

### Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 proposed 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have made a preliminary determination under the Instruction that this action is not likely to have a significant effect on the human environment. An

environmental analysis checklist supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

### List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 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. Revise § 165.1102 to read as follows:

#### § 165.1102 Security Zone; Naval Base Point Loma; San Diego Bay, San Diego, CA.

(a) *Location.* The following area is a security zone: The water adjacent to the Naval Base Point Loma, San Diego, CA, enclosed by the following coordinates:

Beginning at 32°42.48' N, 117°14.21' W (Point A); 32°42.48' N, 117°14.17' W (Point B); 32°42.17' N, 117°14.00' W (Point C); 32°41.73' N, 117°14.21' W (Point D); 32°41.53' N, 117°14.23' W (Point E); 32°41.55' N, 117°14.02' W (Point F); 32°41.17' N, 117°13.95' W (Point G); 32°41.04' N, 117°14.14' W (Point H); thence running generally north along the shoreline to the place of beginning (Point A).

(b) *Regulations.* (1) The general regulations governing security zones found in 33 CFR 165.33 apply to the security zone described in paragraph (a) of this section.

(2) Entry into, or remaining in, the area of this zone is prohibited unless authorized by the Captain of the Port San Diego; Commanding Officer, Naval Base Point Loma; or Commander, Navy Region Southwest.

(3) Persons desiring to transit the area of the security zone may request permission from the Captain of the Port San Diego at telephone number (619) 278-7033 or on VHF channel 16 (156.8 MHz) or from either the Commanding Officer, Naval Base Point Loma or the Commander, Navy Region Southwest by calling the Navy Port Operation Dispatch at telephone number (619)

556-1433 or on VHF-FM channels 16 or 12. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port San Diego or his or her designated representative.

(c) *Definitions.* For purposes of this section:

*Captain of the Port San Diego* means the Commanding Officer of the Coast Guard Sector San Diego.

*Commander, Navy Region Southwest* means Navy Region Commander responsible for the Southwest Region.

*Commanding Officer, Naval Base Point Loma* means the Installation Commander of the naval base located on Point Loma, San Diego, California.

*Designated Representative* means any U.S. Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port San Diego to assist in the enforcement of the security zone described in paragraph (a) of this section.

*Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the security zone described in paragraph (a) of this section by the U.S. Navy and local law enforcement agencies.

3. Remove § 165.1103.

Dated: December 22, 2008.

**T.H. Farris,**

*Captain, U.S. Coast Guard, Captain of the Port San Diego.*

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### POSTAL SERVICE

#### 39 CFR Part 955

#### Rules of Practice of the Postal Service Board of Contract Appeals

**AGENCY:** Postal Service.

**ACTION:** Proposed rule.

**SUMMARY:** This document contains the rules of procedure of the Postal Service Board of Contract Appeals (Board) which will govern all proceedings before the Board. The Board was re-established by the National Defense Authorization Act for Fiscal Year 2006, to hear and decide contract disputes relative to a contract entered into by the United States Postal Service or the Postal Regulatory Commission. In addition the Board has jurisdiction over other matters assigned to it by the Postmaster General, and over matters otherwise authorized by applicable law. The Board intends to issue final, revised rules after considering all comments on the proposed rules.

**DATES:** Comments must be received on or before March 13, 2009.

**ADDRESSES:** Judicial Officer Department, United States Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201-3078.

**FOR FURTHER INFORMATION CONTACT:** Administrative Judge Gary E. Shapiro, Board Member, (703) 812-1910.

**SUPPLEMENTARY INFORMATION:** The Postal Service Board of Contract Appeals was re-established by section 847 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109-163, 119 Stat. 3136), codified at section 8(c) of the Contract Disputes Act, 41 U.S.C. 607(c), to hear and decide contract disputes relative to a contract entered into by the United States Postal Service or the Postal Regulatory Commission.

These revised rules of procedure have the same general intent and coverage as the existing rules. However, the revised rules have been updated, are more comprehensive than the existing rules, and are intended to reflect more precisely actual practice in proceedings before the Board.

These revised rules will completely replace the existing rules of practice and once adopted as a final rule, will be effective for all appeals docketed by the Board on and after their effective date. While the language of the proposed rules may have changed considerably to enhance clarity and consistency, and to reflect more precisely the practices of the Board, we here identify the most significant changes of substance.

The proposed rules provide that the Board may consider the Federal Rules of Civil Procedure and the Federal Rules of Evidence, where appropriate, for guidance in construing its rules and in processing appeals.

The proposed rules provide that requests for extensions of time shall represent that the moving party has contacted the opposing party about the request, and indicate whether the opposing party consents to the extension, and if filed after the time for taking the required action has expired, indicate the reasons for the party's failure to have submitted the request timely.

The proposed rules require the filing party to serve complaints and answers upon the opposing party. The only documents that should not be served on the opposing party are simultaneous briefs. The proposed rules also allow for filing by fax but provide that the Board may determine not to extend a filing deadline solely because the Board's fax machine is busy or unavailable, or the fax is incomplete or illegible. The rules

do not permit electronic filing at this time.

The proposed rules formalize Board precedent that notices of appeal may be filed either with the contracting officer or directly with the Board. Notices of appeal filed with the contracting officer are required to be forwarded by the contracting officer to the Board along with a copy of the contracting officer's final decision on which the appeal is based.

The proposed rules require Postal Service counsel to file the appeal file within thirty days from receipt by Postal Service counsel of the Board's docketing notice, a change from the existing rules that require filing within thirty days from the date the contracting officer receives notice of an appeal. Objections to appeal file documents are to be made at least ten days prior to a hearing or the date specified for settling the record. The proposed rules require the appellant to file the complaint within forty-five days after receipt of the notice of docketing, a change from the existing rules that require filing within thirty days after receipt of the notice of docketing. The proposed rules also formalize Board practice that the Board may order the Postal Service to file the complaint in appeals involving affirmative claims by the Postal Service.

The proposed rules specifically provide for summary judgment motions, and describe the requirements and limitations thereon.

The proposed rules formalize the Board's practices regarding discovery and the requirements and limitations that may be prescribed thereon. Procedures for the production of documents have been specified. Requirements for motions to compel discovery responses have been clarified.

The proposed rules clarify that hearings may be held at the Board's hearing room in Arlington, Virginia, or in another location convenient to the parties and witnesses. The proposed rules formalize the Board's practices regarding exclusion of witnesses at hearings. The proposed rules also provide that both parties will be provided transcripts or copies of proceedings without charge.

The proposed rules require an attorney who has filed a notice of appearance and who wishes to withdraw from a case to file a motion or notice identifying the person that will assume responsibility for the party in the appeal and the contact information therefor. The proposed rules detail the Board's sanction powers over parties and attorneys.

## List of Subjects in 39 CFR Part 955

Administrative practice and procedure, Contract Disputes Act of 1978, Postal Service.

For the reasons stated in the preamble, the Postal Service proposes to revise 39 CFR Part 955 to read as follows:

1. Part 955 is revised to read as follows:

### PART 955—RULES OF PRACTICE BEFORE THE POSTAL SERVICE BOARD OF CONTRACT APPEALS

Sec.

- 955.1 Jurisdiction, procedure, service of papers.
- 955.2 Notice of appeals.
- 955.3 Contents of notice of appeal.
- 955.4 Forwarding of appeals.
- 955.5 Preparation, contents, organization, forwarding, and status of appeal file.
- 955.6 Motions.
- 955.7 Pleadings.
- 955.8 Amendments of pleadings or record.
- 955.9 Hearing election.
- 955.10 Prehearing briefs.
- 955.11 Prehearing or presubmission conference.
- 955.12 Submission without a hearing.
- 955.13 Optional Small Claims (Expedited) and Accelerated Procedures.
- 955.14 Settling the record.
- 955.15 Discovery.
- 955.16 Interrogatories to parties, admission of facts, and production and inspection of documents.
- 955.17 Depositions.
- 955.18 Hearings—where and when held.
- 955.19 Notice of hearings.
- 955.20 Unexcused absence of a party.
- 955.21 Nature of hearings.
- 955.22 Examination of witnesses.
- 955.23 Copies of papers, withdrawal of exhibits.
- 955.24 Posthearing briefs.
- 955.25 Transcript of proceedings.
- 955.26 Representation of the parties.
- 955.27 Withdrawal of attorney.
- 955.28 Suspension.
- 955.29 Decisions.
- 955.30 Motion for reconsideration.
- 955.31 Dismissal without prejudice.
- 955.32 Dismissal for failure to prosecute.
- 955.33 Ex parte communications.
- 955.34 Sanctions.
- 955.35 Subpoenas.
- 955.36 Effective Dates and Applicability.

**Authority:** 39 U.S.C. 204, 401; 41 U.S.C. 607, 608.

#### § 955.1 Jurisdiction, procedure, service of papers.

(a) *Jurisdiction for considering appeals.* Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601-613, the Postal Service Board of Contract Appeals (Board) has jurisdiction to consider and decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory

Commission relative to a contract made by either. In addition the Board has jurisdiction over other matters assigned to it by the Postmaster General, and over matters otherwise authorized by applicable law.

(b) *Organization and location of the Board.* (1) The Board is located at 2101 Wilson Boulevard, Suite 600, Arlington, Virginia 22201–3078. The Board's telephone number is (703) 812–1900, and its Web site is *www.usps.gov/judicial*. The Board's fax number is (703) 812–1901.

(2) The Board consists of the Judicial Officer as Chairman, the Associate Judicial Officer as Vice Chairman, and the Judges of the Board, as appointed by the Postmaster General in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 601–613. All members of the Board shall meet the qualifications established in the Contract Disputes Act. In general, appeals are assigned to a panel of at least three members of the Board. The decision of a majority of the panel constitutes the decision of the Board.

(c) *Board procedures—(1) Rules.* Appeals to the Board are handled in accordance with the rules of the Board.

(2) *Administration and Interpretation of Rules.* These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay. Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. The Board may consider the Federal Rules of Civil Procedure for guidance in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein.

(3) *Time, computation, and extensions.* (i) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension in appropriate circumstances.

(ii) Except as otherwise provided by law, in computing any period of time prescribed by these rules or by any order of the Board, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a federal holiday in which event the period shall run to the end of the next business day. Except as otherwise provided in these rules or an applicable order, prescribed periods of

time are measured in calendar days rather than business days.

(iii) Requests for extensions of time from either party shall be made in writing stating good cause therefor, shall represent that the moving party has contacted the opposing party about the request, and shall indicate whether the opposing party consents to the extension. If the request for extension of time is filed after the time for taking the required action has expired, the request should indicate the reasons for the party's failure to have submitted the request before that time expired.

(4) Place of filings. Unless the Board otherwise directs, pleadings and other communications shall be filed with the Recorder of the Board at its office at 2101 Wilson Boulevard, Suite 600, Arlington, Virginia 22201–3078. Generally, and unless otherwise prescribed by law, rule or applicable Board order, the Board considers documents filed upon the earlier of receipt by the Recorder of the Board during the Board's working hours or, if mailed, the date mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

(5) Service of papers. Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of simultaneous briefs shall be filed directly with the Board for distribution and shall not be sent directly by the parties to each other. The party filing any other paper with the Board shall send a copy thereof to the opposing party, by an equally or more expeditious means of transmittal, noting on the paper filed with the Board, or on the transmitting letter, that a copy has been so furnished. The filing of a document by fax transmission occurs upon receipt by the Board of the entire legible submission by fax. The Board may determine not to extend a deadline for filing solely because the Board's fax machine is busy or otherwise unavailable when a filing is due.

#### **§ 955.2 Notice of appeals.**

Notice of an appeal must be in writing, and the original, together with two copies, may be filed with the contracting officer from whose decision the appeal is taken, or may be filed directly with the Board. The notice of appeal must be mailed or otherwise filed within the time specified by applicable law.

#### **§ 955.3 Contents of notice of appeal.**

(a) A notice of appeal from a contracting officer's decision should indicate that an appeal is thereby

intended. It should identify the contract by number and identify the decision from which the appeal is taken, or it should attach a copy of the contracting officer's decision. If an appeal is taken from the failure of a contracting officer to issue a decision, the notice of appeal should describe in detail the claim that the contracting officer has failed to decide and/or attach a copy of the claim that the contracting officer has failed to decide, and explain that the contracting officer has failed to decide the claim as required.

(b) The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), or by an officer of the appellant corporation or member of the appellant firm, or by the contractor's duly authorized representative or attorney. The complaint referred to in § 955.7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

#### **§ 955.4 Forwarding of appeals.**

Upon receipt of a notice of appeal in any form, the contracting officer shall indicate thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the Board, and shall include a copy of the contracting officer's final decision if one has been issued. Following receipt by the Board of the original notice of an appeal (whether through the contracting officer or otherwise), the contractor and contracting officer will be advised promptly of its receipt, and the contractor will be furnished a copy of these rules.

#### **§ 955.5 Preparation, contents, organization, forwarding, and status of appeal file.**

(a) *Duties of the respondent.* Within 30 days from receipt of the Board's docketing notice, or such other period as the Board may order, the respondent's counsel shall file with the Board an appeal file consisting of all documents pertinent to the appeal and shall provide a copy to the appellant. The appeal file shall include:

(1) The claim and contracting officer's final decision from which the appeal is taken;

(2) The contract, including pertinent specifications, amendments, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to

the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

(b) *Duties of the appellant.* Within 30 days after receipt of a copy of the appeal file, the appellant shall supplement the appeal file by transmitting to the Board any documents not contained therein considered to be pertinent to the appeal, and shall furnish copies of such documents to Postal Service counsel.

(c) *Organization of appeal file.* Documents in the appeal file or supplement, as applicable, may be originals or legible copies thereof, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents. Page numbering shall be consecutive and continuous from one document to the next, so that the complete file or supplement, as applicable, will consist of one set of consecutively numbered pages.

(d) *Lengthy documents.* The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. The party filing with the Board a document as to which such a waiver has been granted, shall notify the other party at the time of filing that the document is available for inspection at the offices of the Board or of the party.

(e) *Status of documents in appeal file.* Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision, unless a party objects to the consideration of a particular document. Unless otherwise provided by Board order, any such objection shall be made at least 10 days prior to a hearing or the date specified for settling the record in the event there is no hearing on the appeal. If timely objection to a document is made, the Board will rule upon its admissibility into the record as evidence in accordance with §§ 955.14 and 955.21.

#### § 955.6 Motions.

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion may be afforded on application of either party. The Board may at any time and on its own motion raise the issue of its jurisdiction to proceed with a particular case.

(b) A motion filed in lieu of an answer shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by Board order. Any other dispositive

motion shall be filed as soon as practicable after the grounds therefor are known.

(c) Motions for summary judgment may be considered by the Board. However, the Board may defer ruling on a motion for summary judgment, in its discretion, until after a hearing or other presentation of evidence. Motions for summary judgment may be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief as a matter of law. The parties are to consider proceeding by submission of the case without a hearing in accordance with § 955.12, in lieu of a motion for summary judgment.

(1) Motions for summary judgment shall include a separate document titled *Statement of Uncontested Facts*, which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to affidavits, declarations and/or documents relied upon to support such statement.

(2) The opposing party shall file with its opposition a separate document titled *Statement of Genuine Issues*. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement, and support its opposition with references to affidavits, declarations and/or documents that demonstrate the existence of a genuine dispute.

(3) The moving party and the non-moving party shall each submit a memorandum of law supporting or opposing summary judgment.

(4) If, despite reasonable efforts, the opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may issue such other order as is just. The parties should not expect the Board to search the record for evidence in support of either party's position.

#### § 955.7 Pleadings.

(a) *Appellant.* Within 45 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board a complaint setting forth simple, concise and direct statements of each of its claims, alleging the basis, with appropriate reference to contract provisions, for each claim, and the dollar amount claimed, and shall serve

the respondent with a copy. This pleading shall fulfill the generally recognized requirements of a complaint although no particular form or formality is required. Should the complaint not be filed within the time required, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to constitute the complaint and the respondent shall be so notified.

(b) *Respondent.* Within 30 days from receipt of said complaint, or the aforesaid notice from the Board, the respondent shall prepare and file with the Board an answer thereto, setting forth simple, concise, and direct statements of the respondent's defenses to each claim asserted by the appellant, and shall serve the appellant with a copy. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counterclaims as appropriate. Should the answer not be filed within the time required, the Board may, in its discretion, enter a general denial on behalf of the respondent, and the appellant shall be so notified.

(c) *Affirmative claims by the respondent.* Where an appellant has appealed an affirmative claim by the respondent asserted in a final decision by a Postal Service contracting officer, such as a termination for default or a Postal Service claim that a contractor owes the Postal Service money under a contract, the Board may order the respondent to file the complaint as described in § 955.7(a), and the appellant to file the answer as described in § 955.7(b).

#### § 955.8 Amendments of pleadings or record.

(a) Upon its own initiative or upon application by a party, the Board may, in its discretion, order a party to submit a more definite statement of the complaint or answer, or to reply to an answer.

(b) When issues within the proper scope of an appeal, but not raised in the pleadings, have been raised without objection or with permission of the Board at a hearing or in record submissions, they may be treated in all respects as if they had been raised in the pleadings. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, in its discretion the Board may admit the evidence and grant the objecting party a continuance or other relief if necessary to enable it to meet such evidence.

**§ 955.9 Hearing election.**

As directed by Board order, each party shall inform the Board, in writing, whether it desires a hearing as prescribed in §§ 955.18 through 955.25, or in the alternative submission of its case on the record without a hearing as prescribed in § 955.12. If a hearing is elected, the election should state where and when the electing party desires the hearing to be conducted and should explain the reasons for its choices. In appropriate cases, the appellant shall also state whether the optional small claims (expedited) procedure or accelerated procedure prescribed in § 955.13 is elected.

**§ 955.10 Prehearing briefs.**

Based on an examination of the documentation described in § 955.5, the pleadings, and a determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to § 955.9. In the absence of a Board requirement therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall be furnished simultaneously to the other party.

**§ 955.11 Prehearing or presubmission conference.**

(a) Whether the case is to be submitted pursuant to § 955.12, or heard pursuant to §§ 955.18 through 955.25, the Board may upon its own initiative or upon the application of either party, convene a conference to consider:

- (1) The simplification or clarification of the issues;
- (2) The possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;
- (3) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;
- (4) The possibility of agreement disposing of all or any of the issues in dispute; and
- (5) Such other matters as may aid in the disposition of the appeal.

(b) The results of the conference shall be reduced to writing by the Board and this writing shall thereafter constitute part of the record.

**§ 955.12 Submission without a hearing.**

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to § 955.14. Submission of the case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the record. The Board may permit such submission to be supplemented by oral argument (transcribed if requested), and by briefs in accordance with § 955.24.

**§ 955.13 Optional Small Claims (Expedited) and Accelerated Procedures.**

(a) *The Small Claims (Expedited) Procedure.* (1) The Expedited Procedure is available solely at the election of the appellant. Such election requires decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure.

(2) The appellant may elect this procedure when:

- (i) There is a monetary amount in dispute and that amount is \$50,000 or less, or
- (ii) There is a monetary amount in dispute and that amount is \$150,000 or less and the appellant is a small business concern (as that term is defined in the Small Business Act and regulations promulgated under the Act).

(3) In cases proceeding under the Expedited Procedure, the respondent shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any, within ten days from the respondent's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the Expedited Procedure. If either party requests an oral hearing in accordance with § 955.9, the Board shall promptly schedule such a hearing for a mutually convenient time consistent with administrative due process and the 120-day limit for a decision, at a place determined under § 955.18. If a hearing is not requested by either party, the appeal shall be deemed to have been submitted under § 955.12 without a hearing.

(4) Promptly after receipt of the appellant's election of the Expedited Procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. Pleadings, discovery, and other prehearing activities may be restricted or eliminated at the Board's discretion

as necessary to enable the Board to decide the appeal within 120 days after the Board has received the appellant's notice of election of the Expedited Procedure. In so doing, the Board may reserve whatever time it considers necessary for preparation of the decision.

(5) Written decisions by the Board in cases processed under the Expedited Procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Judge. If there has been a hearing, the Judge presiding at the hearing may, in his or her discretion, at the conclusion of the hearing and after entertaining such oral arguments as he or she deems appropriate, render on the record oral summary findings of fact, conclusions of law, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a printed copy of such oral decision for the record and payment purposes and for the establishment of the commencement date of the period for filing a motion for reconsideration under § 955.30.

(6) Decisions of the Board under the Expedited Procedure will not be published, will have no value as precedents, and in the absence of fraud, cannot be appealed.

(b) *The Accelerated Procedure.* (1) The Accelerated Procedure is available solely at the election of the appellant and shall apply only to appeals where there is a monetary amount in dispute and the amount in dispute is \$100,000 or less. Such election requires decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure.

(2) Promptly after receipt of the appellant's election of the Accelerated Procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. The Board, in its discretion, may shorten time periods prescribed elsewhere in these Rules as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the Accelerated Procedure.

(3) Written decisions by the Board in cases processed under the Accelerated Procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Judge with the concurrence of the Chairman or Vice Chairman or other designated Judge, or by a majority among these two and an additional designated member in case of disagreement. In cases where the

amount in dispute is \$50,000 or less and in which there has been a hearing, the single Judge presiding at the hearing may, with the concurrence of both parties, convert the appeal to an Expedited Proceeding and at the conclusion of the hearing, after entertaining such oral arguments as he or she deems appropriate, render on the record oral summary findings of fact, conclusions of law, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a printed copy of such oral decision for record and payment purposes and to establish the date of commencement of the period for filing a motion for reconsideration under § 955.30.

(c) *Denial of election.* At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute and/or the appellant's status make the election of the Expedited Procedure or the Accelerated Procedure inappropriate.

(d) *Motions for Reconsideration in Cases Arising Under § 955.13.* Motions for reconsideration of cases decided under either the Expedited Procedure or the Accelerated Procedure need not be decided within the time periods prescribed by this § 955.13 for the initial decision of the appeal, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this section.

(e) *General rule.* Except as herein modified, the rules of this Part 955 otherwise apply in all aspects.

#### § 955.14 Settling the record.

(a) The record upon which the Board's decision will be rendered consists of the appeal file described in § 955.5, and to the extent the following items have been filed, pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will at all reasonable times be available for inspection by the parties at the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the

other party, to submit additional evidence on any matter relevant to the appeal.

(d) The Board may consider the Federal Rules of Evidence for guidance regarding admissibility of evidence and other evidentiary issues in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein.

#### § 955.15 Discovery.

(a) The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) The Board may limit the frequency or extent of use of discovery methods described in these rules. In doing so, generally the Board will consider whether: (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or (3) the discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake. The parties are required to make a good faith effort to resolve objections to discovery requests informally. A party receiving an objection to a discovery request, or a party which believes that another party's response to a discovery request is incomplete or entirely absent, may file a motion to compel a response, but such a motion must include a representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally. The motion to compel shall include a copy of each discovery request at issue and the response, if any.

(c) If a party fails to appear for a deposition, after being served with a proper notice, or fails to serve answers or objections to interrogatories, requests for admission of facts, or requests for the production or inspection of documents, after proper service, the party seeking discovery may request that the Board impose appropriate rulings or sanctions.

#### § 955.16 Interrogatories to parties, admission of facts, and production and inspection of documents.

(a) *Interrogatories to parties.* After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days. Upon timely objection, the Board will determine the extent to which the interrogatories will be permitted. The scope and use of interrogatories will be controlled by § 955.15.

(b) *Admission of facts.* After an appeal has been filed with the Board, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request may be ordered by the Board as deemed admitted upon the failure of a party to respond timely and fully to the request for admissions.

(c) *Production and inspection of documents.* After an appeal has been filed with the Board, a party may serve on the other party written requests for the production, inspection, and copying of any documents, electronically stored information, or things, to be answered within 30 days. Upon timely objection, the Board will determine the extent to which the requests must be satisfied, and if the parties cannot themselves agree thereon, the Board shall specify just terms and conditions of compliance.

#### § 955.17 Depositions.

(a) *When depositions permitted.* After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(b) *Orders on depositions.* The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(c) *Use as evidence.* No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the

deponent is available to testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the witness given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions as evidence in supplementation of that record.

(d) *Expenses.* Each party shall bear its own expenses associated with the taking of any deposition.

**§ 955.18 Hearings—where and when held.**

If there is to be a hearing, it will be held at a time and place prescribed by the Board after consultation with the party or parties electing the hearing. At the discretion of the Board, hearings may be held in the Board's hearing room in Arlington, VA or may be held at another location with due consideration to the just, informal, expeditious and inexpensive resolution of each case.

**§ 955.19 Notice of hearings.**

The Board shall issue an order reasonably in advance of the hearing identifying the time and place thereof.

**§ 955.20 Unexcused absence of a party.**

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in § 955.12.

**§ 955.21 Nature of hearings.**

Hearings shall be as informal as may be reasonable and appropriate under the circumstances. The Board may exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or presentation of irrelevant, immaterial or cumulative evidence. Although the Board will consider the Federal Rules of Evidence as described in § 955.14(d), letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the Federal Rules, may be admitted in the discretion of the Board. The weight to be attached to evidence presented in any particular form will be within the discretion of the Board, taking into consideration all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be accepted as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties.

**§ 955.22 Examination of witnesses.**

Witnesses before the Board will be examined orally under oath or

affirmation, unless the facts are stipulated, or the Board shall otherwise order. If the testimony of a witness is not given under oath or affirmation, the Board may warn the witness that his or her statements may be subject to the provisions of 18 U.S.C. 287 and 1001, and any other provisions of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof. Upon the request of either party or if the Board deems it advisable, the Board will exclude witnesses from the hearing room. The Board will not exclude a party who is an individual, the properly designated representative of a party which is an entity, a person whose presence is essential to the presentation of a party's case, or someone authorized by statute to be present.

**§ 955.23 Copies of papers, withdrawal of exhibits.**

(a) When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

(b) After a decision has become final, upon request and after notice to the other party, the Board in its discretion may permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

**§ 955.24 Posthearing briefs.**

Posthearing briefs may be submitted upon such terms as may be ordered by the Board at the conclusion of the hearing. Ordinarily, they will be simultaneous briefs, submitted to the Board on a date established by the Board, following receipt of transcripts.

**§ 955.25 Transcript of proceedings.**

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Transcripts or copies of the proceedings will be provided to the parties by the Board.

**§ 955.26 Representation of the parties.**

(a) The term *appellant* means a party that has filed an appeal for resolution by the Board. An individual appellant may appear before the Board in his or her own behalf, a corporation may appear before the Board by an officer thereof, a partnership or joint venture may appear before the Board by a member thereof,

or any of these may appear before the Board by an attorney at law duly licensed in any state, commonwealth, territory of the United States, or in the District of Columbia. An attorney representing an appellant shall file a written notice of appearance with the Board.

(b) The term *respondent* means the U.S. Postal Service. Postal Service counsel, who shall be an attorney at law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia, designated by the General Counsel, will represent the interest of the Postal Service before the Board. Postal Service counsel shall file a written notice of appearance with the Board.

(c) References to contractor, appellant, contracting officer, respondent and parties shall include respective counsel for the parties, as soon as appropriate notices of appearance have been filed with the Board.

**§ 955.27 Withdrawal of attorney.**

Any attorney for either party who has filed a notice of appearance and who wishes to withdraw from a case must file a motion or notice which includes the name, address, telephone number, and fax machine number of the person who will assume responsibility for representation of the party in question.

**§ 955.28 Suspension.**

(a) Whenever at any time it appears that the parties are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal: *Provided, however,* That if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's active docket.

(b) The Board may in its discretion suspend proceedings to permit a contracting officer to issue a decision when an appeal has been taken from the contracting officer's failure to render a timely decision, or for other good cause.

**§ 955.29 Decisions.**

Decisions of the Board will be made in writing and sent simultaneously to both parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board, and may be made available on its official Web site and to commercial publishers. Decisions of the Board will be made solely upon the record, as described in § 955.14.

**§ 955.30 Motion for reconsideration.**

A motion for reconsideration, if filed by either party, shall set forth

specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion. Arguments already made and reinterpretations of evidence generally are not sufficient grounds for granting reconsideration, or for altering or amending a decision.

**§ 955.31 Dismissal without prejudice.**

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. In any such case where the suspension has continued, or it appears that it will continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

**§ 955.32 Dismissal for failure to prosecute.**

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If the offending party shall fail to show such cause, the Board may take such action as it deems reasonable and proper under the circumstances.

**§ 955.33 Ex parte communications.**

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to ex parte communications concerning the Board's administrative functions or procedures.

**§ 955.34 Sanctions.**

(a) All parties and their attorneys must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and attorneys. As to an attorney,

the standards include the rules of professional conduct and ethics of the jurisdictions in which that attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings.

(b) If any party or its attorney fails to comply with any direction or order issued by the Board, or engages in misconduct affecting the Board, its process, or its proceedings, the Board may issue such orders as are just, including the imposition of appropriate sanctions. Sanctions may include:

(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case;

(2) Forbidding challenge of the accuracy of any evidence;

(3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;

(4) Prohibiting the disobedient party from introducing in evidence designated documents or testimony;

(5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed;

(6) Dismissing or granting the case or any part thereof;

(7) Imposing such other sanctions as the Board deems appropriate.

(c) In addition, the Board may sanction individual attorneys for a violation of any Board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

**§ 955.35 Subpoenas.**

(a) *General.* Upon written request of either party filed with the Recorder or on his or her own initiative, the Board may issue a subpoena requiring:

(1) *Testimony at a deposition.* The deposing of a witness in the city or county where the witness resides or is employed or transacts business in person, or at another convenient location as determined by the Board;

(2) *Testimony at a hearing.* The attendance of a witness for the purpose of taking testimony at a hearing; or

(3) *Production of books and papers.* The production by a witness of books, papers, documents, electronically stored information, and other tangible and intangible things designated in the subpoena.

(b) *Voluntary cooperation.* Each party is expected (1) To cooperate and make

available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (2) To secure voluntary attendance of desired third-party witnesses, books, papers, documents, or tangible things whenever possible.

(c) *Requests for subpoenas.* (1) A request for a subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought, and/or where the production by a witness of books, papers, documents, electronically stored information, and other tangible and intangible things is sought; and

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought; except that

(iii) In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books, papers, documents, electronically stored information, and other tangible and intangible things sought.

(d) *Requests to quash or modify.* Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (1) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (2) require the person in whose behalf the subpoena was issued to advance the reasonable cost of compliance. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) *Form; issuance.* (1) Every subpoena shall state the name of the Board and the title of the appeal and shall command each person to whom it is directed to attend and give testimony, and where appropriate, to produce specified books, papers, documents, electronically stored information, and other tangible and intangible things at a time and place therein specified. In issuing a subpoena to a requesting party, the Judge shall sign the subpoena and may enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the



manner provided in 28 U.S.C. 1781–1784.

(f) *Service.* (1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(g) *Contumacy or refusal to obey a subpoena.* In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a U.S. District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

#### **§ 955.36 Effective Dates and Applicability.**

These revised rules govern proceedings in all cases docketed by the Board on or after a date determined by the Board.

Stanley F. Mires,

Chief Counsel, *Legislative.*

[FR Doc. E9–2843 Filed 2–10–09; 8:45 am]

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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

[FWS–R1–ES–2008–0079; 92210–1117–0000]

RIN 1018–AW18

#### **Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Marbled Murrelet**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of public comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for submitting comments on our July 31, 2008 proposed revised designation of critical habitat for the marbled murrelet (*Brachyramphus marmoratus marmoratus*) under the Endangered Species Act of 1973, as amended (Act). The reopened comment period will provide all interested parties with an additional opportunity to submit written comments on the proposed rule. Comments previously submitted for the proposed revised critical habitat designation need not be resubmitted; they have already been incorporated into the public record and will be fully considered in any final decisions.

**DATES:** We will accept comments from all interested parties until March 13, 2009. Any comments received after the closing date may not be considered in the final decision on the revised designation of critical habitat.

**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: FWS–R1–ES–2008–0079; 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:** Ken Berg, Field Supervisor, Western Washington Fish and Wildlife Office, 510 Desmond Drive, SE, Suite 102, Lacey, WA 98503–1273, telephone (360) 753–9440, facsimile (360) 753–9008; Paul Henson, Field Supervisor, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266, telephone (503) 231–6179, facsimile (503) 231–6195; or Michael Long, Field Supervisor, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521, telephone (707) 822–7201, facsimile (707) 822–8411. 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 intend that any final action resulting from the proposed rule will be

as accurate and as effective as possible. Therefore, we request comments or suggestions on the proposed revised designation of critical habitat for the marbled murrelet (*Brachyramphus marmoratus marmoratus*).

We particularly seek comments concerning:

(1) The reasons why we should or should not revise currently designated critical habitat for the marbled murrelet by removing 254,070 ac (102,820 ha) from the 1996 designation, based on new information that is the best available information indicating that these areas do not meet the definition of critical habitat;

(2) Specific information on the amount and distribution of marbled murrelet habitat;

(3) Any foreseeable economic, national security, or other potential impacts resulting from the proposed critical habitat revision, and in particular, any impacts on small entities;

(4) Our proposal to revise 50 CFR 17.11 to adopt the taxonomic clarification for the marbled murrelet to reflect the change from *Brachyramphus marmoratus marmoratus* to *Brachyramphus marmoratus*; and

(5) Whether we could improve or modify our approach to revising critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning the proposed revised designation of critical habitat for the marbled murrelet by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

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 submissions on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed revised designation of critical habitat for the marbled murrelet, 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, Western Washington Fish and