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The final economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the final economic analysis, energy-related impacts associated with *Acanthomintha ilicifolia* conservation activities within the final critical habitat designation are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(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; Aid to Families with Dependent Children 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 result in the destruction or adverse modification of critical habitat. Non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. 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 onto State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for *Acanthomintha ilicifolia* in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for *Acanthomintha ilicifolia* does not pose significant takings implications.

Federalism

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in California. The designation may have some benefit to these governments in that the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the PCE of the habitat necessary to the conservation of the species is specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the

physical and biological features essential to the conservation of the subspecies within the designated areas to assist the public in understanding the habitat needs of *Acanthomintha ilicifolia*.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the Jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation, and no unoccupied Tribal lands that are essential for the conservation of *Acanthomintha ilicifolia*. Therefore, we are not designating critical habitat for *A. ilicifolia* on Tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

Author(s)

The primary authors of this rulemaking are the staff members of the Carlsbad Fish and Wildlife Office.

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. Amend § 17.12(h), by revising the entry for ''*Acanthomintha ilicifolia*'' under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Acanthomintha ilicifolia.	San Diego thornmint	U.S.A. (CA), Mexico	Lamiaceae	T	649	17.96(a)	NA
*	*	*	*	*	*	*	

■ 3. Amend § 17.96(a), by adding an entry for ''*Acanthomintha ilicifolia* (San Diego thornmint),'' in alphabetical order under family Lamiaceae, to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Lamiaceae: *Acanthomintha ilicifolia* (San Diego thornmint)

(1) Critical habitat units are depicted for San Diego County, California, on the maps below.

(2) The primary constituent element of critical habitat for *Acanthomintha ilicifolia* is clay lenses that provide substrate for seedling establishment and space for growth and development of *Acanthomintha ilicifolia* that are:

(i) Within chaparral, grassland, and coastal sage scrub;

(ii) On gentle slopes ranging from 0 to 25 degrees;

(iii) Derived from gabbro and soft calcareous sandstone substrates with a loose, crumbly structure and deep fissures (approximately 1 to 2 feet (30 to 60 cm)); and

(iv) Characterized by a low density of forbs and geophytes, and a low density or absence of shrubs.

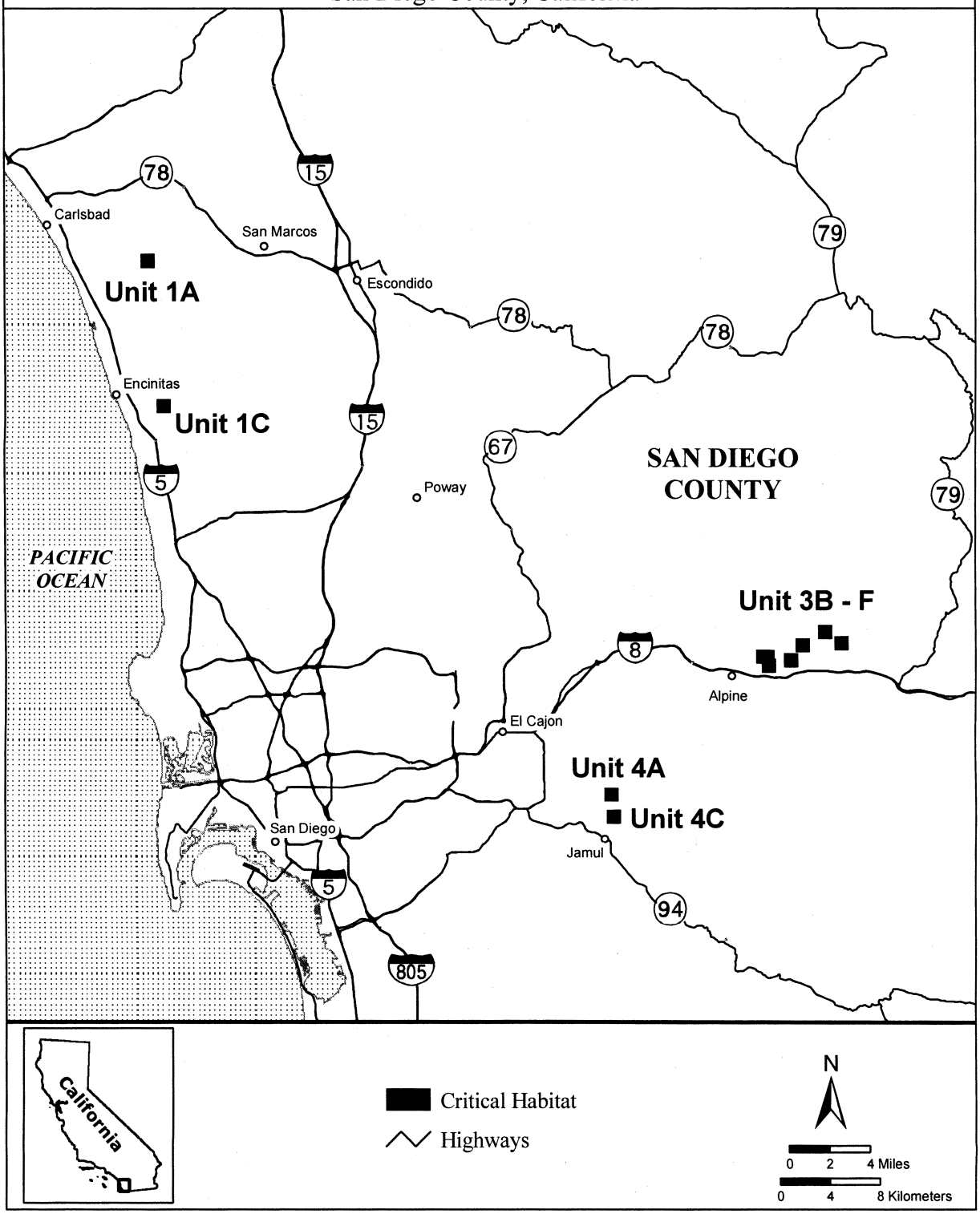
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which such structures are located existing on the effective date of this rule.

(4) Critical habitat map units. Data layers defining map units were created using a base of U.S. Geological Survey 7.5′ quadrangle maps, and the critical habitat units were then mapped using UTM coordinates.

(5) **Note:** Index map of critical habitat units for *Acanthomintha ilicifolia* (San Diego thornmint) follows:

BILLING CODE 4310–55–P

Index Map
Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)
San Diego County, California



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(6) Unit 1: San Diego County, California. From USGS 1:24,000 quadrangle maps San Luis Rey, San Marcos, Encinitas, and Rancho Santa Fe.

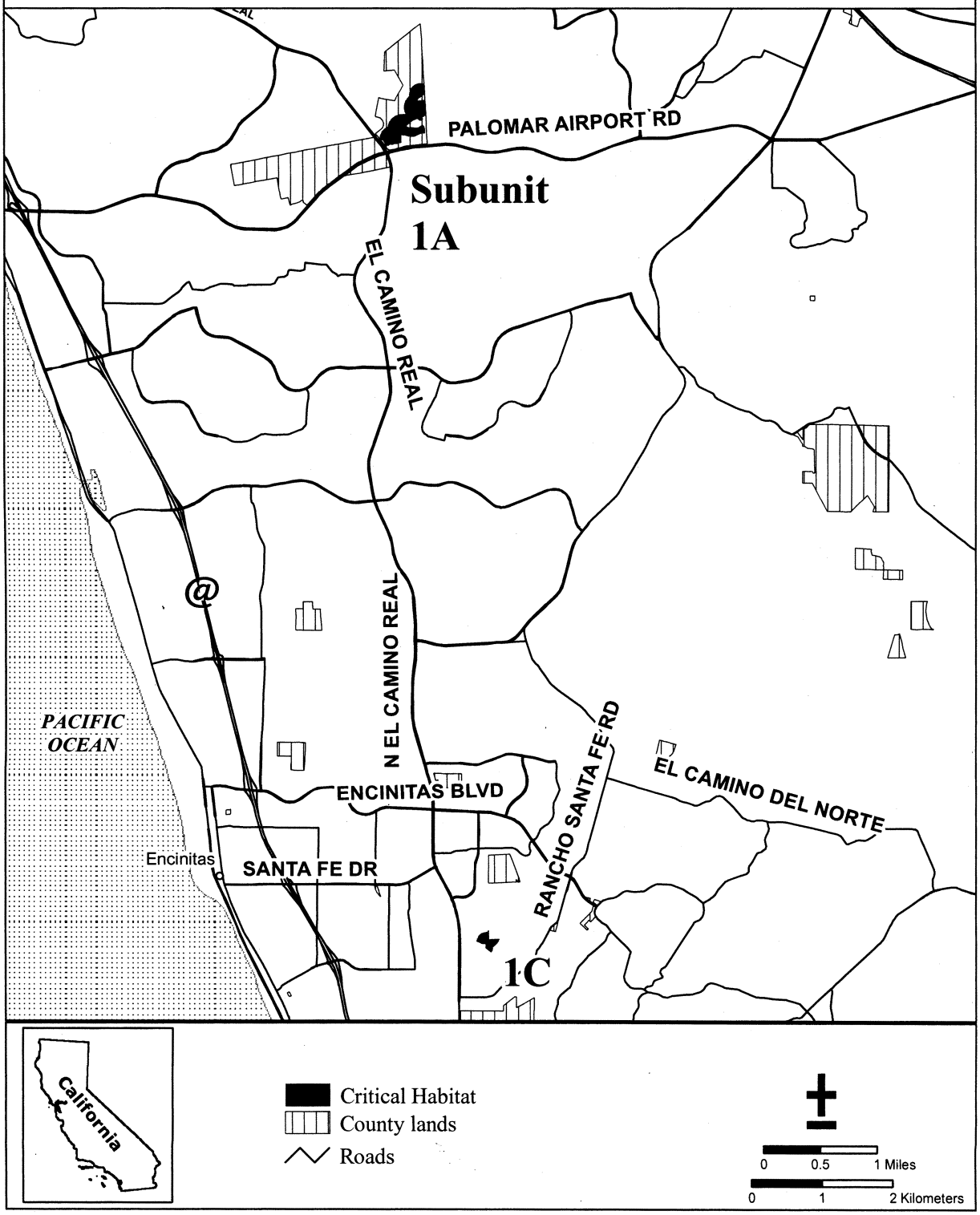
(i) Subunit 1A. Land bounded by the following UTM NAD27 coordinates (E,N): 475715, 3666433; 475721, 3666303; 475701, 3666286; 475680, 3666267; 475668, 3666256; 475657, 3666252; 475640, 3666251; 475636, 3666235; 475627, 3666226; 475627, 3666225; 475624, 3666222; 475614, 3666214; 475604, 3666209; 475588, 3666206; 475577, 3666207; 475570, 3666200; 475651, 3666200; 475724, 3666204; 475729, 3666090; 475729, 3666089; 475715, 3666078; 475725, 3665997; 475684, 3665976; 475692, 3665942; 475678, 3665937; 475677, 3665937; 475667, 3665934; 475660, 3665932; 475625, 3665959; 475555, 3665930; 475456, 3665852; 475471, 3665837; 475502, 3665823; 475526, 3665825; 475595, 3665822; 475610, 3665823; 475639, 3665823; 475697, 3665853; 475706, 3665850; 475706, 3665850; 475707, 3665847; 475709, 3665845; 475710, 3665842; 475711, 3665840; 475713, 3665837; 475714, 3665834; 475715, 3665832; 475716, 3665829; 475717, 3665826; 475718, 3665823; 475719, 3665821; 475720, 3665818; 475721, 3665815; 475721, 3665812; 475722, 3665809; 475723, 3665807; 475723, 3665804; 475724, 3665801; 475724, 3665798; 475725, 3665795; 475725, 3665792; 475726, 3665789; 475726, 3665787; 475726, 3665784; 475726, 3665781; 475726, 3665778; 475726, 3665775; 475726, 3665772; 475726, 3665769; 475726, 3665766; 475726, 3665763; 475726, 3665760; 475726, 3665758; 475725, 3665755; 475725, 3665752; 475725, 3665751; 475690, 3665758; 475660, 3665748; 475573, 3665707; 475497, 3665712; 475443, 3665727; 475419, 3665730; 475402, 3665733; 475390, 3665731; 475389, 3665722; 475387, 3665635; 475393, 3665625; 475384, 3665621; 475363, 3665616; 475351, 3665612; 475329, 3665607; 475298, 3665608; 475276, 3665597; 475267, 3665596; 475257, 3665597; 475244, 3665599; 475234, 3665595; 475221, 3665587; 475170, 3665590; 475172, 3665599; 475154, 3665640; 475145, 3665651; 475119, 3665668; 475104, 3665685; 475097, 3665688; 475098, 3665697; 475100, 3665707; 475103, 3665716; 475107, 3665725; 475111, 3665735; 475114, 3665741; 475117, 3665745; 475123, 3665756; 475124, 3665759; 475129, 3665767; 475135, 3665775; 475142, 3665783; 475148, 3665790; 475156, 3665797; 475161, 3665801; 475175, 3665813; 475178, 3665815; 475186, 3665821; 475195, 3665826; 475203, 3665831; 475212, 3665835; 475215, 3665836; 475216, 3665844; 475216, 3665854; 475218, 3665864; 475220, 3665873; 475223, 3665883; 475227, 3665892; 475231, 3665901; 475236, 3665910; 475241, 3665919; 475247, 3665927; 475253, 3665934; 475260, 3665942; 475267, 3665948; 475286, 3665965; 475286, 3665965; 475294, 3665972; 475302, 3665977; 475310, 3665983; 475319, 3665987; 475328, 3665991; 475337, 3665995; 475338, 3665995; 475339, 3665996; 475372, 3666006; 475381, 3666009; 475390, 3666011; 475400, 3666013; 475410, 3666014; 475420, 3666014; 475430, 3666014; 475440, 3666013; 475450, 3666011; 475452, 3666011; 475478, 3666005; 475474, 3666011; 475472, 3666014; 475466, 3666022; 475461, 3666030; 475456, 3666039; 475452, 3666048; 475448, 3666057; 475445, 3666067; 475443, 3666077; 475441, 3666087; 475440, 3666096; 475440, 3666106; 475440, 3666116; 475441, 3666126; 475443, 3666134; 475446, 3666150; 475446, 3666152; 475448, 3666162; 475451, 3666171; 475455, 3666181; 475459, 3666190; 475464, 3666199; 475468, 3666205; 475479, 3666223; 475480, 3666225; 475486, 3666233; 475492, 3666241; 475496, 3666245; 475511, 3666260; 475514, 3666263; 475518, 3666267; 475517, 3666269; 475517, 3666272; 475517, 3666275; 475516, 3666278; 475516, 3666281; 475516, 3666284; 475516, 3666287; 475516, 3666289; 475516, 3666292; 475516, 3666295; 475516, 3666298; 475517, 3666301; 475517, 3666304; 475517, 3666307; 475518, 3666310; 475518, 3666313; 475519, 3666315; 475519, 3666318; 475520, 3666321; 475520, 3666324; 475521, 3666327; 475522, 3666330; 475523, 3666332; 475524, 3666335; 475524, 3666338; 475525, 3666341; 475526, 3666343; 475528, 3666346; 475529, 3666349; 475530, 3666351; 475531, 3666354; 475532, 3666357; 475534, 3666359; 475535, 3666362; 475536, 3666364; 475538, 3666367; 475539, 3666369; 475541, 3666372; 475543, 3666374; 475544, 3666376; 475546, 3666379; 475548, 3666381; 475550, 3666383; 475551, 3666386; 475553, 3666388; 475555, 3666390; 475557, 3666392; 475559, 3666394; 475561, 3666396; 475563, 3666398; 475565, 3666400; 475568, 3666402; 475570, 3666404; 475572, 3666406; 475574, 3666408; 475577, 3666410; 475579, 3666411; 475581, 3666413; 475584, 3666415; 475586, 3666416; 475589, 3666418; 475591, 3666419; 475594, 3666421; 475596, 3666422; 475599, 3666424; 475601, 3666425; 475604, 3666426; 475607, 3666427; 475609, 3666428; 475612, 3666430; 475615, 3666431; 475617, 3666432; 475620, 3666433; 475623, 3666433; 475626, 3666434; 475628, 3666435; 475631, 3666436; 475634, 3666437; 475637, 3666437; 475640, 3666438; 475643, 3666438; 475645, 3666439; 475648, 3666439; 475651, 3666439; 475654, 3666440; 475657, 3666440; 475660, 3666440; 475663, 3666440; 475666, 3666440; 475669, 3666440; 475671, 3666440; 475674, 3666440; 475677, 3666440; 475680, 3666440; 475683, 3666440; 475686, 3666439; 475689, 3666439; 475692, 3666439; 475695, 3666438; 475697, 3666438; 475700, 3666437; 475703, 3666437; 475706, 3666436; 475709, 3666435; 475712, 3666434; 475714, 3666433; returning to 475715, 3666433.

(ii) Subunit 1C. Land bounded by the following UTM NAD27 coordinates (E,N): 476734, 3654344; 476773, 3654344; 476753, 3654337; 476753, 3654314; 476730, 3654283; 476699, 3654259; 476670, 3654230; 476667, 3654190; 476654, 3654166; 476578, 3654226; 476581, 3654228; 476586, 3654259; 476577, 3654287; 476576, 3654287; 476519, 3654289; 476485, 3654306; 476451, 3654315; 476452, 3654320; 476457, 3654334; 476457, 3654335; 476461, 3654344; 476465, 3654353; 476467, 3654358; 476474, 3654370; 476476, 3654374; 476481, 3654383; 476487, 3654391; 476488, 3654392; 476497, 3654403; 476502, 3654409; 476509, 3654417; 476515, 3654423; 476519, 3654426; 476609, 3654448; 476615, 3654465; 476615, 3654341; 476616, 3654341; returning to 476734, 3654344.

(iii) **Note:** Map of Unit 1, Subunits 1A and 1C, follows:

BILLING CODE 4310–55–P

Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)
Unit 1: Subunits 1A and 1C, San Diego County, California



BILLING CODE 4310–55–C

(7) Unit 3: San Diego County, California. From USGS 1:24,000 quadrangle map Viejas Mountain.

(i) Subunit 3B. Land bounded by the following UTM NAD27 coordinates (E,N): 524469, 3634407; 524471, 3634409; 524477, 3634418; 524483, 3634425; 524490, 3634433; 524497, 3634439; 524505, 3634446; 524513, 3634452; 524522, 3634457; 524530, 3634461; 524539, 3634466; 524549, 3634469; 524557, 3634472; 524601, 3634484; 524603, 3634484; 524607, 3634485; 524617, 3634500; 524621, 3634504; 524627, 3634512; 524634, 3634519; 524641, 3634526; 524647, 3634531; 524683, 3634560; 524686, 3634562; 524694, 3634568; 524702, 3634573; 524711, 3634578; 524720, 3634582; 524729, 3634585; 524739, 3634588; 524749, 3634590; 524758, 3634592; 524768, 3634593; 524778, 3634593; 524783, 3634593; 524811, 3634592; 524816, 3634592; 524826, 3634591; 524836, 3634590; 524845, 3634587; 524855, 3634584; 524864, 3634581; 524873, 3634577; 524882, 3634572; 524891, 3634567; 524899, 3634561; 524907, 3634555; 524914, 3634548; 524917, 3634544; 524933, 3634527; 524937, 3634523; 524943, 3634516; 524949, 3634508; 524954, 3634499; 524959, 3634490; 524963, 3634481; 524966, 3634472; 524986, 3634414; 524987, 3634413; 524990, 3634403; 524992, 3634394; 524993, 3634384; 524994, 3634374; 524995, 3634364; 524994, 3634354; 524993, 3634344; 524992, 3634334; 524990, 3634325; 524987, 3634315; 524985, 3634311; 524970, 3634270; 524968, 3634265; 524964, 3634255; 524959, 3634247; 524957, 3634243; 524957, 3634242; 524953, 3634220; 524952, 3634214; 524950, 3634204; 524947, 3634194; 524943, 3634185; 524939, 3634176; 524935, 3634167; 524929, 3634159; 524923, 3634150; 524917, 3634143; 524913, 3634139; 524890, 3634114; 524887, 3634111; 524880, 3634104; 524872, 3634098; 524864, 3634092; 524856, 3634087; 524847, 3634082; 524838, 3634078; 524832, 3634076; 524804, 3634066; 524801, 3634065; 524791, 3634062; 524781, 3634059; 524774, 3634058; 524755, 3634055; 524744, 3634054; 524741, 3634053; 524732, 3634052; 524731, 3634341; 524634, 3634343; 524436, 3634347; 524436, 3634347; 524439, 3634356; 524444, 3634365; 524448, 3634374; 524452, 3634380; 524454, 3634383; returning to 524469, 3634407. Land bounded by the following UTM NAD27 coordinates (E,N): 524386, 3634381; 524389, 3634377; 524400, 3634360; 524402, 3634356; 524406, 3634348; 524348, 3634349; 524325, 3634350; 524325, 3634407; 524325, 3634407; 524324, 3634436; 524342, 3634425; 524344, 3634424; 524352, 3634418; 524360, 3634411; 524367, 3634405; 524374, 3634397; 524374, 3634397; 524381, 3634390; 524385, 3634384; returning to 524386, 3634381. Land bounded by the following UTM NAD27 coordinates (E,N): 524764, 3633867; 524774, 3633864; 524783, 3633860; 524792, 3633856; 524801, 3633851; 524810, 3633846; 524818, 3633840; 524826, 3633834; 524833, 3633827; 524840, 3633820; 524846, 3633812; 524852, 3633804; 524857, 3633796; 524862, 3633787; 524866, 3633778; 524869, 3633768; 524871, 3633763; 524896, 3633679; 524897, 3633675; 524900, 3633665; 524901, 3633655; 524902, 3633645; 524902, 3633635; 524902, 3633625; 524901, 3633615; 524900, 3633606; 524897, 3633596; 524894, 3633586; 524891, 3633577; 524887, 3633568; 524882, 3633559; 524877, 3633551; 524871, 3633542; 524865, 3633535; 524858, 3633527; 524851, 3633521; 524844, 3633515; 524805, 3633485; 524768, 3633441; 524765, 3633438; 524749, 3633418; 524749, 3633418; 524749, 3633467; 524735, 3633871; 524745, 3633870; 524755, 3633869; 524758, 3633868; returning to 524764, 3633867.

(ii) **Note:** Subunit 3B for *Acanthomintha ilicifolia* is depicted on the map in paragraph (7)(x) of this entry.

(iii) Subunit 3C. Land bounded by the following UTM NAD27 coordinates (E,N): 527110, 3634008; 527113, 3633915; 527118, 3633794; 527114, 3633788; 527113, 3633774; 527112, 3633774; 527093, 3633707; 527076, 3633649; 527047, 3633595; 526929, 3633588; 526900, 3633612; 526851, 3633672; 526802, 3633692; 526764, 3633652; 526723, 3633606; 526709, 3633575; 526535, 3633564; 526387, 3633555; 526378, 3633555; 526380, 3633421; 526384, 3633149; 526237, 3633148; 526221, 3633170; 526221, 3633170; 526215, 3633178; 526209, 3633187; 526205, 3633195; 526201, 3633205; 526197, 3633214; 526194, 3633223; 526194, 3633225; 526175, 3633297; 526173, 3633306; 526171, 3633315; 526171, 3633325; 526170, 3633335; 526170, 3633340; 526173, 3633452; 526174, 3633458; 526175, 3633468; 526176, 3633478; 526179, 3633487; 526181, 3633497; 526185, 3633506; 526189, 3633515; 526194, 3633524; 526199, 3633532; 526192, 3633537; 526183, 3633543; 526176, 3633549; 526169, 3633555; 526138, 3633586; 526137, 3633587; 526131, 3633594; 526124, 3633602; 526118, 3633610; 526113, 3633618; 526109, 3633627; 526104, 3633636; 526101, 3633646; 526098, 3633655; 526096, 3633665; 526094, 3633675; 526093, 3633684; 526090, 3633734; 526085, 3633793; 526074, 3633870; 526074, 3633871; 526064, 3633943; 526064, 3633944; 526063, 3633954; 526062, 3633964; 526063, 3633974; 526064, 3633984; 526064, 3633986; 526073, 3634048; 526074, 3634056; 526076, 3634066; 526079, 3634076; 526083, 3634085; 526084, 3634088; 526100, 3634123; 526100, 3634133; 526091, 3634181; 526070, 3634267; 526069, 3634273; 526068, 3634278; 526058, 3634337; 526058, 3634342; 526057, 3634352; 526057, 3634353; 526054, 3634397; 526054, 3634406; 526054, 3634416; 526055, 3634426; 526057, 3634435; 526059, 3634445; 526062, 3634455; 526066, 3634464; 526070, 3634473; 526074, 3634482; 526080, 3634490; 526085, 3634498; 526092, 3634506; 526099, 3634513; 526102, 3634517; 526123, 3634536; 526127, 3634540; 526134, 3634546; 526143, 3634552; 526151, 3634557; 526160, 3634562; 526169, 3634566; 526178, 3634570; 526187, 3634572; 526213, 3634579; 526214, 3634580; 526224, 3634582; 526234, 3634584; 526235, 3634584; 526261, 3634587; 526270, 3634588; 526277, 3634588; 526310, 3634612; 526318, 3634617; 526320, 3634620; 526340, 3634682; 526341, 3634684; 526344, 3634694; 526348, 3634703; 526353, 3634712; 526358, 3634720; 526364, 3634728; 526370, 3634736; 526377, 3634743; 526385, 3634750; 526392, 3634756; 526400, 3634762; 526403, 3634764; 526449, 3634794; 526455, 3634797; 526464, 3634802; 526473, 3634806; 526483, 3634810; 526492, 3634812; 526502, 3634815; 526512, 3634816; 526522, 3634817; 526532, 3634818; 526542, 3634817; 526549, 3634817; 526586, 3634812; 526589, 3634812; 526598, 3634810; 526608, 3634808; 526618, 3634805; 526627, 3634802; 526636, 3634798; 526645, 3634793; 526653, 3634788; 526662, 3634782; 526669, 3634775; 526677, 3634769; 526683, 3634761; 526690, 3634754; 526695, 3634745; 526701, 3634737; 526705, 3634728; 526710, 3634719; 526712, 3634713; 526738, 3634641; 526739, 3634638; 526742, 3634628; 526744, 3634619; 526746, 3634609; 526747, 3634599; 526747, 3634589; 526747, 3634583; 526744, 3634492; 526761, 3634446; 526790, 3634400; 526792, 3634397; 526796, 3634389; 526797, 3634389; 526807, 3634393; 526814, 3634395; 526876, 3634412; 526877, 3634413; 526887, 3634415; 526897, 3634417; 526902, 3634417; 526973, 3634424; 526978, 3634425; 526988, 3634425; 526998, 3634425; 527008, 3634424; 527017, 3634422; 527027,

3634420; 527029, 3634419; 527087, 3634403; 527095, 3634401; 527104, 3634397; 527113, 3634393; 527120, 3634389; 527111, 3634389; 527111, 3634111; returning to 527110, 3634008.

(iv) **Note:** Subunit 3C for *Acanthomintha ilicifolia* is depicted on the map in paragraph (7)(x) of this entry.

(v) Subunit 3D. Land bounded by the following UTM NAD27 coordinates (E,N): 527502, 3634924; 527484, 3634918; 527477, 3634916; 527467, 3634914; 527460, 3634912; 527393, 3634902; 527391, 3634902; 527381, 3634901; 527371, 3634901; 527314, 3634901; 527314, 3634901; 527304, 3634901; 527294, 3634902; 527284, 3634904; 527275, 3634906; 527265, 3634909; 527256, 3634912; 527247, 3634917; 527238, 3634921; 527229, 3634927; 527221, 3634932; 527214, 3634939; 527206, 3634945; 527200, 3634953; 527199, 3634953; 527164, 3634993; 527158, 3635001; 527152, 3635009; 527147, 3635017; 527142, 3635026; 527138, 3635035; 527134, 3635045; 527132, 3635054; 527129, 3635064; 527128, 3635074; 527127, 3635076; 527120, 3635142; 527119, 3635150; 527119, 3635160; 527119, 3635170; 527120, 3635180; 527121, 3635189; 527124, 3635199; 527127, 3635209; 527130, 3635218; 527130, 3635219; 527172, 3635317; 527176, 3635326; 527180, 3635335; 527186, 3635343; 527191, 3635351; 527196, 3635357; 527263, 3635436; 527265, 3635438; 527272, 3635445; 527279, 3635452; 527280, 3635453; 527285, 3635457; 527376, 3635529; 527378, 3635530; 527386, 3635536; 527395, 3635541; 527403, 3635546; 527413, 3635550; 527422, 3635554; 527430, 3635556; 527514, 3635580; 527516, 3635580; 527525, 3635582; 527535, 3635584; 527545, 3635585; 527555, 3635585; 527565, 3635585; 527566, 3635585; 527661, 3635578; 527671, 3635577; 527680, 3635576; 527690, 3635573; 527763, 3635554; 527823, 3635540; 527827, 3635539; 527837, 3635536; 527846, 3635532; 527855, 3635528; 527864, 3635524; 527872, 3635518; 527881, 3635513; 527888, 3635506; 527895, 3635500; 527900, 3635252; 527901, 3635233; 527900, 3635233; 527896, 3635228; 527895, 3635227; 527529, 3635219; 527494, 3635218; returning to 527502, 3634924.

(vi) **Note:** Subunit 3D for *Acanthomintha ilicifolia* is depicted on the map in paragraph (7)(x) of this entry.

(vii) Subunit 3E. Land bounded by the following UTM NAD27 coordinates (E,N): 529307, 3636146; 529297, 3636146; 529297, 3636146; 529284, 3636147; 529274, 3636148; 529264, 3636149; 529260, 3636150; 529249, 3636153; 529243, 3636154; 529233, 3636157; 529224, 3636161; 529215, 3636165; 529210, 3636167; 529197, 3636175; 529193, 3636177; 529184, 3636182; 529176, 3636188; 529168, 3636194; 529161, 3636201; 529154, 3636208; 529148, 3636216; 529143, 3636223; 529135, 3636235; 529134, 3636236; 529129, 3636245; 529124, 3636253; 529120, 3636263; 529116, 3636272; 529114, 3636279; 529111, 3636290; 529110, 3636292; 529108, 3636302; 529107, 3636311; 529106, 3636321; 529105, 3636331; 529106, 3636341; 529107, 3636351; 529107, 3636356; 529110, 3636370; 529111, 3636376; 529113, 3636386; 529116, 3636395; 529119, 3636405; 529123, 3636413; 529129, 3636426; 529130, 3636427; 529134, 3636435; 529140, 3636444; 529145, 3636451; 529160, 3636471; 529161, 3636472; 529167, 3636480; 529174, 3636487; 529181, 3636494; 529189, 3636500; 529195, 3636505; 529214, 3636518; 529216, 3636519; 529224, 3636524; 529233, 3636529; 529242, 3636533; 529251, 3636537; 529258, 3636539; 529276, 3636544; 529279, 3636544; 529288, 3636547; 529297, 3636548; 529319, 3636551; 529321, 3636552; 529331, 3636553; 529340, 3636553; 529350, 3636553; 529360, 3636552; 529370, 3636550; 529373, 3636549; 529388, 3636546; 529394, 3636544; 529404, 3636542; 529413, 3636538; 529416, 3636537; 529428, 3636532; 529434, 3636529; 529443, 3636524; 529451, 3636519; 529459, 3636513; 529467, 3636507; 529474, 3636500; 529481, 3636493; 529483, 3636490; 529495, 3636476; 529499, 3636471; 529505, 3636463; 529510, 3636454; 529515, 3636446; 529519, 3636437; 529523, 3636427; 529525, 3636420; 529531, 3636398; 529532, 3636396; 529534, 3636386; 529536, 3636376; 529537, 3636366; 529537, 3636356; 529537, 3636356; 529537, 3636345; 529537, 3636336; 529536, 3636326; 529534, 3636316; 529532, 3636306; 529529, 3636296; 529525, 3636287; 529521, 3636278; 529519, 3636273; 529512, 3636262; 529510, 3636258; 529505, 3636249; 529499, 3636241; 529493, 3636233; 529492, 3636233; 529480, 3636219; 529474, 3636212; 529466, 3636205; 529459, 3636199; 529451, 3636193; 529442, 3636188; 529439, 3636186; 529419, 3636175; 529414, 3636173; 529405, 3636169; 529402, 3636167; 529379, 3636159; 529373, 3636156; 529363, 3636153; 529354, 3636151; 529347, 3636150; 529330, 3636147; 529327, 3636147; 529317, 3636146; returning to 529307, 3636146.

(viii) **Note:** Subunit 3E for *Acanthomintha ilicifolia* is depicted on the map in paragraph (7)(x) of this entry.

(ix) Subunit 3F. Land bounded by the following UTM NAD27 coordinates (E,N): 530315, 3635191; 530282, 3635194; 530276, 3635194; 530273, 3635195; 530266, 3635195; 530213, 3635199; 530116, 3635207; 530086, 3635210; 530086, 3635212; 530086, 3635218; 530085, 3635235; 530085, 3635238; 530086, 3635248; 530087, 3635258; 530087, 3635259; 530089, 3635277; 530091, 3635285; 530093, 3635295; 530096, 3635304; 530099, 3635314; 530100, 3635316; 530109, 3635336; 530112, 3635344; 530117, 3635352; 530122, 3635361; 530128, 3635369; 530133, 3635374; 530140, 3635383; 530142, 3635386; 530149, 3635393; 530156, 3635400; 530164, 3635406; 530172, 3635412; 530176, 3635415; 530186, 3635421; 530191, 3635424; 530200, 3635428; 530209, 3635432; 530218, 3635436; 530228, 3635439; 530237, 3635441; 530246, 3635443; 530255, 3635444; 530257, 3635444; 530265, 3635445; 530264, 3635448; 530263, 3635458; 530263, 3635458; 530261, 3635472; 530260, 3635481; 530260, 3635491; 530260, 3635501; 530261, 3635510; 530262, 3635522; 530263, 3635523; 530264, 3635533; 530266, 3635542; 530269, 3635552; 530273, 3635561; 530275, 3635567; 530279, 3635575; 530281, 3635578; 530291, 3635578; 530311, 3635593; 530327, 3635609; 530347, 3635630; 530361, 3635647; 530364, 3635658; 530367, 3635660; 530377, 3635663; 530386, 3635666; 530386, 3635666; 530395, 3635669; 530405, 3635672; 530415, 3635673; 530425, 3635674; 530432, 3635674; 530446, 3635675; 530449, 3635675; 530459, 3635674; 530469, 3635673; 530479, 3635672; 530488, 3635670; 530491, 3635669; 530507, 3635664; 530514, 3635662; 530523, 3635659; 530532, 3635655; 530541, 3635650; 530549, 3635645; 530558, 3635639; 530565, 3635632; 530571, 3635627; 530581, 3635617; 530582, 3635616; 530589, 3635609; 530595, 3635601; 530601, 3635593; 530606, 3635585; 530611, 3635576; 530613, 3635571; 530618, 3635560; 530620, 3635556; 530628, 3635562; 530636, 3635567; 530645, 3635572; 530649, 3635574; 530671, 3635584; 530677, 3635587; 530686, 3635590; 530696, 3635593; 530705, 3635595; 530713, 3635597; 530733, 3635600; 530735, 3635600; 530729, 3635610; 530729, 3635611; 530725, 3635620; 530721, 3635630; 530718, 3635639; 530717, 3635643; 530715, 3635652; 530712, 3635655; 530705, 3635663; 530698, 3635670; 530693, 3635678; 530691, 3635681; 530686, 3635689; 530682, 3635695; 530677, 3635704; 530673, 3635713; 530670,

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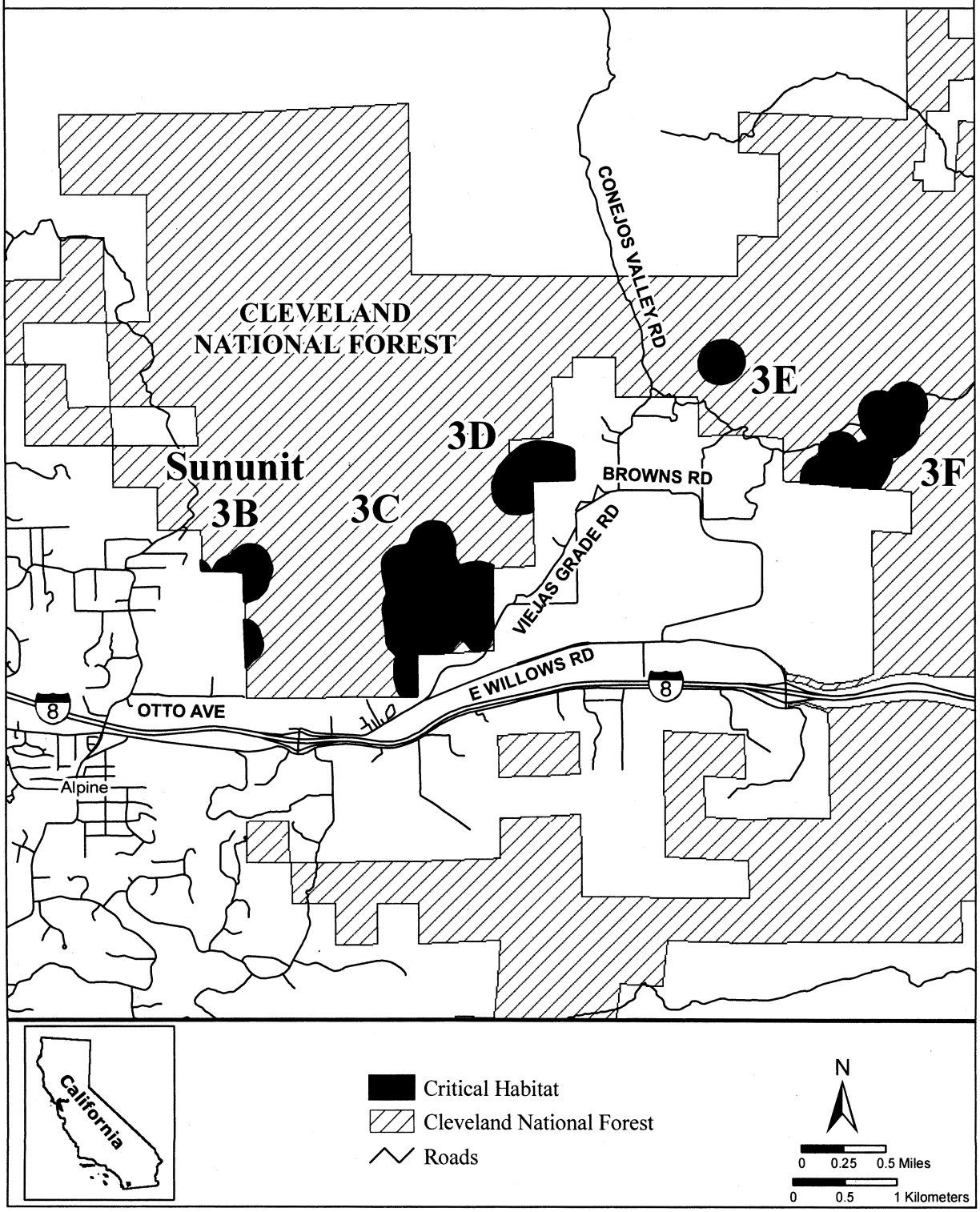
(x) **Note:** Map of Unit 3, Subunits 3B, 3C, 3D, 3E, and 3F, follows:

BILLING CODE 4310–55–P

Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)
Unit 3: Subunits 3B, 3C, 3D, 3E and 3F, San Diego County, California



BILLING CODE 4310–55–C

(8) Unit 4: San Diego County, California. From USGS 1:24,000 quadrangle maps Alpine and Dulzura.

(i) Subunit 4A. Land bounded by the following UTM NAD27 coordinates (E,N): 512272, 3623323; 512234, 3623334; 512185, 3623361; 512163, 3623400; 512214, 3623403; 512216, 3623412; 512233, 3623405; 512281, 3623398; 512302, 3623368; 512301, 3623330; 512297, 3623324; returning to 512272, 3623323.

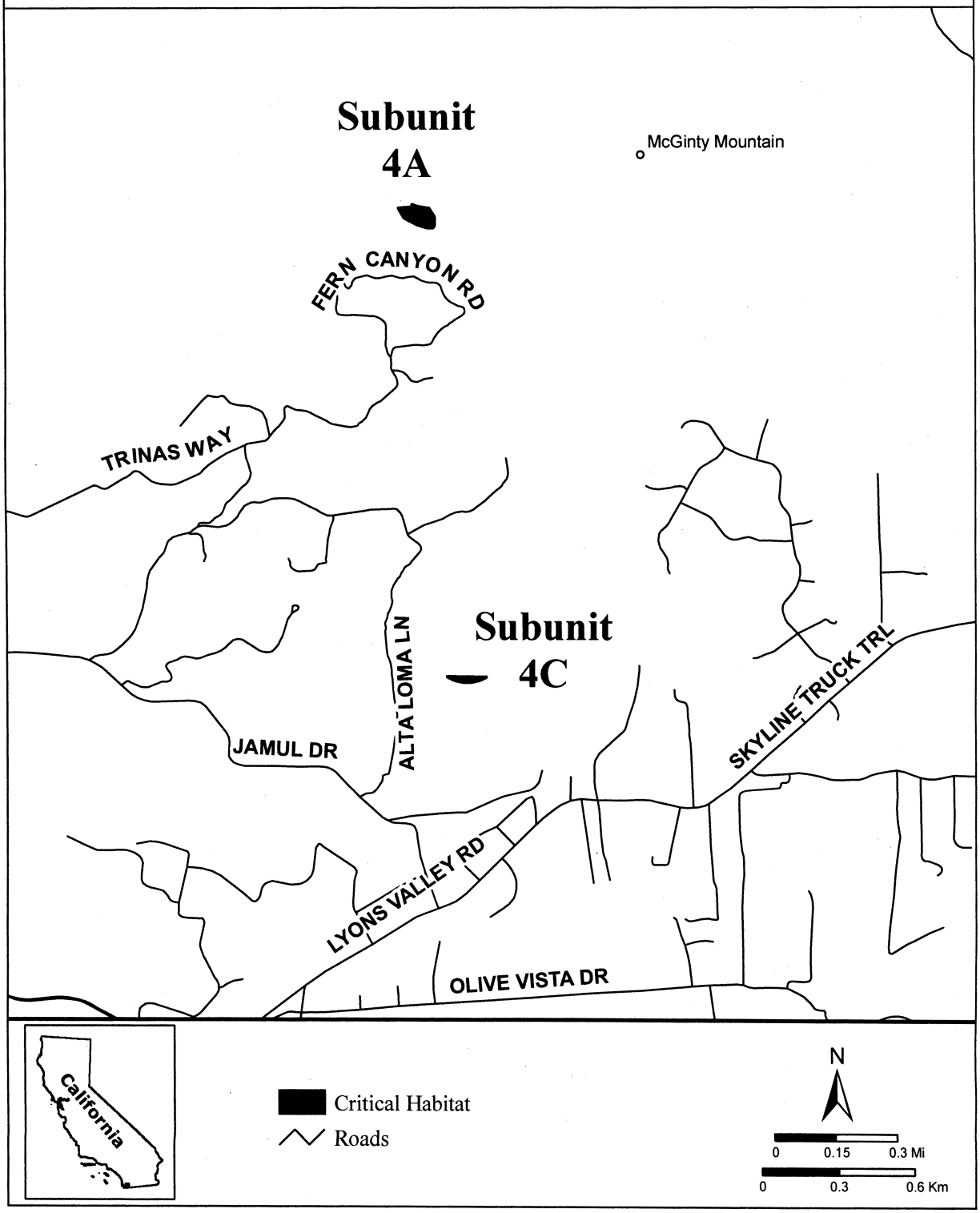
(ii) **Note:** Subunit 4A for *Acanthomintha ilicifolia* is depicted on the map in paragraph (8)(iv) of this entry.

(iii) Subunit 4C Land bounded by the following UTM NAD27 coordinates (E,N): 512490, 3621562; 512502, 3621562; 512500, 3621561; 512498, 3621559; 512495, 3621558; 512493, 3621557; 512490, 3621556; 512487, 3621555; 512485, 3621553; 512482, 3621552; 512479, 3621551; 512476, 3621550; 512474, 3621550; 512471, 3621549; 512468, 3621548; 512465, 3621547; 512462, 3621546; 512460, 3621546; 512457, 3621545; 512454, 3621545; 512451, 3621544; 512448, 3621544; 512445, 3621543; 512442, 3621543; 512439, 3621543; 512437, 3621543; 512434, 3621543; 512431, 3621543; 512428, 3621542; 512425, 3621543; 512422, 3621543; 512419, 3621543; 512416, 3621543; 512413, 3621543; 512411, 3621543; 512408, 3621544; 512405, 3621544; 512402, 3621545; 512399, 3621545; 512396, 3621546; 512393, 3621546; 512391, 3621547; 512388, 3621548; 512385, 3621549; 512382, 3621550; 512379, 3621550; 512377, 3621551; 512374, 3621552; 512371, 3621553; 512369, 3621555; 512366, 3621556; 512363, 3621557; 512361, 3621558; 512358, 3621559; 512355, 3621561; 512353, 3621562; 512351, 3621563; 512351, 3621564; 512490, 3621562; returning to 512490, 3621562.

(iv) **Note:** Map of Unit 4, Subunits 4A and 4C follows:

BILLING CODE 4310–55–P

Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)
Unit 4: Subunits 4A and 4C, San Diego County, California



BILLING CODE 4310–55–C

* * * * *

Dated: August 13, 2008.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–19194 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Tuesday,
August 26, 2008

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Peninsular Ranges Population of Desert Bighorn Sheep (*Ovis canadensis nelsoni*); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2008–0005; 92210–1117–0000–B4]

RIN 1018–AV09

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Peninsular Ranges Population of Desert Bighorn Sheep (*Ovis canadensis nelsoni*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, revised proposed critical habitat, notice of availability of draft economic analysis, notice of public hearings, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period and the scheduling of public hearings on our October 10, 2007, proposed revision to critical habitat for the Peninsular bighorn sheep (*Ovis canadensis nelsoni*) under the Endangered Species Act of 1973, as amended (Act). In this document, we propose to add approximately 36,240 acres (ac) (14,667 hectares (ha)) to our proposed revision of critical habitat. We also announce the availability of the draft economic analysis (DEA) of the proposed revision to critical habitat and amended required determinations. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revisions to critical habitat, the associated DEA, and the amended required determinations section. Please do not resend comments that you submitted on the October 10, 2007, proposed rule. We considered those comments in our revisions to the proposed critical habitat that are set forth in this supplemental proposed rule. Comments previously submitted are included in the public record for this rulemaking.

DATES: *Written Comments:* We will accept comments received or postmarked on or before October 27, 2008. Any comments received after the closing date may not be considered in the final designation of critical habitat.

Public Hearings: The public hearings will take place on September 10, 2008 from 1 p.m. to 3 p.m. and from 6 p.m. to 8 p.m. at The Living Desert, 47–900 Portola Ave., Palm Desert, California.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, *Attn:* RIN 1018–AV07, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760/431–9440; facsimile 760/431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the Peninsular Ranges population of desert bighorn sheep published in the **Federal Register** on October 10, 2007 (72 FR 57740), the proposed revisions to the October 2007 proposed rule outlined in this notice, the DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why habitat should or should not be designated as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), specifically the benefits of excluding or the benefits of including any particular area as critical habitat.

(2) Specific information on:

- The amount and distribution of habitat for Peninsular bighorn sheep,
- What areas occupied by the Peninsular bighorn sheep at the time of listing that contain features essential for the conservation of the Peninsular bighorn sheep we should include in the designation and why, and
- What areas not occupied by the Peninsular bighorn sheep at the time of listing are essential to the conservation of the Peninsular bighorn sheep and why.

(3) Specific information on dispersal areas important for habitat connectivity, the role of such areas in the conservation and recovery of the Peninsular bighorn sheep, and why such areas should or should not be included in the critical habitat designation.

(4) Our proposed revision of criteria used to identify critical habitat, our addition of 36,240 ac (14,667 ha) to proposed critical habitat, and removal of 163 ac (66 ha) from proposed critical habitat as described in this notice (see Changes to Proposed Critical Habitat section below).

(5) Our proposed exclusion of approximately 4,790 ac (1,938 ha) of Peninsular bighorn sheep habitat located on the Agua Caliente Band of Cahuilla Indian's tribal lands in consideration of 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), which are also covered under the Tribe's draft Habitat Conservation Plan (Tribal HCP). Additionally, we are interested in comments related to whether the benefits of excluding these areas would outweigh the benefits of including these areas under section 4(b)(2) of the Act (see the Areas Considered for Exclusion Under Section 4(b)(2) of the Act section of the October 10, 2007, proposed rule (72 FR 57740) and the Changes to Areas Considered for Exclusion section of this document for a detailed discussion).

(6) Our consideration of excluding approximately 18,801 ac (7,609 ha) of private land and permittee-owned land in Peninsular bighorn sheep habitat covered under the draft Coachella Valley Multiple Species Habitat Conservation Plan (CVMSHCP) and whether the benefits of excluding these areas would outweigh the benefits of including these areas as critical habitat under section 4(b)(2) of the Act (see the Areas Considered for Exclusion Under Section 4(b)(2) of the Act section of the October 10, 2007, proposed rule (72 FR 57740) and the Changes to Areas Considered for Exclusion section of this document for a detailed discussion).

(7) Any areas included in the proposed revision of critical habitat that are covered by existing or proposed conservation or management plans that we should consider for exclusion from the revised final designation under

section 4(b)(2) of the Act. We specifically request information on any operative or draft Habitat Conservation Plans (HCP) for the Peninsular bighorn sheep that have been prepared under section 10(a)(1)(B) of the Act, as well as any other management plan, conservation plan, or agreement that benefits the Peninsular bighorn sheep or the essential physical and biological features of its habitat.

(8) Specific information regarding the current status of plan implementation for the draft Tribal HCP and the draft CVMSHCP.

(9) Land use designations and current or planned activities in the subject areas, and their possible impacts on proposed revised critical habitat.

(10) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the DEA may have been adopted largely as a result of listing the Peninsular bighorn sheep under the Act.

(11) Information on whether the DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we may have overlooked.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate revised critical habitat.

(13) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Any foreseeable economic, national security, or other relevant impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and information on the benefits of including or excluding areas that exhibit these impacts.

(16) Information on whether the DEA appropriately identifies all costs that could result from the proposed revised designation.

(17) Whether the categorization of estimated economic impacts into pre-designation and post-designation baseline economic impacts and incremental impacts is accurate.

(18) Information on any quantifiable economic benefits of the revised designation of critical habitat.

(19) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(20) Economic data on the incremental costs of designating any particular area as revised critical habitat.

(21) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the October 10, 2007, proposed rule (72 FR 57740) during the initial comment period from October 10 to December 10, 2007, please do not resubmit them. Comments previously submitted are included in the public record and we will fully consider them in preparation of our final determination. Our final determination concerning revised critical habitat for the Peninsular bighorn sheep will take into consideration all written comments we receive, oral or written comments we receive at the public hearing on September 10, 2008, and any additional information we receive during all comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, amended required determinations, and DEA by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** sections.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule to revise critical habitat and the DEA on the Internet at *http://www.regulations.gov*, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

On February 1, 2001, we designated approximately 844,897 ac (341,919 ha) of land in Riverside, San Diego, and Imperial counties, California, as critical habitat for the Peninsular Ranges Population of bighorn sheep (66 FR 8649; February 1, 2001). On March 7, 2005, the Agua Caliente Band of Cahuilla Indians filed a complaint against the Service alleging that the economic analysis developed for our 2001 designation used a methodology similar to that ruled to be insufficient by the Tenth Circuit Court in *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). Other parties subsequently intervened as plaintiffs in the case. A July 31, 2006, court-approved consent decree enacted a limited partial vacature of Tribal, mining, and Desert Riders lands (29,925 ac (12,110 ha)) and remanded the critical habitat designation back to the Service for new rulemaking. On October 10, 2007, we published a proposed rule to revise critical habitat for the Peninsular bighorn sheep (72 FR 57740), identifying approximately 384,410 ac (155,564 ha) in Riverside, San Diego, and Imperial counties, California, that meet the definition of critical habitat for the Peninsular bighorn sheep. Of this, we proposed to exclude approximately 4,512 ac (1,826 ha) of Tribal land covered by the draft Tribal HCP and announced that we would evaluate and consider the possible exclusion of approximately 19,211 ac (7,774 ha) of private land covered under the draft CVMSHCP from the final designation under section 4(b)(2) of the Act (see the Areas Considered for Exclusion Under Section 4(b)(2) of the Act section of the October 10, 2007, proposed rule (72 FR 57740) for a detailed discussion).

In the 1998 final listing rule, Peninsular bighorn sheep were listed as a distinct population segment (DPS) of the species *Ovis canadensis.* As stated in the October 10, 2007, proposed rule, we are formally proposing a taxonomic revision to amend the final listing rule from a DPS of the species *Ovis canadensis*, to a DPS of the subspecies *Ovis canadensis nelsoni*, which is the currently accepted taxonomy. Within this document we will refer to the listed entity as a distinct population segment (DPS) of desert bighorn sheep (*Ovis canadensis nelsoni*), not as a subspecies

as we did in the October 10, 2007, proposed rule. This DPS occupies the Peninsular Ranges of southern California, previously identified at the time of listing as the Peninsular Ranges population of bighorn sheep. The taxonomic revision does not materially affect discreteness and significance of Peninsular bighorn sheep as a DPS entity. For a detailed discussion of the DPS analysis for Peninsular bighorn sheep, see the Distinct Vertebrate Population Segment section of the 1998 final listing rule (63 FR 13134).

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. In making a decision to exclude areas, we consider the economic impacts, national security, or any other relevant impacts of the designation.

Changes to Proposed Revised Critical Habitat

Criteria Used To Identify Critical Habitat

In this document, we are advising the public of revisions we made to the criteria used to identify critical habitat (as described in the October 10, 2007, proposed rule (72 FR 57740)). During the first comment period for the proposed rule, we received significant comments from the public, including biologists familiar with Peninsular bighorn sheep, which led us to reevaluate and revise the criteria used to identify critical habitat. The major change to our criteria is the consideration of a larger data set dating back another 10 years from 1998 to 1988, thereby incorporating data for the average lifespan of any Peninsular bighorn sheep alive at the time of listing. Below, we present our revised ''Criteria Used To Identify Critical Habitat'' section, which replaces the ''Criteria Used To Identify Critical Habitat'' section provided in the October 10, 2007, proposed rule.

All proposed revised critical habitat is within areas that we have determined were occupied at the time of listing, and that contain the physical and biological features essential to the conservation of the DPS. Lands were proposed for designation based on sufficient essential features being present to support the life processes.

We used the following data to delineate proposed revised critical habitat: (1) Areas with occupancy data indicating they are currently occupied or areas with occupancy data indicating they have been occupied at some point between 2008 (present time) and 1988 (i.e., the time of listing (1998) less 10 years, which is the average lifespan of Peninsular bighorn sheep); (2) areas within the ewe group distribution (i.e., subpopulations) boundaries identified by Rubin *et al.* (1998); (3) areas where occupancy data points indicate repeated Peninsular bighorn sheep use, but which were not captured within the ewe group distribution boundaries identified by Rubin *et al.* (1998); and (4) areas that contain the essential physical and biological features required by the DPS as determined from aerial imagery and Geographic Information System (GIS) data on vegetation, elevation, and slope. We also gathered information from our files, staff biologists, the California Department of Fish and Game, the Bighorn Institute, and known bighorn sheep experts. Our proposed revision to critical habitat is designed to capture ewe groups; lambing areas; foraging areas, including alluvial fans; water sources; ram movement; and areas used for associated herd (i.e., male, female, and young) movements and migrations.

We delineated the proposed revised critical habitat boundaries using the following steps:

(1) As a first step in the delineation process, we mapped ewe group areas from Rubin *et al.* (1998) over GIS imagery of the Peninsular Ranges to delineate the distribution of ewe groups in the proposed revised critical habitat. We consider Rubin *et al.* (1998) to be the best available data on Peninsular bighorn sheep ewe group distribution. The ewe group delineations presented in Rubin *et al.* (1998) were based on data collected during 1993 to 1996, when the population of Peninsular bighorn sheep was at its smallest known size. Therefore, the ewe group delineations present a minimum distribution of bighorn sheep in the Peninsular Ranges. However, this is the only data we are aware of that identifies the distribution of ewe groups and subgroups within the Peninsular Ranges. Furthermore, we believe that the ewe groups presented in Rubin *et al.* (1998) accurately depict the general locations of the known ewe groups in these ranges and provide a logical starting point for the delineation of critical habitat.

(2) We compared the ewe group delineation from Rubin *et al.* (1998, pp. 539–561) with all occupancy data collected since 1988 on GIS imagery maps to: (1) Ensure that Rubin *et al.* (1998, pp. 539–561) accurately represents the boundaries of the ewe groups at larger population levels; (2) capture possible ram movement; and (3) capture other areas used by sheep in recent years. Subsequently, we expanded the delineated ewe group areas to include areas where occupancy data points indicate repeated Peninsular bighorn sheep use and sheep movements (pre- and post-Rubin *et al.* 1998, pp. 539–561), and to include areas that contain the primary constituent elements (PCEs) for Peninsular bighorn sheep. We delineated the critical habitat boundaries at these locations to capture the majority of occurrence points while still following the boundaries of the essential features, such as elevations below 4,600 feet (ft) (1,400 meters (m)) (PCE 1), areas with 30 percent canopy cover or less (PCE 1), escape terrain (PCE 3), slopes of 20 percent or greater (PCE 1), alluvial fans (PCE 4), washes (PCE 4), and water sources (PCE 5) immediately adjacent to the identified ewe groups. When it was not possible to follow boundaries of the essential features, we delineated the border around occurrence points to follow natural breaks in the terrain such as ridgelines, canyon bottoms, and toe of slope.

Specifically, we expanded the area representing the northernmost ewe group delineation (i.e., San Jacinto Mountains) to include the area north of Chino Canyon where (1) we have evidence of recent ewe and ram movements; and (2) the Bighorn Institute has released, and continues to release, captive-born sheep to help recover this DPS. We also expanded the area representing the southernmost ewe group delineation (i.e., Carizzo Canyon area) to the southeast to capture water sources (PCE 5), including habitat near

the Interstate 8-State Route 98 split south to the U.S.-Mexico border where there are consistent, recent sightings of uncollared Peninsular bighorn sheep. Finally, we expanded ewe group delineations to include areas of occupied habitat between the ewe groups in the Santa Rosa Mountains continuing south along the Peninsular Ranges to the Vallecito Mountains ewe group. Use of these areas is consistent with the Rubin *et al.* (1998, pp. 539–561) demographic study, which indicated possible connectivity between ewe groups through this area.

(3) We then examined all pre-listing occurrence data in our files to determine if our revised critical habitat missed any areas of historical repeated Peninsular bighorn sheep use. We identified an area of historical repeated use that was occupied at the time of listing between two ewe subgroups documented in Rubin *et al.* (1998, pp. 539–561) as (1) Santa Rosa Mountains east of State Route 74 (Martinez Canyon); and (2) Santa Rosa Mountains east of State Route 74 (south)). Use of this area is consistent with the Rubin *et al.* (1998, pp. 539–561) demographic study, which indicated possible connectivity between these subgroups through this area. This area is important in light of genetic findings by Boyce *et al.* (1999, pp. 99–106) that indicate ewe groups within these ranges maintain genetic connectivity, probably through male-mediated nuclear gene flow. Based on the importance of this area for connectivity between subgroups, we expanded the proposed revised critical habitat boundaries to include areas where occupancy data points indicate historically occupied habitat. Since the number of occurrence data points in historically occupied areas is relatively small, we delineated the unit boundaries in these areas to follow the boundaries of the essential features, such as elevations below 4,600 ft (1,400 m) (PCE 1), areas with 30 percent canopy cover or less (PCE 1), escape terrain (PCE 3), alluvial fans (PCE 4), washes (PCE 4), and water sources (PCE 5) immediately adjacent to the identified ewe groups.

(4) As a final step in refining our delineation, we closely examined our revised units to ensure they capture all of the features essential to the conservation of the DPS. Where appropriate, we expanded the boundaries to capture the extent of an alluvial fan or water source (PCE 4 or 5, respectively). We also removed areas that we determined do not contain essential features or otherwise do not contain suitable Peninsular bighorn sheep habitat, such as areas above 4,600 ft (1,400 m) elevation (PCE 1), areas containing conifer woodland with canopy cover greater than 30 percent (PCE 1), and slopes less than 20 percent (PCE 1), unless those areas overlapped specifically with Rubin *et al.*'s (1998, pp. 539–561) ewe group distributions and had documented use by Peninsular bighorn sheep as evidenced by occurrence data.

When determining the proposed revisions to critical habitat boundaries within this revised proposed rule, we made every effort to avoid including developed areas such lands covered by buildings, pavement, and other structures because such lands lack essential features for the Peninsular bighorn sheep. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed revision to critical habitat have been excluded by text in the revised proposed rule and are not proposed for designation as revised critical habitat. Therefore, once the critical habitat designation is finalized, Federal actions limited to these areas would not trigger section 7 consultation, unless they may affect the DPS or PCEs in adjacent critical habitat.

Areas Proposed as Critical Habitat

In this document, we are proposing additional revisions to the area of critical habitat described in the October 10, 2007, proposed rule (72 FR 57740). During the first comment period for the proposed rule, we received significant comments from the public, including biologists familiar with the Peninsular bighorn sheep, on areas essential to the conservation of the DPS that should be included in the designation. As a result of these comments, new information received, and a revision of our criteria used to identify critical habitat, we reevaluated the following areas: The eastern edge of the Santa Rosa Mountains; the San Ysidro, Pinyon, and Vallecito Mountains; and the Jacumba Mountains. Over 98 percent of these areas are currently designated as critical habitat for the Peninsular bighorn sheep (50 CFR 17.95(a)); however, we did not propose these areas as critical habitat in the October 10, 2007, proposed revision to critical habitat (72 FR 57740). Below, we describe each area we reevaluated, explain why we did not include the area in the 2007 proposed rule, and explain why we are now proposing the area for inclusion in the revised designation of critical habitat.

Eastern Edge of the Santa Rosa Mountains

The eastern edge of the Santa Rosa Mountains stretches along developed and agricultural areas of the Coachella Valley from Palm Desert southeast to the Salton Sea. Along this interface, sheep currently exist near areas of high human activity, and habitat is threatened by spreading development. Where occurrence data indicate repeated sheep use, we delineated proposed revised critical habitat along the eastern slope of the Santa Rosa Mountains, in some cases immediately adjacent to the edge of development and the existing critical habitat boundary (66 FR 8650, February 1, 2001). The eastern edge of the Santa Rosa Mountains contains low-elevation alluvial fan habitat that may be important to Peninsular bighorn sheep. Therefore, we included low-elevation alluvial fan habitat in the proposed revised designation in cases where occurrence data indicated sheep are using these areas. However, large expanses of currently designated critical habitat (2001) lack occurrence data to indicate sheep inhabit those areas, including some low-elevation alluvial habitat. As such, we did not include all currently designated critical habitat along the eastern edge of the Santa Rosa Mountains in the proposed revised critical habitat designation.

During the public comment period, a number of comments we received from biologists familiar with the Peninsular bighorn sheep provided additional information regarding the importance of low-elevation and alluvial fan habitat along the eastern edge of the Santa Rosa Mountains. We also received a limited amount of recently collected occurrence data in the wash areas along the eastern edge of the south Santa Rosa Mountains. In light of these comments and the revision of our criteria used to identify critical habitat to include occurrence data since 1988, we reevaluated and revised our proposed revised critical habitat boundary along the eastern edge of the Santa Rosa Mountains. We agree that low-elevation habitat is important for Peninsular bighorn sheep, and where occurrence data indicated sheep use, we revised our proposed revision of critical habitat to include four additional areas along the eastern edge of the Santa Rosa Mountains. These areas include approximately 32 ac (13 ha) in two parcels along the urban interface between the cities of Cathedral City and Palm Desert in Unit 2A; 3,009 ac (1,218 ha) on and around Indio Mountain in Unit 2A; and 7,477 ac (3,026 ha) of low-elevation and wash habitat to the east of the southernmost portion of the Santa

Rosa Mountains in Unit 2B. Approximately 99 percent of these areas are currently designated as critical habitat (66 FR 8650; February 1, 2001). An approximately 77 ac (31 ha) parcel and a 3 ac (1 ha) parcel located out of Palm Desert are outside of the area currently designated as critical habitat.

San Ysidro, Pinyon, and Vallecito Mountains

The San Ysidro, Pinyon, and Vallecito Mountains roughly comprise the middle portion of the Peninsular bighorn sheep range in the United States. We included the majority of these mountains in the October 2007 proposed rule to revise critical habitat (72 FR 57740). However, although the areas were included in the existing critical habitat designation, we did not include some extreme western portions of the San Ysidro and Pinyon Mountains and the northeastern edge of the Vallecito Mountains in the proposed rule to revise critical habitat because we did not have occurrence data indicating repeated sheep use in these areas.

During the public comment period, we received comments from several biologists who are currently studying the Peninsular bighorn sheep indicating that we did not consider a number of areas along the western San Ysidro and Pinyon Mountains and the northeastern edge of the Vallecito Mountains that are known to be occupied. The commenters indicated the Service was provided occurrence data that indicated occupancy of these areas by bighorn sheep prior to publication of the October 10, 2007, proposed rule (72 FR 57740). Upon receiving these comments, we examined the occurrence data used to delineate the proposed revised critical habitat boundary and found that a set of data was missing from our GIS database. We have since included that occurrence data into our GIS database. In light of this data and our revised criteria used to identify critical habitat to include data since 1988, we have reevaluated the western San Ysidro and Pinyon Mountains and the northeastern edge of the Vallecito Mountains. Because of occurrence data indicating repeated sheep use in these areas, we are proposing to include approximately 6,503 ac (2,632 ha) in five areas along the western San Ysidro Mountains, 5,176 ac (2,095 ha) in the western Pinyon Mountains, and 2,751 ac (1,113 ha) along the northeastern edge of the Vallecito Mountains (all in Unit 2B) in the revision to critical habitat for the Peninsular bighorn sheep. Approximately 97 percent of these areas are currently designated as critical habitat (see 66 FR 8650, February 1, 2001). An approximately 53 ac (21 ha) parcel located near Parks Canyon and an approximately 360 ac (146 ha) parcel located in the San Ysidro Mountains west of Borrego Springs, are outside of the area currently designated as critical habitat.

Jacumba Mountains

The Jacumba Mountains represent the southernmost portion of the Peninsular Ranges in the United States, and the southernmost extent of the Peninsular bighorn sheep's extant range in the United States. Part of the Jacumba Mountains were included in the 2007 proposed revised designation, including an area known as the Interstate 8 ''Island'' where there had been a number of recent sheep sightings. However, we had limited data at the time of the proposed critical habitat rule indicating occupancy or sheep use in the rest of the southeast Jacumba Mountains and the rugged terrain extending east and south to the United States-Mexico border. As a result, we included a small amount of the currently designated critical habitat just north of the United States-Mexico border in Imperial County in the October 10, 2007, proposed revision to critical habitat (72 FR 57740).

Since the proposed revised critical habitat was published, there have been additional sightings and reports of sheep activity around and within the Interstate 8 ''Island,'' including suitable habitat areas that extend south to the United States-Mexico border. Data recently collected by Service biologists and other biologists familiar with the DPS include actual sightings of multiple sheep and reports of sheep scat and tracks throughout the area, indicating that this area is currently occupied by a group of Peninsular bighorn sheep. This area exhibits rugged habitat that contains the features essential for Peninsular bighorn sheep conservation and is continuous with habitat in Mexico. The Jacumba Mountains represent the only area of habitat connecting the DPS listed in the United States with other bighorn sheep populations that occupy the Peninsular Ranges in Mexico. Because of recent occurrence data and to be consistent with the delineation process we have used to include areas of repeated sheep use in critical habitat, we are proposing to include approximately 11,292 ac (4,570 ha) of habitat in the Jacumba Mountains in the revision to critical habitat for the Peninsular bighorn sheep. This area is currently designated as critical habitat (66 FR 8650; February 1, 2001).

In total, we are adding approximately 36,240 ac (14,667 ha) of private, Federal, and State land to the October 10, 2007, proposed revision to critical habitat (72 FR 57740) for the Peninsular bighorn sheep (Table 1).

Areas Removed From Proposed Critical Habitat

While reevaluating the boundaries of the proposed revised critical habitat as described above, we noticed three areas that did not accurately follow the boundaries of the essential features and do not contain suitable habitat. These areas consist of high-elevation habitat above 4,600 ft (1,400 m) and do not meet our criteria used to delineate critical habitat. We are removing approximately 66 ac (28 ha) in proposed Unit 1 and two parcels totaling approximately 97 ac (39 ha) in proposed Unit 2B from the October 10, 2007, proposed revision to critical habitat (72 FR 57740) for the Peninsular bighorn sheep (Table 1).

TABLE 1—LAND OWNERSHIP, AREAS PROPOSED AS REVISED CRITICAL HABITAT IN THE OCTOBER 10, 2007, PROPOSED RULE (72 FR 57740), ADDITIONAL AREAS PROPOSED IN THIS DOCUMENT, AND AREAS REMOVED FROM PROPOSED CRITICAL HABITAT. AREAS ARE PROVIDED IN ACRES (HECTARES)

[Area estimates reflect all land within revised proposed critical habitat unit boundaries]

Critical habitat unit	Land ownership	Proposed revised critical habitat (72 FR 57740) [10]	Additions to proposed revised critical habitat	Areas removed from proposed revised critical habitat	New acreage
1. San Jacinto Mts	Tribal [1]	4,323 (1,749)			
	BLM [2]	3,135 (1,269)			
	USFS [3]	1,237 (501)		66 (27)	
	State [4]	276 (112)			

TABLE 1—LAND OWNERSHIP, AREAS PROPOSED AS REVISED CRITICAL HABITAT IN THE OCTOBER 10, 2007, PROPOSED RULE (72 FR 57740), ADDITIONAL AREAS PROPOSED IN THIS DOCUMENT, AND AREAS REMOVED FROM PROPOSED CRITICAL HABITAT. AREAS ARE PROVIDED IN ACRES (HECTARES)—Continued

[Area estimates reflect all land within revised proposed critical habitat unit boundaries]

Critical habitat unit	Land ownership	Proposed revised critical habitat (72 FR 57740) [10]	Additions to proposed revised critical habitat	Areas removed from proposed revised critical habitat	New acreage
	Private [5]	6,302 (2,550)			
Subtotal		15,273 (6,181)	0 (0)	66 (27)	15,207
2A. N. Santa Rosa Mts	BLM	44,485 (18,003)	613 (248)		
	State [6]	17,547 (7,101)	1,490 (603)		
	Private [5]	12,499 (5,058)	938 (380)		
	Tribal [1]	467 (189)			
Subtotal		74,998 (30,351)	3,041 (1,231)	0 (0)	78,039
2B. S. Santa Rosa Mts south to Vallecito Mts.	BLM	16,266 (6,583)			
	State [7]	197,509 (79,929)	19,794 (8,011)	97 (39)	
	Private	12,436 (5,033)	2,113 (855)		
Subtotal		226,211 (91,545)	21,907 (8,866)	97 (39)	248,021 (100,371)
3. Carrizo Canyon	BLM	27,762 (11,235)	9,985 (4,041)		
	State [8]	35,475 (14,356)	58 (23)		
	Private	4,177 (1,690)	1,249 (505)		
	Local [9]	514 (208)			
Subtotal		67,928 (27,489)	11,292 (4,570)	0 (0)	79,220 (32,059)
Total		384,410 (155,565)	36,240 (14,667)	163 (66)	420,487 (170,166)

[1] Tribal = Agua Caliente Band of Cahuilla Indians Reservation and Tribal Lands.
[2] BLM = Bureau of Land Management.
[3] USFS = United States Forest Service.
[4] State = Coachella Valley Mountains Conservancy (CVMC).
[5] Private = Private and/or draft CVMSHCP permittee.
[6] State = University of California Natural Reserve System, CVMC, Wildlife Conservation Board, and State undetermined.
[7] State = California Department of Fish and Game, California State Lands Commission, and California Department of Parks and Recreation (CDPR).
[8] State = CDPR.
[9] Local = City/County Park.
[10] Proposed critical habitat acreages for ownership types reported in this column do not match those reported in the October 10, 2007, proposed rule (72 FR 57740) as they have been revised to reflect updated ownership information obtained since the proposed rule published.

Changes to Areas Currently Being Considered for Exclusion

We are revising the areas currently considered for exclusion based on ownership data that has been updated since the publication of the proposed rule (Table 1). Based on the ownership updates, there are approximately 4,323 ac (1,749 ha) of Tribal Lands of the Agua Caliente Band of Cahuilla Indians (Tribal land) within Unit 1 and 467 ac (189 ha) in Unit 2A. We are now proposing to exclude from the final designation of critical habitat a total of approximately 4,790 ac (1,938 ha) of Tribal land in consideration of 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). Based on ownership updates and additions to the proposed revised critical habitat described in this document, there are approximately 6,302 ac (2,550 ha) of private and draft CVMSHCP permittee-owned land in Unit 1 and 12,499 ac (5,058 ha) in Unit 2A. We are now evaluating and considering the possible exclusion from the final revised critical habitat designation approximately 18,801 ac (7,609 ha) of private and draft CVMSHCP permittee-owned lands covered by the draft CVMSHCP under section 4(b)(2) of the Act. Aside from these revisions, the remainder of the exclusion discussion presented in the proposed revised rule remains unchanged. The DEA was prepared prior to identification of the specific acreage revisions that resulted from updated land ownership information obtained since the proposed rule published (see Table 1, footnote 10 above). Specifically, the DEA acknowledges Tribal lands are located in subunit 2A, as reported above in Table 1, however at the time of the preparation of the DEA the exact location of those lands was not known (page 2–6, footnote 36 of the DEA). Ownership information will be updated in the final economic analysis.

Revised Unit Descriptions

Below we present revised unit descriptions for Peninsular bighorn sheep critical habitat units 1, 2A, 2B, and 3, which replace the descriptions for these units presented in the October 10, 2007, proposed rule (72 FR 57740).

Unit 1: San Jacinto Mountains

Unit 1 consists of approximately 15,207 ac (6,154 ha) in the San Jacinto

Mountains, Riverside County. Unit 1 is generally located within an area bounded on the east by the city of Palm Springs, bounded on the north by Windy Point and Snow Canyon, and extends south to the northern Palm Canyon area. Land ownership within the unit includes approximately 4,323 ac (1,749 ha) of Tribal land; 3,135 ac (1,269 ha) of BLM land; 1,171 ac (474 ha) of USFS land; and 6,302 ac (2,550 ha) of private and draft CVMSHCP permittee-owned land (Table 1).

Unit 1 begins at a low elevation of about 450 ft (137 m) on the eastern slope and rises to about 4,600 ft (1,400 m) to the west. It is the northernmost unit proposed as revised critical habitat for the Peninsular bighorn sheep. This unit was occupied at the time of listing and is currently occupied. This unit contains features that are essential to the conservation of the Peninsular bighorn sheep including a range of vegetation types (PCE 2), foraging and watering areas including alluvial fans (PCE 4 and 5), and steep to very steep, rocky terrain with elevations and slopes that provide for sheltering, lambing, mating, movement among and between ewe groups (PCE 1), and predator evasion (PCE 3).

The essential features in Unit 1 may require special management considerations or protection to ameliorate the threats of urban and industrial development (particularly in lower elevation areas) due to the proximity of this unit to the Palms Springs area, and to decrease the direct and indirect effects of human disturbance to the Peninsular bighorn sheep and its habitat. Please see the ''Special Management Considerations or Protection'' section of the proposed rule (72 FR 57740) for a detailed discussion of the threats to Peninsular bighorn sheep habitat and potential management considerations.

This unit includes approximately 4,323 ac (1,749 ha) of Tribal land meeting the definition of critical habitat for Peninsular bighorn sheep. We are proposing to exclude these lands from the final designation. The designation of critical habitat would be expected to adversely impact our working relationship with the Tribe, and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Furthermore, the approximately 4,323 ac (1,749 ha) of Tribal land are currently managed in a manner that provides conservation benefits to the Peninsular bighorn sheep, and are also within the plan area of the draft Tribal HCP (see October 10, 2007, proposed rule (72 FR 57740), ''Proposed Exclusion of Agua Caliente Band of Cahuilla Indians Tribal Lands Under Section 4(b)(2) of the Act'' for a detailed discussion).

This unit also includes lands within the plan area for the draft CVMSHCP. We are considering whether to exclude approximately 6,302 ac (2,550 ha) of private and draft CVMSHCP land from the final critical habitat designation based, at least in part, on the benefits provided to the Peninsular bighorn sheep and its habitat by the CVMSCHP, which is in draft form and under review by the Service (see October 10, 2007, proposed rule (72 FR 57740), ''Lands Covered by Management Plans—Exclusions Under Section 4(b)(2) of the Act'' for a detailed discussion).

Unit 2A: North Santa Rosa Mountains

Unit 2A consists of approximately 78,039 ac (31,581 ha) in the northern Santa Rosa Mountains, Riverside County. Unit 2A is generally located on the east-facing slopes of the northern Santa Rosa Mountains, and extends from near the City of Rancho Mirage in the north to Martinez Canyon in the south, limited to the east by the communities of the northern Coachella Valley. Land ownership within the unit includes approximately 43,872 ac (17,754 ha) of BLM land; 16,057 ac (6,498 ha) of land owned by the State of California; 467 ac (189 ha) of Tribal land; and 11,561 ac (4,679 ha) of private and draft CVMSHCP permittee-owned land (Table 1).

Unit 2A begins at a low elevation of about 50 ft (15 m) on the eastern slope and rises to about 4,600 ft (1,400 m) to the west. This unit was occupied at the time of listing and remains occupied. This unit contains features that are essential to the conservation of the Peninsular bighorn sheep including a range of vegetation types (PCE 2), foraging and watering areas including alluvial fans (PCE 4 and 5), and steep to very steep, rocky terrain with elevations and slopes that provide for sheltering, lambing, mating, movement among and between ewe groups (PCE 1), and predator evasion (PCE 3).

The essential features in Unit 2A may require special management considerations or protection to ameliorate the threats of urban, industrial, and agricultural development, and to decrease the direct and indirect effects of human disturbance to Peninsular bighorn sheep and its habitat, due to the proximity of this unit to the highly developed northern Coachella Valley. In particular, the essential features in this unit may require special management considerations or protection to alleviate threats to Peninsular bighorn sheep and its habitat associated with roadways, such as State Route 74 that cuts through the midsection of this unit and may impede movement between ewe groups. Please see the ''Special Management Considerations or Protection'' section of the October 10, 2007, proposed rule (72 FR 57740) for a detailed discussion of the threats to Peninsular bighorn sheep habitat and potential management considerations.

This unit includes approximately 467 ac (189 ha) of Agua Caliente Band of Cahuilla Indians (Tribe) tribal lands meeting the definition of critical habitat for Peninsular bighorn sheep. We are proposing to exclude these lands from the final designation. As stated above under the description of Unit 1, the designation of critical habitat would be expected to adversely impact our working relationship with the Tribe, and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Furthermore, these approximately 467 ac (189 ha) of Tribal land are currently managed by the Tribe in a manner that provides some conservation benefits to the Peninsular bighorn sheep, and are also within the plan area of the draft Tribal HCP (see October 10, 2007, proposed rule (72 FR 57740), ''Proposed Exclusion of Agua Caliente Band of Cahuilla Indians Tribal Lands Under Section 4(b)(2) of the Act'' for a detailed discussion).

This unit includes lands that are within the plan area for the draft CVMSHCP. We are considering the possible exclusion of approximately 11,561 ac (4,679 ha) of private and draft CVMSHCP permittee owned land in Unit 2A from the final critical habitat designation based on benefits provided to the Peninsular bighorn sheep and its habitat under this plan, which is in draft form and under review by the Service (see October 10, 2007, proposed rule (72 FR 57740), ''Areas Considered for Exclusion Under Section 4(b)(2) of the Act'' for a detailed discussion).

Unit 2B: South Santa Rosa Mountains South to Vallecito Mountains

Unit 2B consists of approximately 248,021 ac (100,371 ha) in the southern Santa Rosa Mountains, Coyote Canyon, San Ysidro Mountains, Pinyon Mountains, and Vallecito Mountains, in Riverside, San Diego, and Imperial counties. Unit 2B is generally located on the east-facing slopes of the above ranges, loosely bounded on the east by the Coachella Valley floor, and extends from the southern Santa Rosa

Mountains in the north to the Fish Creek Mountains in the south. Land ownership within the unit includes approximately 16,266 ac (6,583 ha) of BLM land; 217,206 ac (87,901 ha) of land owned by the State of California; and 14,549 ac (5,888 ha) of private land (Table 1). Portions of the Anza-Borrego Desert State Park occur within this unit.

Unit 2B begins at a low elevation of about 150 ft (45 m) on the eastern slope and rises to about 4,600 ft (1,400 m) to the west. This unit was occupied at the time of listing and remains occupied. This unit contains features that are essential to the conservation of the Peninsular bighorn sheep including a range of vegetation types (PCE 2), foraging and watering areas including alluvial fans (PCE 4 and 5), and steep to very steep, rocky terrain with elevations and slopes that provide for sheltering, lambing, mating, movement among and between ewe groups (PCE 1), and predator evasion (PCE 3).

The essential features in Unit 2B may require special management considerations or protection to (1) ameliorate threats of urban, industrial, and agricultural development due to the proximity of this unit to the Coachella Valley, especially the lower elevation areas in the northeastern portions of this unit; (2) decrease the direct and indirect effects of human disturbance to Peninsular bighorn sheep and its habitat due to recreational activity, since most of this unit includes lands within Anza-Borrego Desert State Park, which is open to recreational activities; (3) alleviate threats to Peninsular bighorn sheep and its habitat associated with State Route 78, which cuts through the southern portion of this unit and may impede movement between ewe groups; and (4) alleviate threats to Peninsular bighorn sheep and its habitat associated with mining operations at Fish Canyon Quarry and various mining claims in the unit. Please see the ''Special Management Considerations or Protection'' section of the October 10, 2007, proposed rule (72 FR 57740) for a detailed discussion of the threats to Peninsular bighorn sheep habitat and potential management considerations.

Unit 3: Carrizo Canyon

Unit 3 consists of approximately 79,220 ac (32,059 ha) in the Carrizo Canyon area of San Diego and Imperial counties, extending south to the U.S.-Mexico border. Unit 3 is generally located in Carrizo Canyon and the surrounding In-Ko-Pah Mountains, Jacumba Mountains, Coyote Mountains, and Tierra Blanca Mountains; it is loosely bounded on the north, east, and west by the Coachella Valley floor. Land ownership within the unit includes approximately 37,747 ac (15,276 ha) of BLM land; 35,533 ac (14,380 ha) of land owned by the State of California; 5,426 ac (2,196 ha) of private land; and 514 ac (208 ha) of local park land (Table 1). Portions of the Anza-Borrego Desert State Park occur within this unit.

Unit 3 begins at a low elevation of about 400 ft (122 m) on the eastern slope and rises to about 4,600 ft (1,400 m) to the west. This unit was occupied at the time of listing and is currently occupied. This unit contains features that are essential to the conservation of the Peninsular bighorn sheep including a range of vegetation types (PCE 2), foraging and watering areas including alluvial fans (PCE 4 and 5), and steep to very steep, rocky terrain with elevations and slopes that provide for sheltering, lambing, mating, movement among and between ewe groups (PCE 1), and predator evasion (PCE 3).

The essential features in Unit 3 may require special management considerations or protection to decrease the direct and indirect effects of human disturbance associated with recreational activities on Peninsular bighorn sheep and its habitat. Most of this unit occurs within the Anza-Borrego Desert State Park, which is open to recreational activities. Additionally, the essential features in Unit 3 may require special management considerations or protection to protect Peninsular bighorn sheep habitat from mining operations at Ocotillo Mineral Material Site. Please see the ''Special Management Considerations or Protection'' section of the October 10, 2007, proposed rule (72 FR 57740) for a detailed discussion of the threats to Peninsular bighorn sheep habitat and potential management considerations.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a DEA of the proposed revised critical habitat designation based on the October 10, 2007, proposed rule to revise critical habitat for the Peninsular bighorn sheep (72 FR 57740) and the proposed changes herein. A final economic analysis will address all areas included in a revised final critical habitat designation.

The intent of the DEA is to quantify the baseline and incremental economic impacts of all potential conservation efforts for the Peninsular bighorn sheep. Baseline impacts include the potential economic impacts of all actions relating to the conservation of the Peninsular bighorn sheep, including costs associated with sections 7, 9, and 10 of the Act. Baseline impacts also include the economic impacts of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation in the study area. Incremental impacts are those potential future economic impacts of conservation actions relating to the designation of critical habitat; these impacts would not be expected to occur without the designation of critical habitat. The DEA describes economic impacts of Peninsular bighorn sheep conservation efforts associated with the following categories of activity: (1) Habitat management; (2) development; (3) mining; (4) recreation; (5) transportation; and (6) utility construction.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for the Peninsular bighorn sheep. Conservation efforts related to development activities constitute the majority of total baseline costs to areas proposed for critical habitat (more than 70 percent). Mining-related impacts comprise 20 percent of the impacts; these impacts result from potential conservation effort costs associated with mine operations. Recreation and habitat management related impacts comprise about 9 percent of the impacts. Post-designation baseline impacts are estimated to be approximately $92.5 million in present value terms using a 3 percent discount rate ($6.22 million annualized) over the next 20 years (2008 to 2027) in areas proposed as critical habitat (not including areas proposed or considered for exclusion under section 4(b)(2) of the Act). Stated in other terms, these post-designation baseline impacts are estimated to be approximately $67.4 million ($6.36 million annualized) in present value terms using a 7 percent discount rate.

Post-designation baseline impacts for areas proposed for exclusion were calculated separately from areas proposed as critical habitat. These impacts are related to continued habitat management practices within areas managed by the Agua Caliente Band of Cahuilla Indians Tribe and are estimated to be approximately $499,000 ($33,500 annualized) using a 3 percent discount rate. Stated in present value terms using a 7 percent discount rate, these impacts are estimated at $369,000 ($34,800 annualized). Additionally, post-designation baseline impacts for areas considered for exclusion were

calculated separately from areas proposed as critical habitat. These impacts are related to habitat management, development, and transportation, and are estimated to be approximately $86.3 million ($4.95 million annualized) using a 3 percent discount rate. Assuming a 7 percent discount rate, post-designation baseline impacts are estimated at $59.7 million ($5.15 million annualized).

The majority of incremental impacts attributed to the proposed revised critical habitat designation are expected to be related to habitat management conservation efforts. The DEA estimates potential incremental economic impacts in areas proposed as revised critical habitat over the next 20 years to be $411,000 ($27,600 annualized) assuming a 3 percent discount rate (not including areas proposed or considered for exclusion under section 4(b)(2) of the Act). Assuming a 7 percent discount rate, these impacts are estimated to be approximately $306,000 ($28,900 annualized).

Incremental impacts for areas proposed for exclusion (Tribal HCP) were calculated separately from other areas proposed as critical habitat. These impacts are related to habitat management and development and are estimated to be approximately $11.3 million ($758,000 annualized) assuming a 3 percent discount rate. Assuming a 7 percent discount rate, incremental impacts for areas proposed for exclusion are estimated at $8.31 million ($785,000 annualized). Additionally, incremental impacts for areas considered for exclusion (CVMSHCP) were also calculated separately from areas proposed as critical habitat. These impacts are related to forecast section 7 consultations and are estimated to be approximately $8,850 ($595 annualized) assuming a 3 percent discount rate. Assuming a 7 percent discount rate, incremental impacts for areas considered for exclusion are estimated at $7,920 ($747 annualized).

The economic analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The economic analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by decision-makers to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

Finally, the economic analysis looks retrospectively at costs that have been incurred since the date we listed the Peninsular bighorn sheep as endangered (March 18, 1998; 63 FR 13134), and considers those costs that may occur in the years following the revised designation of critical habitat, with the timeframes for this analysis varying by activity. The baseline and incremental economic impacts of potential conservation efforts for the Peninsular bighorn sheep are associated with the following activities: (1) Habitat management; (2) development; (3) mining; (4) recreation; (5) transportation; and (6) utility construction.

As stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed rule and our amended required determinations. The final designation may differ from the proposed rule based on new information we receive during the public comment periods. Our supporting record will reflect any new information used in making the final designation. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as revised critical habitat, provided such exclusion will not result in the extinction of the DPS.

Public Hearings

Section 4(b)(5)(E) of the Act requires a public hearing be held if any person requests it within 45 days of the publication of a proposed rule. In response to requests from the public, the Service will conduct public hearings for the critical habitat proposal on the date and at the address and times identified in the **DATES** and **ADDRESSES** sections above.

Persons wishing to make an oral statement for the record are encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us. If you have any questions concerning the public hearing, please contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Persons needing reasonable accommodations in order to attend and participate in the public hearings should contact Dixie Ward, Carlsbad Fish and Wildlife Office, at 760–431–9440 as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding this notice is available in alternative formats upon request.

Required Determinations—Amended

In our October 10, 2007, proposed rule (72 FR 57740), we said that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees,

loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (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 the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revised this determination as part of our final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the Peninsular bighorn sheep would affect a substantial number of small entities, we considered the number of affected small entities within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the Peninsular bighorn sheep. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in chapters 2 through 7, and evaluates the potential for economic impacts related to activity categories including species management, development, mining, recreation, transportation, and utilities construction and management. The DEA concludes that there are no incremental impacts resulting from this rulemaking that may be borne by small entities.

In summary, we have considered whether the proposed rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, this revised proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued 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. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to no regulatory action. The DEA finds that none of these criteria are relevant to this analysis. However, the DEA identified San Diego Gas and Electric (SDG&E) as an entity involved in the production of energy. Although SDG&E is likely to incur incremental Peninsular bighorn sheep conservation costs related to their proposed Sunrise Powerlink project, these costs are not expected to rise to the level of a ''significant adverse effect.'' Over the next 20 years, the Sunrise Powerlink project is forecast to incur total expenses of $4,030, discounted at seven percent. These impacts are not sufficient to reduce electricity production appreciably, or to increase the cost of energy production or delivery by more than one percent. Thus, based on information in the DEA (Appendix A), the incremental impacts associated with critical habitat designation for Peninsular bighorn sheep are unlikely to be of sufficient magnitude to affect energy production or delivery, and the energy-related impacts are not considered ''a significant adverse effect.'' As such, we do not expect the proposed revised designation of critical habitat for the Peninsular bighorn sheep to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of

conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except as (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

Critical habitat designation does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency. 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) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The DEA concludes that there are no incremental impacts resulting from this rulemaking that may be borne by small entities. Incremental impacts stemming from various species conservation and development controls are expected to be borne by the Agua Caliente Band of Cahuilla Indians, which is not considered a small government. Similarly, potential incremental impacts stemming from the Sunrise Powerlink project will be borne by San Diego Gas and Electric, which is also not a small government.

Executive Order 12630—Takings

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of proposing revised critical habitat for the Peninsular bighorn sheep in a takings implications assessment. Our takings implications assessment concludes that this proposed revision to critical habitat for the Peninsular bighorn sheep does not pose significant takings implications.

References Cited

A complete list of all references we cited in the proposed rule and this rulemaking is available on the Internet at *http://www.regulations.gov* or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this rulemaking are the staff members of the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), revise the entry for ''Sheep, bighorn'' under ''Mammals'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Sheep, desert bighorn.	*Ovis canadensis nelsoni.*	U.S.A. (western conterminous States), Canada (southwestern), Mexico (northern).	U.S.A. (CA–Peninsular Ranges).	E	634	17.95(a)	NA
*	*	*	*	*	*		*

2. In § 17.95, amend paragraph (a) by revising the entry for ''Bighorn Sheep (Peninsular Ranges) (*Ovis canadensis*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Desert Bighorn Sheep (Peninsular Ranges) *(Ovis canadensis nelsoni)*

(1) Critical habitat units are depicted for Riverside, San Diego, and Imperial Counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for the Peninsular bighorn sheep are:

(i) Moderate to steep, open slopes (20 to 60 percent) and canyons, with canopy cover of 30 percent or less (below 4,600 feet (1,402 meters) elevation in the Peninsular Ranges) that provide space for sheltering, predator detection, rearing of young, foraging and watering, mating, and movement within and between ewe groups.

(ii) Presence of a variety of forage plants, indicated by the presence of shrubs (e.g., Ambrosia spp., Caesalpinia spp., Hyptis spp., Sphaeralcea spp., Simmondsia spp.), that provide a primary food source year round, grasses (e.g., Aristida spp., Bromus spp.) and cacti (e.g., Opuntia spp.) that provide a source of forage in the fall, and forbs

(e.g., Plantago spp., Ditaxis spp.) that provide a source of forage in the spring.

(iii) Steep, rugged slopes (60 percent slope or greater) (below 4,600 feet (1,402 meters) elevation in the Peninsular Ranges) that provide secluded space for lambing as well as terrain for predator evasion.

(iv) Alluvial fans, washes, and valley bottoms that provide important foraging areas where nutritious and digestible plants can be more readily found during times of drought and lactation and that provide and maintain habitat connectivity by serving as travel routes between and within ewe groups, adjacent mountain ranges, and important resource areas, such as foraging areas and escape terrain.

(v) Intermittent and permanent water sources that are available during extended dry periods and that provide relatively nutritious plants and drinking water.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Data layers defining map units were created on a base of USGS 1:24,000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) **Note:** Index map of critical habitat units for the Peninsular Ranges Population of Desert Bighorn Sheep (*Ovis canadensis nelsoni*) follows:

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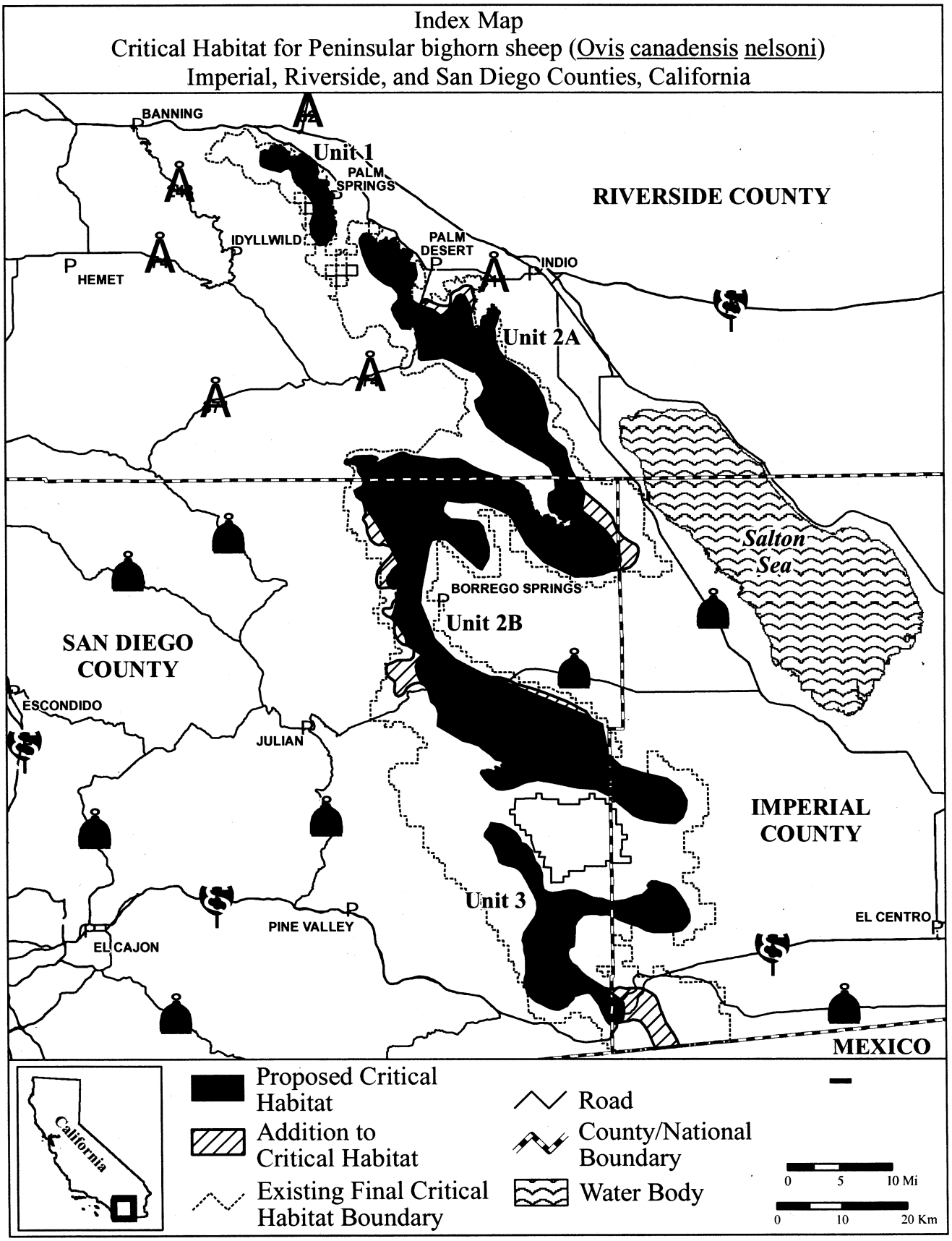

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(6) Unit 1: San Jacinto Mountains, Riverside County, California.

(i) From USGS 1:24,000 quadrangles Desert Hot Springs, Palm Springs, San Jacinto Peak, and White Water. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 534054, 3750217; 534386, 3749877; 534416, 3749846; 534493, 3749817; 534918, 3749652; 534713, 3749297; 534806, 3749129; 535048, 3748980; 535231, 3749003; 535347, 3749018; 535391, 3748994; 535584, 3748893; 535627, 3748870; 535627, 3748848; 535634, 3748849; 535660, 3748846; 535698, 3748833; 535737, 3748823; 535755, 3748819; 535864, 3748820; 535920, 3748820; 535921, 3748820; 535976, 3748820; 535976, 3748852; 536420, 3749105; 536848, 3749349; 537229, 3748990; 537930, 3748330; 537985, 3748278; 538456, 3747922; 538456, 3747898; 538487, 3747898; 538822, 3747644; 539027, 3747489; 539156, 3746746; 539160, 3746658; 539161, 3746651; 539174, 3746376; 539008, 3746044; 539165, 3745329; 539186, 3745340; 539482, 3745396; 539722, 3745388; 540115, 3745364; 540421, 3745296; 540421, 3745096; 540431, 3745047; 540433, 3745043; 540441, 3745043; 540528, 3745043; 540738, 3745042; 540821, 3745042; 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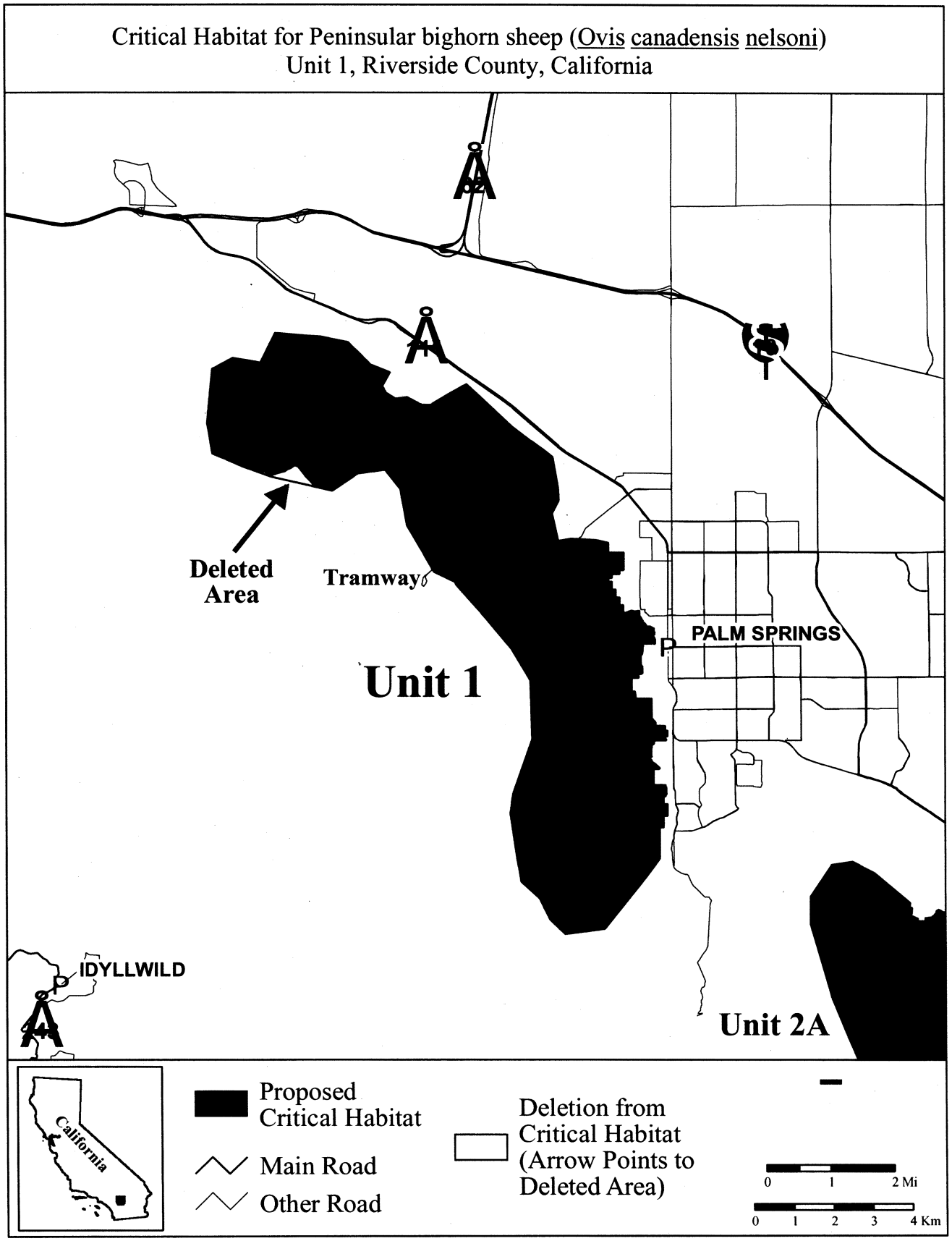
(ii) **Note:** Map of Unit 1, San Jacinto Mountains follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(7) Unit 2A: North Santa Rosa Moutains, Riverside County, California.

(i) From USGS 1:24,000 quadrangles Cathedral City, Clark Lake NE, La Quinta, Martinez Mountain, Palm Springs, Palm View Peak, Rabbit Peak, Rancho Mirage, Toro Peak, and Valerie. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 548120, 3735700; 548120, 3735696; 548132, 3735696; 548150, 3735689; 548162, 3735684; 548174, 3735679; 548198, 3735669; 548206, 3735666; 548220, 3735661; 548220, 3735596; 548320, 3735596; 548420, 3735596; 548420, 3735676; 548435, 3735674; 548443, 3735674; 548481, 3735677; 548501, 3735683; 548511, 3735687; 548527, 3735692; 548528, 3735692; 548564, 3735686; 548579, 3735692; 548593, 3735699; 548610, 3735716; 548636, 3735741; 548640, 3735746; 548656, 3735765; 548689, 3735802; 548694, 3735810; 548703, 3735826; 548699, 3735853; 548699, 3735854; 548720, 3735873; 548742, 3735883; 548746, 3735884; 548764, 3735878; 548789, 3735870; 548795, 3735868; 548810, 3735860; 548813, 3735858; 548829, 3735849; 548876, 3735824; 548941, 3735786; 548958, 3735776; 548996, 3735747; 549006, 3735739; 549021, 3735729; 549051, 3735709; 549051, 3735721; 549045, 3735749; 549032, 3735776; 549026, 3735790; 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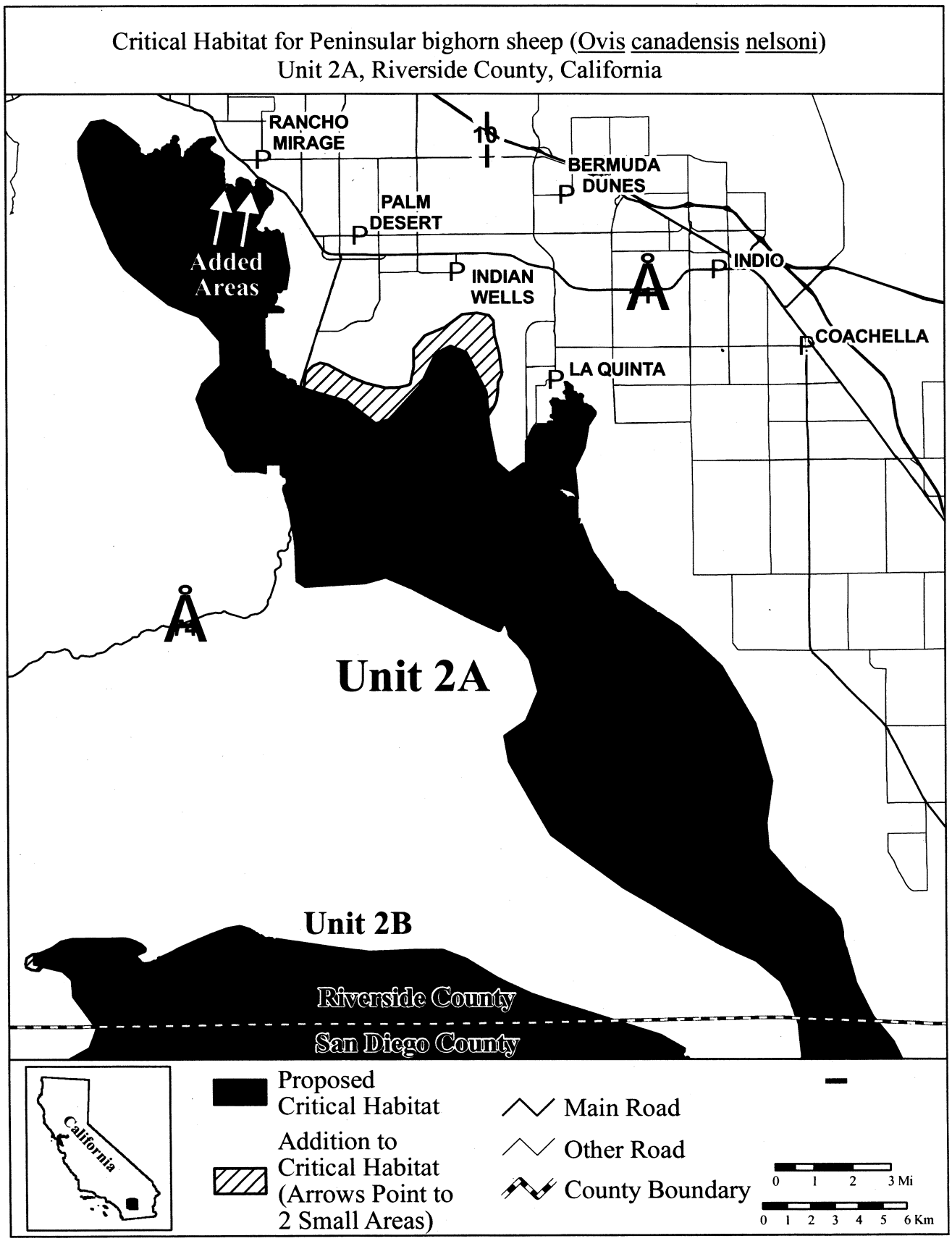
(ii) **Note:** Map of Unit 2A, North Santa Rosa Mountains follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(8) Unit 2B: South Santa Rosa Mountains south to Vallecito Mountains, Riverside, San Diego, and Imperial Counties, California.

(i) From USGS 1:24,000 quadrangles Agua Caliente Springs, Arroyo Tapiado, Borrego Mountain, Borrego Mountain SE, Borrego Palm Canyon, Borrego Sink, Bucksnort Mountain, Carrizo Mountain NE, Clark Lake, Clark Lake NE, Collins Valley, Earthquake Valley, Fonts Point, Harper Canyon, Hot Springs Mountain, Oasis, Plaster City NW, Rabbit Peak, Seventeen Palms, Tubb Canyon, and Whale Peak. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 552693, 3702782; 552693, 3702763; 552721, 3702763; 552721, 3702735; 552749, 3702735; 552749, 3702706; 552834, 3702706; 552834, 3702678; 552863, 3702678; 552863, 3702650; 552891, 3702650; 552891, 3702621; 552920, 3702621; 552920, 3702593; 553033, 3702593; 553033, 3702564; 553090, 3702564; 553090, 3702536; 553118, 3702536; 553118, 3702508; 553175, 3702508; 553175, 3702479; 553232, 3702479; 553232, 3702451; 553260, 3702451; 553260, 3702479; 553288, 3702479; 553288, 3702508; 553373, 3702508; 553373, 3702479; 553459, 3702479; 553459, 3702451; 553487, 3702451; 553487, 3702423; 553544, 3702423; 553544, 3702394; 553572, 3702394; 553572, 3702423; 553629, 3702423; 553629, 3702451; 553637, 3702451; 554374, 3702339; 554536, 3702314; 556083, 3702087; 556587, 3702024; 556848, 3701991; 557540, 3701905; 558443, 3701948; 559451, 3701996; 560050, 3701996; 560589, 3701996; 561590, 3701586; 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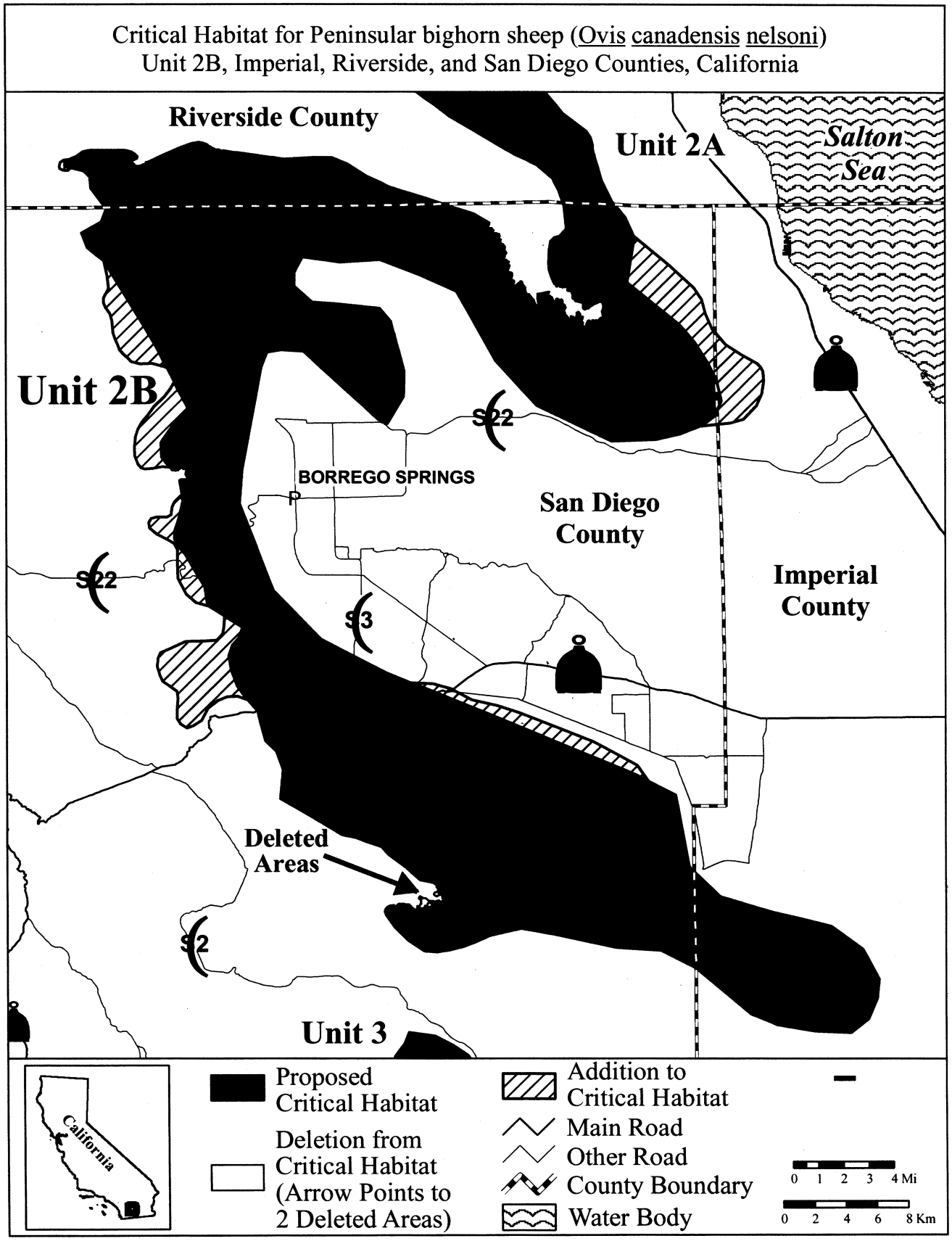
(ii) **Note:** Map of Unit 2B, South Santa Rosa Mountains south to Vallecito Mountains follows:

BILLING CODE 4310–55–P



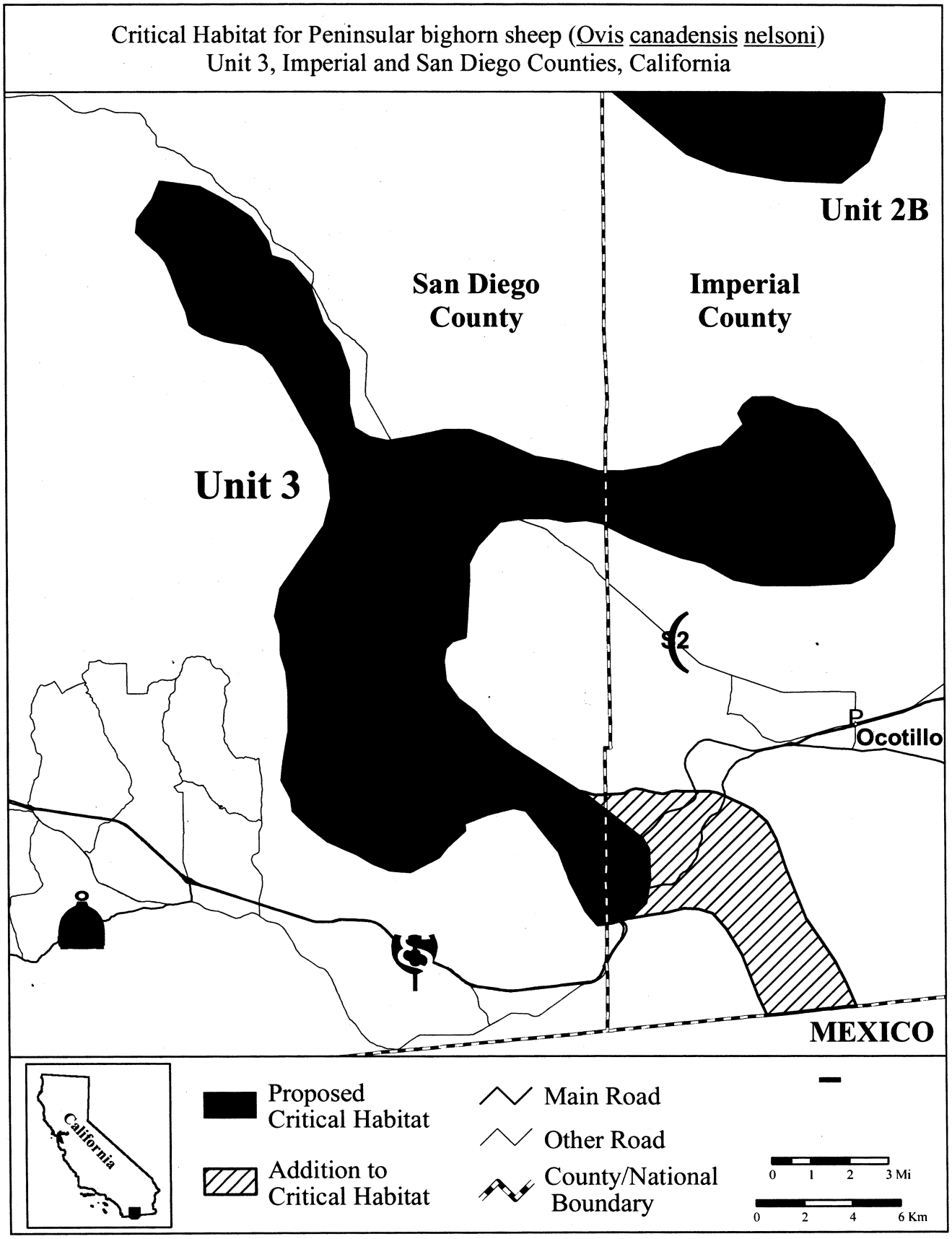
BILLING CODE 4310–55–C

(9) Unit 3: Carrizo Canyon, San Diego and Imperial Counties, California.

(i) From USGS 1:24,000 quadrangles Agua Caliente Springs, Arroyo Tapiado, Carrizo Mountain, Coyote Wells, In-Ko-Pah Gorge, In-Ko-Pah Gorge OE S, Jacumba, Painted Gorge, Sombrero Peak, and Sweeney Pass. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 574077, 3634457; 574841, 3634304; 575834, 3634457; 577209, 3634762; 578278, 3634762; 579118, 3634457; 579958, 3634075; 580951, 3633617; 582325, 3633388; 583623, 3633006; 583831, 3633006; 583900, 3633006; 584616, 3633006; 586143, 3633235; 587289, 3633693; 588053, 3633922; 588740, 3634075; 589656, 3634991; 589427, 3635449; 589617, 3635766; 589656, 3635831; 590038, 3636137; 590878, 3636137; 591783, 3635789; 591871, 3635755; 592711, 3635602; 593551, 3635068; 594238, 3634228; 595002, 3633006; 595689, 3631708; 595918, 3630715; 595852, 3629989; 595842, 3629875; 595803, 3629826; 595231, 3629111; 594620, 3628500; 594086, 3628271; 592329, 3628195; 591107, 3628195; 590344, 3628195; 589198, 3628424; 587976, 3629111; 587060, 3629340; 586220, 3629646; 584922, 3630180; 583919, 3630715; 583854, 3630749; 583776, 3630791; 583089, 3630944; 582249, 3630868; 581485, 3631020; 580569, 3631020; 579500, 3630868; 578583, 3629875; 578201, 3629111; 578201, 3628348; 578125, 3626897; 578049, 3625980; 577514, 3625827; 577443, 3625756; 577394, 3625707; 577209, 3625522; 577132, 3624987; 577209, 3624147; 577743, 3623384; 578430, 3622849; 579194, 3621933; 579958, 3621322; 582791, 3619460; 583018, 3619422; 583206, 3619346; 583360, 3619320; 583651, 3619310; 583966, 3619334; 584438, 3619367; 584571, 3619387; 584654, 3619402; 584742, 3619444; 584893, 3619527; 585096, 3619576; 585354, 3619548; 585604, 3619471; 585862, 3619422; 585996, 3619391; 586176, 3619367; 586276, 3619366; 586395, 3619397; 586484, 3619418; 586553, 3619443; 586630, 3619460; 586758, 3619474; 587034, 3619471; 587821, 3619471; 588135, 3619471; 588442, 3619416; 588735, 3619304; 589157, 3619109; 589501, 3618937; 589953, 3618701; 590556, 3618184; 590921, 3617453; 591309, 3616248; 591674, 3615323; 592148, 3614118; 593353, 3612289; 593826, 3611342; 594244, 3610397; 593729, 3610357; 593162, 3610298; 592415, 3610215; 592060, 3610174; 591668, 3610129; 591261, 3610081; 590921, 3610051; 590514, 3610016; 590125, 3610869; 589458, 3612590; 588834, 3613645; 588253, 3614312; 587651, 3614484; 587096, 3614529; 586432, 3614356; 585500, 3614208; 584839, 3614094; 584660, 3614043; 584111, 3613888; 583864, 3613853; 583773, 3613840; 583471, 3613796; 583261, 3614050; 582960, 3614413; 582940, 3614437; 582317, 3615682; 582178, 3616071; 582144, 3616167; 581878, 3616908; 580515, 3618647; 579988, 3618761; 578965, 3618496; 577972, 3618114; 577974, 3618054; 577980, 3617805; 577413, 3617282; 577340, 3617214; 577266, 3617146; 576900, 3616688; 576592, 3616523; 576417, 3616430; 576139, 3616282; 575798, 3616111; 575681, 3616052; 574896, 3616124; 574841, 3616129; 574236, 3616371; 574077, 3616434; 573467, 3616816; 572932, 3617045; 572245, 3617351; 571481, 3617962; 570794, 3618649; 570717, 3619183; 570335, 3619947; 570412, 3620711; 570498, 3621198; 570566, 3621582; 570641, 3622009; 570641, 3622696; 570641, 3623689; 570565, 3624529; 570335, 3625293; 570335, 3626133; 570106, 3626897; 570335, 3628042; 572168, 3630715; 572474, 3631860; 572411, 3632678; 572397, 3632853; 571939, 3634151; 571405, 3635068; 570870, 3636060; 570106, 3637435; 569648, 3637970; 568961, 3638352; 568466, 3638434; 568044, 3638504; 567128, 3638810; 566593, 3639192; 566441, 3639803; 566135, 3640490; 565830, 3641330; 565601, 3641865; 565295, 3642246; 565129, 3642389; 564761, 3642705; 564379, 3643086; 564455, 3643621; 565066, 3644461; 565372, 3645225; 567052, 3644995; 568197, 3644385; 569190, 3643697; 569877, 3642705; 569949, 3642419; 570003, 3642202; 570030, 3642094; 570794, 3641865; 570891, 3641750; 571634, 3640872; 572168, 3639268; 572856, 3638428; 573237, 3637282; 573237, 3635831; 573467, 3634839; thence returning to 574077, 3634457.

(ii) **Note:** Map of Unit 3, Carrizo Canyon follows:

BILLING CODE 4310–55–P


Critical Habitat for Peninsular bighorn sheep (Ovis canadensis nelsoni)
Unit 3, Imperial and San Diego Counties, California
Unit 2B
San Diego County
Imperial County
Unit 3
Ocotillo
MEXICO
California
Proposed Critical Habitat
Addition to Critical Habitat
Main Road
Other Road
County/National Boundary
0 1 2 3 Mi
0 2 4 6 Km

* * * * *

Dated: August 13, 2008.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–19465 Filed 8–25–08; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Tuesday,
August 26, 2008

Part V

Postal Regulatory Commission

39 CFR Part 3007

Administrative Practice and Procedure, Confidential Business Information, Postal Service; Proposed Rule

POSTAL REGULATORY COMMISSION

39 CFR 3007

[Docket No. RM2008–1; Order No. 96]

Administrative Practice and Procedure, Confidential Business Information, Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing rules on the treatment of non-public material submitted by the Postal Service. Issuance of this proposal will allow interested parties to comment on the Commission's approach to implementing a new statutory requirement.

DATES: Initial comments due September 25, 2008; reply comments due October 10, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: The Postal Regulatory Commission (Commission) proposes to implement 39 U.S.C. 504(g) by adopting regulations applicable to confidentiality of materials submitted by the Postal Service to the Commission.

I. Statutory Standards for According Confidentiality to Postal Service Materials

39 U.S.C. 504(g)(1) holds that the Postal Service may determine ''that any document or other matter it provides to the Postal Regulatory Commission'' is exempt from public disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). The Postal Service must give reasons, in writing, for its claim. *See* 39 U.S.C. 504(g)(1). Unless the Commission has established rules for determining the appropriate degree of protection of information or materials claimed to be non-public by the Postal Service, the Commission may not (1) ''use such information for purposes other than the purposes for which it is supplied,'' or (2) ''permit anyone who is not an officer or employee of the Commission to have access to any such information.'' *See* 39 U.S.C. 504(g)(2).

Under 39 U.S.C. 410(c), the Postal Service may claim as exempt from public disclosure the name and address information of postal customers; certain commercial information, for example, trade secrets; certain information related to the negotiation of collective bargaining agreements; information prepared for proceedings before the Commission or the federal courts concerning postal rates, classes and services; reports and memoranda prepared by outside sources unless their disclosure would have been required if the Postal Service had prepared the reports or memoranda itself; and investigatory files compiled for law enforcement purposes, unless legally available to parties other than the Postal Service.

Under 5 U.S.C. 552(b), records that may be withheld from public disclosure include, but are not limited to, matters concerning only internal personnel matters of an agency; matters specifically exempted from public disclosure by statute; trade secrets and privileged or confidential commercial or financial information; non-public interagency or intra-agency memoranda or letters; privacy protected personnel, medical and other files; and certain law enforcement records or information. Section 552(b) provides that any portions of records subject to disclosure that can be segregated from records otherwise exempt from disclosure must be provided.

Upon adopting appropriate regulations under 5 U.S.C. 553 that ''establish a procedure for according appropriate confidentiality,'' the Commission may publicly disclose information which the Postal Service asserts is exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). In determining what degree of protection is appropriate, the Commission is directed to ''balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.'' 39 U.S.C. 504(g)(3)(A).[1]

Similarly, section 504(g)(3)(B) provides that in the narrower context of any ''discovery procedure'' that is part of a Commission ''proceeding,'' the Commission has the authority to require the Postal Service to produce information that the Postal Service has claimed as exempt from production. As under section 504(g)(3)(A) and before requiring such disclosure, the Commission ''shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for information furnished to any party.''[2]

Section 504(g)(3)(B) appears to be a specific application, in the context of discovery, of the more general authority granted in 39 U.S.C. 504(g)(3)(A) to disclose information obtained from the Postal Service if disclosure is found appropriate and consistent with the kind of balancing of interests that is performed by federal civil courts when asked to establish protective conditions under rule 26(c) of the Federal Rules of Civil Procedure.

The general parameters for disclosure, and conversely protection of confidentiality, of information during the discovery process under section 504(g)(3)(B) must be gleaned from the federal case law pertaining to Federal Rule of Civil Procedure 26, and those parameters are, as stated above, a more specific application of the parameters established by the balancing test laid out in section 504(g)(3)(A).[3] Case law surrounding Federal Rule of Civil Procedure 26 identifies several non-exclusive factors to be applied under the rule 26(c) ''good cause balancing test.''[4] In the 2007 *Arnold* decision, the Third Circuit reaffirms the balancing test factors it developed in its 1994 *Pansy* decision:

> (1) [T]he interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

Id. (*citing Pansy,* 23 F.3d at 787–88). Most of the seven specific factors listed by the *Pansy* court appear to be applicable to the general balancing test

[1] *Compare* Postal Rate Commission Order No. 1025 at 14. (The Commission notes that ''[t]he standards by which commercial information is accorded confidential treatment under [Fed. R. Civ. P. 26(c)], * * * are essentially those that govern the invocation of Freedom of Information (FOIA) exemption (b)(4), except that the alleged commercial harm of disclosure is balanced against the alleged need for the information. *See, e.g., Covey Oil* v. *Continental Oil Co.,* 340 F.2d 993 (10th Cir. 1965).''

[2] Rule 26(c), which is entitled ''Protective Conditions,'' authorizes the court to issue a variety of orders to protect parties or witnesses in the discovery process. *See* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2035, *et seq.* (2d ed. 1994).

[3] *See, e.g., Arnold* v. *Penn. Dep't of Transp.,* 477 F.3d 105 (3d Cir. 2007) at 109–110; *Pansy* v. *Borough of Stroudsburg,* 23 F.3d 772 (3d Cir. 1994) at 788; *Leucadia, Inc.* v. *Applied Extrusion Technologies,* 998 F.2d 157 (3d Cir. 1993) at 167. *See generally* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427 (1991).

[4] *See Arnold* v. *Penn. Dep't of Transp.,* 477 F.3d 105, 108 (3d Cir. 2007).

weighing the competing interests of the Postal Service against the public interest for transparency.[5]

It must be noted, nonetheless, that section 504(g)(3)(B) specifically and particularly instructs the Commission to establish procedures for assuring confidentiality when requiring production of information during the discovery process based on Federal Rule of Civil Procedure 26(c). Under Federal Rule of Civil Procedure 26(c), a party or person may during the discovery process request a protective order. Under the rule, a court may, for good cause, issue a protective order ''to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *.'' Federal Rule of Civil Procedure 26(c) lists several possible procedures to limit discovery and ensure confidentially of information, including (1) completely forbidding the disclosure; (2) specifying terms for disclosure, for example, specifying the time and/or place of discovery; (3) ordering a specific method of discovery; (4) limiting the scope of discovery as it relates to certain matters; (5) limiting who may be present during discovery; (6) sealing a deposition; and (7) requiring that a trade secret or other confidential information be revealed only in a specific and limited manner.

Because the Commission interprets the Postal Accountability and Enhancement Act (PAEA) as intending that the Commission engage in essentially the same balancing of interests under the standards in both sections 504(g)(3)(A) and 504(g)(3)(B), and the universe of specific procedures to assure the protection of information, when appropriate, is essentially the same, the Commission is initially of the view that a single rule governing disclosure applying to both sections 504(g)(3)(A) and 504(g)(3)(B) is sufficient.[6]

Section 504 recognizes the need to balance the Postal Service's legitimate expectation to keep commercially sensitive information confidential with the public's expectation for accountability and transparency of a governmental entity operating in commercial markets. The PAEA relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability. Therefore, as directed by the provisions of the PAEA and because the Commission considers it necessary and appropriate, the Commission proposes rules that could lead to public disclosure of information initially claimed by the Postal Service as non-public. In developing proposed rules, the Commission is mindful of, and takes very seriously, its responsibility to achieve a fair balance between the commercial interests of the Postal Service and the public interest in disclosure of information concerning a public entity that operates in commercial markets.

The Commission will obtain information from the Postal Service, and must manage access to that information, in three basic contexts. In the first context, the Postal Service will file information pursuant to a specific statutory requirement or Commission rules. In these instances, with respect to some reports, the PAEA explicitly authorizes the Postal Service to designate portions as non-public annexes or to otherwise avail itself of the protections afforded Postal Service documents or other matters under the procedures of section 504(g). *See* 39 U.S.C. 3642(d), 3652(f), and 3654(f). Under proposed rule 3007.20, the Postal Service would notify the Commission at the time that it files the information that it considers specifically identified portions of its report or annex to be non-public and to qualify for a degree of protection from public disclosure. The Postal Service in its application for relief from disclosure must also include its reasons for concluding that the information should not be publicly disclosed. *See* proposed rule 3007.21.

In the second major context, the Commission may request information or materials from the Postal Service by way of a data or information request, or, if necessary, by issuance of a subpoena.[7] When the Commission identifies information that it needs for the preparation of reports, for the conduct of ''proceedings,'' or other functions under the PAEA, the normal procedure contemplated for obtaining that information will be the issuance of data or information requests under proposed rule 3007.3. Data or information requests in the proposed rules are similar to requests that were issued in the former Postal Rate Commission's international mail dockets as part of its preparation of its reports to Congress on international mail. The proposed rules contemplate that, where it perceives it to be necessary, the Postal Service would file an application for relief under proposed rule 3007.20 with regard to data or information provided in response to a request issued by the Commission. In its application for relief, the Postal Service would ask for a necessary degree of protection from public disclosure, for example, by requesting limiting the scope of the information to be produced, or restricting the dissemination of the information provided, as is commonly done in the application of rule 26(c) of the Federal Rules of Civil Procedure in federal civil courts.

In both instances, the non-public information would initially be protected from disclosure until such time as the Commission decides what actual degree of protection, if any, from public disclosure should be afforded such non-public information. However, before acting on its own initiative to require disclosure of information claimed to be non-public by the Postal Service, the Commission will give the Postal Service an opportunity to respond within seven days of the issuance of the Commission's notice that it considers certain information to be not confidential.

In the third context, a person (as defined by the Commission's rules) may file a motion for access to the materials claimed to be non-public by the Postal Service. Access to such non-public information, if any, will most often be granted under a protective order. Such protective order could, for example, specify that no person involved in competitive decision-making for any entity that might gain competitive advantage from use of the information at issue should be granted access to the materials. In addition, restrictions could be imposed on any person granted access to the materials at issue limiting or prohibiting its dissemination.

Because the Commission frequently operates under tight deadlines, it is important to have procedures in place that prevent unnecessary delay in determining whether granting a person access to non-public materials is appropriate. *See, e.g.*, 39 U.S.C. 3653(a) (annual determination of compliance). Therefore, the Commission proposes a streamlined procedure for persons who

[5] Of the enumerated factors, ''embarrassment'' and ''public health concerns'' probably will be the least applicable in the majority of matters before the Commission, but fairness, public interest, efficiency and so forth should all be considered when deciding whether the need for transparency outweighs the need for protecting the commercial or other interests of the Postal Service.

[6] In application of the proposed disclosure rule, the decision-maker will also take into account relevant factors such as the procedural stage a matter is in (for example, discovery versus a formal hearing before the Commission) when deciding whether protection or non-disclosure of information sought by the Postal Service is appropriate. Another factor to be considered is whether the information at issue relates to market dominant or competitive products.

[7] Information and materials required to be provided to the Commission in response to a subpoena that the Postal Service determines to be exempt are subject to the same rules under proposed part 3007 as information or materials provided in response to a data or information request. *See* 39 U.S.C. 504(f), (g).

agree to abide by the Commission's standard protective conditions. If a person attaches an executed copy of the Commission's standard protective conditions to its motion, answers to that motion are due within three days after such a motion is filed. On the other hand, if an executed copy of the Commission's standard protective conditions is not attached, answers are due within seven days after such a motion is filed.

The Commission will publish its standard protective conditions on its Web site. The Commission is cognizant of the fact that in many instances it will be necessary to tailor protective conditions to the circumstances of a particular case. For example, protective conditions may have to be stricter if a direct competitor of the Postal Service requests access to non-public materials concerning competitive products than when a non-competitor requests access. The Commission will publish several examples of protective orders in this docket that will be representative of the standard protective conditions the Commission intends to publish on it website. The Commission also invites comments regarding the form such standard protective conditions should take.

The proposed rules also include a ''sunset provision'' stating that protective conditions afforded to any non-public materials filed by the Postal Service shall expire 10 years after such filing, unless the Commission or its authorized representative enters an order providing for an extension of the protective conditions. The Commission or its authorized representative can enter such an order in its own discretion or upon a motion by the Postal Service.

The Commission in rule 3004.8 already provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C. 552(b) (namely, trade secrets or commercially or financially sensitive materials) and then determined to be exempt by the Commission will lose such exemption 10 years after its submission. A longer exemption period from disclosure may be requested by the person submitting the information, but must be specifically justified by the requestor and approved by the Commission. 39 CFR 3004.8.

The Commission believes that administrative convenience and sound records management practices will be served by such a provision. It initially appears to the Commission that the 10-year period for the sunset provision should be adequate to protect the commercial interest of the Postal Service, but invites comments as to whether the proposed time period is appropriate. In addition, the Commission is interested in comments as to whether any specific category of non-public materials should be exempted from the sunset provision. Initial comments are due within 30 days of the publication of this Notice in the **Federal Register**. Reply comments are due within 45 days of the publication of this Notice in the **Federal Register**.

II. Analysis of Proposed Rules

Below, the Commission provides a concise description of each rule designed to assist commenters in understanding the scope and nature of the proposed rules.

Rule 3007.1 Definitions. This provision simply sets forth definitions used in part 3007. The term ''non-public materials'' is defined as any information, documents, and things filed by the Postal Service which, pursuant to 39 U.S.C. 504(g), it determines to be exempt from disclosure. As used in the rules, the phrase ''materials claimed to be non-public'' has the same meaning as non-public materials.

Rule 3007.2 Scope. This provision sets forth the scope of information, documents, and things that the Commission (or its authorized representative) may require the Postal Service to provide in connection with the Commission's responsibilities under title 39. It is intended to encompass information, documents, and things in whatever form that are likely to materially assist the Commission in fulfilling its statutory responsibilities.

Rule 3007.3 Data or Information requests. This proposed rule provides that the Commission (or its authorized representative) may issue data or information requests to the Postal Service concerning materials covered by proposed rule 3007.2.

Rule 3007.10 Submission of non-public materials under seal. This proposed rule sets forth the manner in which non-public materials are to be filed with the Commission. More specifically, it provides that non-public materials are not to be filed electronically pursuant to rule 3001.9, but are to be filed in sealed envelopes clearly marked as confidential. The proposed rule requires non-public materials to be filed in hard copy as well as electronic form (compact discs), with the latter subject to certain conditions to ensure their usefulness. In addition, the proposed rule requires that a redacted copy of the non-public materials be filed electronically pursuant to rule 3001.9.

Rule 3007.20 Application for non-public treatment. This provision directs the Postal Service to file an application for relief from public disclosure whenever it files non-public materials.

Rule 3007.21 Form and content of the application for non-public treatment. This proposed rule requires the Postal Service to identify the materials it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary by the Postal Service, and any other factors relevant to the application for relief.

Rule 3007.22 Treatment of material claimed to be non-public. This proposed rule provides that the Commission will not disclose non-public materials except as pursuant to the rules in part 3007.

Rule 3007.23 Access to non-public material. This proposed rule permits Commissioners and Commission employees access to non-public material subject to the limitations in 39 U.S.C. 504(g)(2)(A) and (B).

As a matter of course, the Commission will review non-public material submitted by the Postal Service for substance, and in the course of such review may have cause to question the claim that part or all of the material should not be disclosed. Thus, the proposed rule also provides that the Commission (or its authorized representative) may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded non-public material filed by the Postal Service.[8] If a notice of preliminary determination is issued, the Postal Service and any interested person may submit a responsive pleading within 7 days (or such longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, the proposed rules do not contemplate any reply to the responsive pleadings. Thus, those submitting responsive pleadings should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the responsive pleadings, if any, the Commission will issue an

[8] This aspect of the rule is designed to enable the Commission to address claims of confidentiality by the Postal Service on its own initiative. It is not intended to imply that the Commission will necessarily make a preliminary determination with respect to each filing by the Postal Service of non-public materials.

order concerning access to the non-public material.

The Commission will not provide access to material subject to protective conditions to contractors or experts hired by the Commission, its authorized representative, or the public representative, unless a notice of access is filed giving the Postal Service an opportunity to object to such access. The Postal Service may interpose an objection within 3 days of the filing of such notice.

Rule 3007.24 Request for access to non-public material. This proposed rule provides procedures for any interested person to request access to non-public material. Any person requesting access must file a motion, which must include a detailed statement and rationale in support of granting access and must also address the pertinent provisions included in the Postal Service's application for relief filed under rule 3007.21(b). Again, given the expedited timetables under which the Commission generally operates, the proposed rules contemplate procedures that will expedite the process. Thus, the proposed rule provides that the person submitting the motion may agree in advance to abide by standard Commission protective conditions by executing a copy of the standard conditions to its motion. In that event, answers to the motion are due within 3 days.[9] Recognizing that protective conditions may vary based on the nature of the non-public material at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, *e.g.*, limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If a copy of the standard protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of the answer, the Commission (or its authorized representative) will issue an order concerning access to the non-public material.

Rule 3007.25 Standard for decision. This proposed rule memorializes the balancing test prescribed in 39 U.S.C. 504(g)(3)(A) for determining the appropriate degree of confidentiality to be accorded non-public material. In addition, the proposed rule also provides a standard for determining the appropriate degree of confidentiality to be accorded information claimed to be confidential by the Postal Service but not filed pursuant to 39 U.S.C. 504(g)(1). This may include, for example, information for which a specific evidentiary privilege is claimed.

Rule 3007.30 Limitations on access to non-public material. This proposed rule identifies various limitations on access to non-public material that may be ordered by the Commission. These limitations, which are generally similar to relief provided by federal civil courts in discovery disputes under rule 26(c) of the Federal Rules of Civil Procedure include, *inter alia*, not requiring the public disclosure of the material, specifying the terms for public disclosure, ordering a specific method of disclosure, restricting to whom the information may be disclosed, specifying a time when access terminates, and such other relief as the Commission deems appropriate.

Rule 3007.31 Notice of access to material subject to protective order. This proposed rule requires that, with certain exceptions, persons seeking access to material subject to a protective order must file a notice of access. Persons not required to file a notice of access include Commissioners, Commission employees, and court personnel. Notice of access, which must be filed under rules 3001.9 through 3001.12, must include the name, title, and company of each individual to have access. The proposed rule provides that access will not be granted for 2 days to afford the Postal Service time to interpose an objection. Any objection must provide written justification for the Postal Service's position. If an objection is filed, the person subject to it may file a response within 2 days. The shortened time periods are consistent with past practice and deemed necessary given the expedited schedule under which the Commission generally operates.

Rule 3007.32 Motion for removal of protective conditions. This proposed rule sets forth procedures whereby a person, having reviewed the non-public material subject to a protective order, requests by motion that the protective conditions be removed.

Rule 3007.33 Expiration of protective conditions. This proposed rule provides that unless otherwise ordered by the Commission (or its authorized representative), protective conditions afforded to non-public materials expire 10 years after the filing of such material.

In the context of FOIA requests, the Commission in rule 3004.8 already provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C. 552(b) (namely, trade secrets or commercially or financially sensitive material) and then determined to be exempt by the Commission will lose such exemption 10 years after its submission. The Commission believes that a 10-year sunset provision in this instance will also serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.

Rule 3007.40 Continued effectiveness of protective conditions. This proposed rule specifies procedures to be followed if a court or other administrative agency subpoenas (or otherwise orders production of) non-public materials which a person has obtained pursuant to a protective order issued by the Commission under protection. This proposed rule also requires that any person seeking to disclose non-public materials to a reviewing court make a good faith effort to obtain protective conditions in accord with those prescribed by the Commission. The proposed rule also provides that unless overridden by the reviewing court, the protective conditions of the Commission (or its authorized representative) remain in effect. The procedures require notice to the Postal Service.

Rule 3007.50 Sanctions for violations of protective order. This proposed rule reiterates the protective conditions, barring the dissemination of non-public materials by every person granted access to such materials to any person not authorized to access such materials. The sanctions include dismissing the proceeding in whole or part, issuing a default judgment against the violator of the protective conditions, and such other relief as the Commission (or its authorized representative) deems appropriate. In addition, the rule provides that the Postal Service may pursue whatever remedies may be available to it under law against the violator as well as the entity on whose behalf that person was acting.

III. Public Representative

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

IV. Ordering Paragraphs

It is Ordered:

1. Docket No. RM2008–1 is established for the purpose of receiving comments on the Commission's proposed rules under the Postal Accountability and Enhancement Act

[9] Consistent with the Commission's rules, any prescribed time period of 5 days or less excludes Saturdays, Sundays, and legal holidays. *See* § 3001.15 of this chapter.

establishing procedures for the treatment of information which the Postal Service requests should not be publicly disclosed.

2. Interested persons may submit initial comments no later than 30 days from the date of publication of this Notice in the **Federal Register**.

3. Reply comments may be filed no later than 45 days from the date of publication of this Notice in the **Federal Register**.

4. Kenneth E. Richardson is designated as the Public Representative representing the interests of the general public in this proceeding.

5. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

List of Subjects

39 CFR Part 3007

Administrative practice and procedure, Confidential business, Postal Service.

Issued August 13, 2008.

Signed August 20, 2008.

By the Commission.

Judith M. Grady,

Acting Secretary.

For the reasons stated in the preamble, under the authority at 39 U.S.C. 504, the Postal Regulatory Commission proposes to amend 39 CFR chapter III by adding part 3007 to read as follows:

PART 3007—TREATMENT OF NON-PUBLIC INFORMATION PROVIDED BY THE POSTAL SERVICE

Sec.

3007.1 Definitions.
3007.2 Scope.
3007.3 Data or information requests.
3007.10 Submission of non-public materials under seal.
3007.20 Application for relief.
3007.21 Form and content of the application for non-public treatment.
3007.22 Treatment of material claimed to be non-public.
3007.23 Access to non-public material.
3007.24 Request for access to non-public material.
3007.25 Standard for decision.
3007.30 Limitations on access to non-public material.
3007.31 Notice of access to material subject to protective order.
3007.32 Motion for removal of protective conditions.
3007.33 Expiration of protective conditions.
3007.40 Continued effectiveness of protective conditions.
3007.50 Sanctions for violations of protective order.

Authority: 39 U.S.C. 504.

§ 3007.1 Definitions.

For purposes of this part:

(a) *Authorized representative* means any Commissioner designated by the Chairman, any administrative law judge appointed by the Commission under 5 U.S.C. 3105, and any employee of the Commission designated by the Commission. The authorized representative may administer oaths, examine witnesses, take depositions, and receive evidence with respect to any proceeding before the Commission under title 39 or obtain information to assist the Commission in the preparation of a report or performance of a function under title 39.

(b) *Non-public materials* means any information, documents, and things filed with the Commission which are claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g).

§ 3007.2 Scope.

The Commission or its authorized representative may require the Postal Service to provide any information, documents, and things in its possession or control, or any information, documents, and things that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39. Information, documents, and things the Postal Service may be required to provide, include, but are not limited to, paper hard copy and electronically stored data and materials—including writings, notes, e-mails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form; or any tangible things.

§ 3007.3 Data or information requests.

The Commission or its authorized representative may issue data or information requests to the Postal Service seeking documents, information, and things covered by § 3007.2. A data or information request shall describe the documents, information, and things sought, briefly explain the reason for the request, and specify a timeframe for receiving the requested information and materials.

§ 3007.10 Submission of non-public materials under seal.

(a) Non-public materials shall not be filed electronically pursuant to § 3001.9 of this chapter, but shall be filed in sealed envelopes clearly marked ''Confidential. Do Not Post on Web.'' The person filing the non-public materials shall submit two copies consisting, where practicable, of two paper hard copies as well as two copies in easily usable electronic form such as compact discs (CDs) or digital video discs (DVDs) of the non-public materials which shall also be clearly marked ''Confidential. Do Not Post on Web.'' Spreadsheets submitted in electronic form shall display the formulas used, their links to related spreadsheets, and shall not be password protected. Each page of any paper hard copy non-public materials submitted shall be clearly marked as non-public.

(b) The person submitting the non-public materials shall also file an electronic public (redacted) copy of the non-public materials pursuant to Commission rule 3001.9. As part of its publicly available electronic filing, the Postal Service must appropriately redact materials that contain both public and non-public information. For example, the Postal Service may not identify a whole page or a whole table as non-public material if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public. If necessary and appropriate for efficient document management, the Postal Service shall sequentially number each page of the materials identified as non-public.

(c) The Postal Service shall mark each page, item, and thing, or portion thereof that it seeks to protect from disclosure in a manner reasonably calculated to alert custodians of the confidential nature of the information or material.

§ 3007.20 Application for relief.

Whenever the Postal Service files non-public information or materials with the Commission, it shall, at the same time, file an application for relief from public disclosure.

§ 3007.21 Form and content of the application for non-public treatment.

(a) The application for relief from public disclosure must clearly identify all non-public information or materials and describe the circumstances causing them to be submitted to the Commission.

(b) When identifying materials it claims to be non-public pursuant to 39 U.S.C. 504(g)(1), the Postal Service must file a specific and detailed statement which shall include:

(1) The rationale for claiming that the materials are non-public, including, but not limited to, a specific statement as to whether the Postal Service considers the materials claimed to be non-public commercially sensitive, or otherwise

protectable within the meaning of 39 U.S.C. 410(c); to be exempt from disclosure under 5 U.S.C. 552(b); and to qualify for a particular evidentiary privilege recognized by federal civil courts, in particular Federal Rule of Civil Procedure 26(c);

(2) A specific and detailed description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(3) In cases of allegations of commercial harm, particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

(4) At least one specific hypothetical, illustrative example of each alleged harm;

(5) The extent of protection from public disclosure deemed to be necessary by the Postal Service;

(6) The length of time the Postal Service deems necessary for the information or material to be protected from public disclosure with justification thereof; and

(7) Any other factors or reasons relevant to support the application for relief.

§ 3007.22 Treatment of material claimed to be non-public.

The Commission will not publicly disclose non-public materials except as provided in the rules of this part.

§ 3007.23 Access to non-public material.

(a) Access to non-public material is permitted for Commissioners and Commission employees with a need to know for purposes of carrying out their appropriate responsibilities. Except as pursuant to the rules in this part, no officer or employee of the Commission may, with respect to any materials claimed to be non-public by the Postal Service:

(1) Use such materials for purposes other than the purposes for which it is supplied; or

(2) Permit anyone who is not an employee of the Commission to have access to any such materials.

(3) Before granting access to material subject to protective conditions to contractors or experts hired by the Commission, its authorized representative, or the public representative to assist in the conduct of their official duties, the Commission, its authorized representative, or the public representative shall file a notice of access pursuant to § 3007.31(b) for such a contractor or expert, and the Postal Service shall have 2 days to object.

(b) The Commission or its authorized representative may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service.

(1) Responsive pleadings (by any interested person, including the Postal Service) are due within 7 days after such a notice is filed, unless a longer period as specified in the notice of preliminary determination;

(2) Following the filing of responsive pleadings, if any, the Commission, or its authorized representative, will issue an order determining the appropriate degree of access, if any, to be accorded to the materials claimed to be non-public by the Postal Service; and

(3) Unless the Commission or its authorized representative otherwise provides, no reply to a responsive pleading or any other further responsive document shall be filed.

§ 3007.24 Request for access to non-public material.

(a) Any person may file a motion requesting access to the materials claimed to be non-public by the Postal Service. The person filing the motion shall file a detailed statement and rationale for why access should be granted, making specific reference to the pertinent rationale provided on the application for relief submitted pursuant to § 3007.21(b).

(b) Any person seeking access to non-public materials may agree to abide by standard Commission protective conditions as published on the Commission's Web site. Such person shall attach an executed copy of the standard protective conditions to its motion; and

(1) If the person agrees to abide by standard Commission protective conditions, answers are due within 2 days after such a motion is filed.

(2) If the person does not agree to standard protective conditions, answers are due within 7 days after such a motion is filed.

(c) Following the filing of responsive pleadings, if any, the Commission or its authorized representative will issue an order determining the appropriate degree of access, if any, and the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service.

(d) Unless the Commission or its authorized representative otherwise provides, no reply to an answer or any other further responsive document shall be filed.

(e) Once the reason for obtaining access to non-public information is no longer applicable, or the person with access to the information withdraws or otherwise no longer is involved in the matter, that person's access to the information shall terminate.

§ 3007.25 Standard for decision.

(a) The Commission or its authorized representative shall balance the nature and extent of the likely commercial or other injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity operating in commercial markets in determining whether to issue an order requiring disclosure of the information or materials filed under 39 U.S.C. 504(g)(1).

(b) The Commission or its authorized representative shall balance the nature and extent of the likelihood that non-public materials would invade a specific evidentiary privilege that is recognized in federal civil courts, or would constitute an undue burden that the Postal Service has quantified to the best of its ability against the public interest that would be served by providing access to the non-public materials in determining whether to issue an order requiring disclosure of non-public materials.

§ 3007.30 Limitations on access to non-public material.

Limitations on access to non-public materials at any stage of a proceeding before the Commission, or in connection with any other purpose under title 39, include:

(a) Not requiring the public disclosure of the materials claimed to be non-public by the Postal Service under 39 U.S.C. 504(g)(1);

(b) Specifying terms for public disclosure of the materials;

(c) Ordering a specific method for disclosing the information or materials;

(d) Restricting the scope of the disclosure of information or materials as they relate to certain matters;

(e) Restricting to whom the information or materials may be disclosed;

(f) Sealing a deposition or part of a proceeding;

(g) Requiring that a trade secret be revealed only in specific and limited manner or to limited or specified persons; and

(h) Such other relief as the Commission or its authorized representative determines to be appropriate.

§ 3007.31 Notice of access to material subject to protective order.

(a) Non-public materials, unless specifically ordered otherwise, may be

disclosed to the following persons, and without their filing a notice of access to the extent necessary to assist in the Commission's performance of any function that is authorized by title 39, or any appeals or reconsiderations thereof:

(1) Members of the Commission;

(2) Commission employees on a need-to-know basis;

(3) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions; and

(4) Reviewing courts and their staffs.

(b) Except as provided in paragraph (a) or a Commission order, each person seeking access to non-public materials subject to protective conditions must file a notice, under § 3001.9–12 of this chapter, identifying each individual to have access by name, company, and title.

(c) Access will not be granted for 2 days after a notice seeking access is filed to allow the Postal Service or other interested person to interpose an objection. If the Postal Service or another interested person does object, it must provide written justification for its position.

(d) The person subject to the objection may submit a written response to the objection no later than 2 days after such an objection is filed.

§ 3007.32 Motion for removal of protective conditions.

(a) After reviewing non-public materials subject to protective conditions, a person may file a motion requesting an order that such non-public materials should not be subject to protective conditions, but should be publicly disclosed. Each such request must provide the Commission with a specific and detailed statement and rationale why the material should be made public. The motion, however, shall not publicly disclose any of the information or materials subject to protective conditions. If it is necessary to use the protected information or materials to formulate the argument in favor of public disclosure, the argument utilizing the non-public materials shall be filed under seal.

(b) Answers are due within 7 days after such a motion is filed.

(c) Following responsive pleadings, if any, the Commission or its authorized representative will issue an order determining whether the non-public materials, or any part thereof, shall be made public.

(d) Unless the Commission or its authorized representative otherwise provides, no reply to an answer or any other further responsive document shall be filed.

§ 3007.33 Expiration of protective conditions.

(a) Protective conditions afforded to any non-public materials filed by the Postal Service shall expire 10 years after such filing unless the Commission or its authorized representative enters an order extending or shortening the protective conditions.

(b) The Commission or its authorized representative may initiate such action in its own discretion or upon a motion by the Postal Service.

(c) Interested persons shall be provided with the opportunity to submit written comments and reply comments before the applicable period is altered.

§ 3007.40 Continued effectiveness of protective conditions.

(a) If a court or other administrative agency subpoenas or orders production of non-public materials which a person has obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall promptly, within 2 days of receipt of the subpoena or order for production, notify the Postal Service of the pendency of the subpoena or order to allow the Postal Service time to object to the production or to seek a protective order or seek such other relief as it deems appropriate.

(b) Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in the Commission order establishing the protective conditions.

(c) The protective conditions ordered by the Commission or its authorized representative under § 3007.24 shall remain in effect throughout any subsequent review unless overridden by the action of the reviewing court.

§ 3007.50 Sanctions for violations of protective order.

(a) No individual who has been granted access to materials subject to protective conditions shall disseminate the materials in whole or in part to any individual not authorized to obtain access under the protective conditions imposed by the Commission. If an individual who has been granted access to such non-public materials under a protective order violates the terms of such order, the Commission or its authorized representative shall impose sanctions on the persons or entities on whose behalf the individual was acting, or both. The sanctions may include:

(1) Dismissing the proceeding in whole or in part;

(2) Ruling by default against the person who violated the protective order; and

(3) Such other sanctions as the Commission or its authorized representative deems appropriate.

(b) The Postal Service, in its discretion, may pursue any remedies available to it under the law against the individual who violated the protective order, or the persons or entities on whose behalf the individual was acting, or both.

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LIST OF PUBLIC LAWS

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 "P L U S" (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.

H.R. 4040/P.L. 110–314

Consumer Product Safety Improvement Act of 2008 (Aug. 14, 2008; 122 Stat. 3016)

H.R. 4137/P.L. 110–315

Higher Education Opportunity Act (Aug. 14, 2008; 122 Stat. 3078)

H.R. 6432/P.L. 110–316

To amend the Federal Food, Drug, and Cosmetic Act to revise and extend the animal drug user fee program, to establish a program of fees relating to generic new animal drugs, to make certain technical corrections to the Food and Drug Administration Amendments Act of 2007, and for other purposes. (Aug. 14, 2008; 122 Stat. 3509)

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