

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 209**

[Docket No. FRA-2004-17530; Notice No. 2]

RIN 2130-ZA03

Inflation Adjustment of the Ordinary Maximum and Aggravated Maximum Civil Monetary Penalties for a Violation of the Hazardous Material Transportation Laws and Regulations**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).**ACTION:** Final rule.

SUMMARY: FRA is adjusting the ordinary maximum penalty and the aggravated maximum penalty that it will apply when assessing a civil monetary penalty for a violation of the Federal hazardous material transportation laws or a regulation, special permit, or approval issued under those laws. The aggravated maximum penalty is available only for a violation that results in death, serious illness, or severe injury to any person or substantial destruction of property. In particular, FRA is increasing the ordinary maximum civil monetary penalty per violation from \$50,000 to \$55,000 and the aggravated maximum civil penalty from \$100,000 to \$110,000. The minimum civil monetary penalty for a violation related to training remains at \$450. The minimum civil monetary penalty per violation for other hazardous material violations remains at \$250. These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection Improvement Act of 1996.

DATES: *Effective Date:* September 27, 2010.**FOR FURTHER INFORMATION CONTACT:**

Roberta J. Stewart, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (telephone 202-493-6027), roberta.stewart@dot.gov.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Act) requires that an agency adjust by regulation each maximum civil monetary penalty (CMP), or range of minimum and maximum penalties, within that agency's jurisdiction by October 23, 1996, and adjust those penalty amounts once every four years thereafter to reflect inflation. Public Law 101-410, 104 Stat. 890, 28 U.S.C. 2461,

note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-373, April 26, 1996. Congress recognized the important role that civil penalties play in deterring violations of Federal laws and regulations and realized that inflation has diminished the impact of these penalties. In the Inflation Act, Congress found a way to counter the effect that inflation has had on the civil penalties by having the agencies charged with enforcement responsibility administratively adjust the civil penalties.

This final rule is published under the authority of 49 U.S.C. 5123 and 5124, which provide civil and criminal penalties for violations of Federal hazardous material transportation law or a regulation, order, special permit or approval issued under that law. The hazardous material transportation regulations are issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 CFR 1.53(b). FRA is authorized as the delegate of the Secretary of Transportation to enforce the hazardous material statutes and regulations. 49 CFR 1.49(s).

Calculation of the Adjustment

The Inflation Act requires each Federal agency to periodically adjust CMPs that it administers to consider the effects of inflation. The Inflation Act is set forth in a note to 29 U.S.C. 2461. According to Section 5 of the Inflation Act, the maximum and minimum CMPs must be increased based on a "cost-of-living adjustment" determined by the increase in the Consumer Price Index (CPI) for the month of June of the calendar year preceding the adjustment as compared to the CPI for the month of June in the year in which the last adjustment was made. The Inflation Act also specifies that the amount of the adjustment must be rounded to the nearest multiple of \$100 for a penalty between \$100 and \$1,000; that the amount of the adjustment must be rounded to the nearest multiple of \$5,000, for a penalty between \$10,000 and \$100,000; and that the first CMP adjustment is limited to 10 percent of the original penalty amount. Any increased CMP applies only to violations that occur after the date the increase takes effect. FRA utilizes Bureau of Labor Statistics data to calculate inflation adjusted CMP amounts.

Section 7120 of the Hazardous Materials Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A

Legacy for Users ("SAFETEA-LU," Pub. L. 109-59, 119 Stat. 1905)) amended 49 U.S.C. 5123(a) to reset the maximum and minimum CMPs for a knowing violation of the Federal hazardous material transportation laws, 49 U.S.C. 5101 *et seq.*, or a regulation, order, special permit, or approval issued under that law as follows:

—Maximum civil penalty: \$50,000, except that amount may be increased to \$100,000 for a violation that results in death, serious illness, or severe injury to a person or substantial destruction of property.

—Minimum civil penalty: \$250, except that the minimum civil penalty for a violation related to training is \$450.

Before the enactment of SAFETEA-LU, the inflation-adjusted maximum civil penalty for a hazardous material violation was \$32,500, and the inflation-adjusted minimum civil penalty for a hazardous materials violation was \$275. 69 FR 30590, May 28, 2004. To implement these SAFETEA-LU amendments to the maximum and minimum penalties, FRA issued a final rule that was published on December 26, 2006, 71 FR 77293, making the new maximum and minimum penalties effective with respect to violations on or after December 26, 2006.

Under the Inflation Act, FRA is now required to adjust the maximum and minimum civil penalties set forth in 49 U.S.C. 5123(a), as amended by SAFETEA-LU. Because these adjustments are the first adjustments to the amounts reset in SAFETEA-LU, an increase in the maximum and minimum civil penalty amounts is limited to 10 percent.

Because this adjustment and the amount thereof are mandated by statute, notice of proposed rulemaking is unnecessary, and there is good cause to make the adjusted ordinary maximum and aggravated maximum civil penalties applicable to any violation occurring on or after September 27, 2010. 5 U.S.C. 553(b), (d).

PHMSA recently issued a final rule to adjust its maximum and minimum civil monetary penalties per the Inflation Act. See 74 FR 68701 (December 29, 2009). FRA's maximum and minimum CMPs that it assesses for violations of the hazardous material transportation laws and regulations have historically mirrored PHMSA's. However, for this round of CMP inflation adjustments, FRA notes that there is one discrepancy between PHMSA's adjusted CMPs and FRA's adjusted CMPs. Because PHMSA's inflation adjustments were performed in calendar year 2009, PHMSA calculated its new maximum

and minimum penalties using the CPIs from June 2008 and June 2005. FRA, on the other hand, is calculating the inflation adjustment of its CMPs for hazardous material violations in calendar year 2010, and is therefore using the CPIs from June 2009 and June 2005. The CPI increase between June 2008 and June 2005 was greater than the CPI increase between June 2009 and June 2005. As calculated by PHMSA, its minimum CMP for violations related to training increased ten percent from \$450 to \$495. 74 FR 68701. In FRA's calculations, as described below, the minimum CMP for violations related to training remains at \$450, due to the different years of CPIs used to calculate the inflation increase.

Calculations To Determine Hazardous Material Civil Monetary Penalty Updates for Violations On or After September 27, 2010

1. Ordinary and Aggravated Maximum Civil Monetary Penalties

As required, this year FRA reevaluated the ordinary and aggravated maximum hazardous material civil penalties and concluded that they should be increased to \$55,000 and \$110,000, respectively, as the next calculations show. The June 2009 CPI of 646.121 (the CPI in the year before the year that the present adjustment is being made) divided by the CPI for June 2005 of 582.6 (the year that the then-current maximum penalty of \$32,500 was reset by SAFETEA-LU) equals an inflation factor of 1.10903; \$50,000 times 1.10903 equals \$55,451.50. The raw inflation adjustment amount of \$5,452 is rounded to the nearest \$5,000, which is \$5,000. Because this is the first adjustment for this penalty, any increase is capped at 10 percent of the current penalty amount; \$5,000 is 10 percent of \$50,000 and does not exceed the 10 percent limit. Therefore, the inflation-adjusted ordinary maximum CMP is \$50,000 plus \$5,000, or \$55,000, and is applicable to all of the hazardous material laws and regulations enforced by FRA.

Applying the same calculations to the \$100,000 aggravated maximum penalty for certain, more serious violations, \$100,000 times 1.10903 equals \$110,903. The raw inflation adjustment amount of \$10,903 is rounded to the nearest \$5,000, which is \$10,000. Because this is the first adjustment for this penalty, any increase is capped at 10 percent of the current penalty amount; \$10,000 is 10 percent of \$100,000 and does not exceed the 10 percent limit. Therefore, the inflation-adjusted aggravated maximum CMP for certain hazardous material violations is

\$110,000. This maximum may apply to CMPs for a violation of the hazardous material laws or regulations that results in death, serious illness, or severe injury to a person or substantial destruction of property. The new ordinary and aggravated maximum CMPs will apply to violations that occur on or after September 27, 2010.

2. Minimum Civil Monetary Penalty for Hazardous Materials Violations Related to Training

FRA also reevaluated the minimum CMP for a training violation and determined that it should remain at \$450, as the following calculations show: \$450 times the inflation factor of 1.10903 equals \$499. The raw inflation adjustment amount of \$49 is rounded to the nearest \$100, which is \$0. The inflation-adjusted minimum CMP for training violations therefore does not change, and remains at \$450.

3. Minimum Civil Monetary Penalty for All Other Hazardous Material Violations

Applying the adjustment calculation, FRA has determined that the minimum CMP for all other hazardous material violations should remain at \$250, as the following calculations show: \$250 times the inflation factor of 1.10903 equals \$277. The raw inflation adjustment amount of \$27 is rounded to the nearest \$100, which is \$0. Therefore, the minimum CMP remains at \$250.

Public Participation

FRA is proceeding to a final rule without providing a notice of proposed rulemaking or an opportunity for public comment. Public comment is unnecessary because, in making these technical amendments, FRA is not exercising discretion in a way that could be informed by public comment. As such, notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest" within the meaning of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). Likewise, the adjustments required by the Inflation Act are ministerial acts over which FRA has no discretion, making public comment unnecessary. FRA is issuing these amendments as a final rule applicable to all future hazardous material civil penalty cases under its authority to cite for violations that occur on or after the effective date of this final rule.

Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures. It is not considered a

significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). This rule is not significant under DOT Regulatory Policies and Procedures. 44 FR 11034. The cost of complying with existing substantive regulations is not being increased. The adjustment for inflation of the maximum and minimum CMP is a limited ministerial act over which the agency has no discretion. The economic impact of the final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

B. Regulatory Flexibility Determination

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This rule applies to shippers and carriers of hazardous material and persons who manufacture, mark, certify, or sell packagings, containers and packaging components as qualified for use in transporting hazardous materials in commerce, some of whom are small entities. However, there is no economic impact on any person who complies with Federal hazardous material transportation law and the regulations, orders, special permits and approvals issued under that law.

C. Federalism

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693, May 22, 2009). As amended in 2005, 49 U.S.C. 5125(h) provided that the preemption provisions in Federal hazardous material transportation law do "not apply to any * * * penalty * * * utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material." Accordingly, this final rule does not have any preemptive effect on the amount or nature of penalties imposed by a State, local, or Indian Tribal government for violations of their requirements which are consistent with requirements in Federal hazardous material transportation law and the regulations prescribed under that law. Preparation of a federalism assessment is not warranted.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary

obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

There are no new information collection requirements in this final rule.

F. Compliance With the Unfunded Mandates Reform Act of 1995

The final rule issued today will not result in the expenditure, in the aggregate, of \$141,300,000 or more in any one year by State, local, or Indian Tribal governments, or the private sector, and thus preparation of a statement is not required.

G. Environmental Assessment

There are no significant environmental impacts associated with this final rule.

H. Energy Impact

According to definitions set forth in Executive Order 13211, there will be no significant energy action as a result of the issuance of this final rule.

I. 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) or online at <http://www.dot.gov/privacy.html>.

List of Subjects in 49 CFR Part 209

Administrative practice and procedure, Hazardous materials

transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

■ In consideration of the foregoing, Part 209 of Subtitle B, Chapter II of Title 49 of the Code of Federal Regulations is amended as follows:

PART 209—[AMENDED]

■ 1. The authority citation for Part 209 continues to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.49.

§ 209.103 [Amended]

- 2. Section 209.103 is revised by:
 - a. Removing the numerical amount “\$50,000” in paragraph (a) and replacing it with the numerical amount “\$55,000”; and
 - b. Removing the numerical amount “\$100,000” in paragraph (a)(1) and replacing it with the numerical amount “\$110,000”; and
 - c. Removing the date of “August 10, 2005” in paragraph (c) and replacing it with “September 27, 2010”.

§ 209.105 [Amended]

- 3. Section 209.105(c) is revised by:
 - a. Removing the numerical amount “\$50,000” in the last sentence and replacing it with the numerical amount “\$55,000”; and
 - b. Removing the numerical amount “\$100,000” in the last sentence and replacing it with the numerical amount “\$110,000”.

Appendix B to Part 209—[AMENDED]

- 4. Appendix B to Part 209 is amended by:
 - a. Removing the numerical amount “\$50,000” in the first paragraph below the heading “APPENDIX B TO PART 209—FEDERAL RAILROAD ADMINISTRATION GUIDELINES FOR INITIAL HAZARDOUS MATERIAL ASSESSMENTS” and replacing it with the numerical amount “\$55,000”; and
 - b. Removing the numerical amount “\$100,000” in the first paragraph below the heading “APPENDIX B TO PART 209—FEDERAL RAILROAD ADMINISTRATION GUIDELINES FOR INITIAL HAZARDOUS MATERIALS

ASSESSMENTS” and replacing it with the numerical amount “\$110,000”.

■ 5. Footnote 2 to Appendix B to Part 209 is amended by:

- a. Removing the numerical amount “\$50,000” and replacing it with the numerical amount “\$55,000”; and
- b. Removing the numerical amount “\$100,000” and replacing it with the numerical amount “\$110,000”.

Issued in Washington, DC, on July 21, 2010.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix: “Step-by-Step Calculations to Determine Civil Monetary Penalty Updates: 2010”

Step-by-Step Calculations to Determine Hazardous Material Civil Penalty Inflation Adjustments: 2010

Ordinary and Aggravated Maximum Civil Penalties

These calculations follow U.S. Department of Transportation and Government Accountability Office (GAO), formerly the General Accounting Office, guidance to determine if the minimum civil monetary penalty (CMP) should be updated according to the Inflation Act. (Sources for guidance: (1) GAO attachment to memorandum with subject “Annual Review of Department of Transportation’s (DOT) Civil Penalties Inflation Adjustment,” dated July 10, 2003; (2) policy paper entitled “Federal Civil Penalties Inflation Adjustment Act of 1990”).

Maximum Civil Monetary Penalties

The current ordinary maximum CMP is \$50,000, set on August 10, 2005, by Section 7120 of the Hazardous Materials Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU,” Pub. L. 109–59, 119 Stat. 1905)), which amended 49 U.S.C. 5123(a).

Step 1: Find the Consumer Price Index (CPI). (BLS, 1967 Base, U.S. City Average).

The CPI for June of the preceding year, i.e.,
CPI for June 2009 = 646.121

The CPI for June of the year the CMP was last set or adjusted under the Inflation Act, i.e.,
CPI for June 2005 = 582.6

Step 2: Calculate the Cost of Living Adjustment (COLA), or the Inflation Factor.

$$\text{COLA} = \frac{\text{CPI for June 2009}}{\text{CPI for June 2005}} = \frac{646.121}{582.6} = 1.10903$$

Step 3: Find the Raw Inflation Adjustment or Inflation Adjustment Before Rounding.

Raw Inflation Adjustment = CMP × COLA =
\$50,000 × 1.10903 = \$55,451.50 ≈
\$55,452

Step 4: Round the Raw Inflation Adjustment Amount.

Recall that the increase in the CMP is rounded, according to the rounding rules.

$$\text{Increase} = \text{Raw Inflation Adjustment} - \text{Original CMP} = \$55,452 - \$50,000 = \$5,452$$

Use the following rounding rule: "If the current unadjusted penalty is greater than \$10,000 and less than or equal to \$100,000, round the *increase* to the nearest multiple of \$5,000." (Federal Civil Penalties Inflation Adjustment Act of 1990, p. 4.) Multiples of \$5,000 are \$0, \$5,000, \$10,000. * * * The nearest multiple of \$5,000 is therefore \$5,000. Rounded, the \$5,452 increase = \$5,000

Step 5: Find the Inflation Adjusted Penalty After Rounding.

$$\text{CMP after rounding} = \text{Original CMP} + \text{Rounded Increase} = \$50,000 + \$5,000 = \$55,000$$

Step 6: Apply a 10% Ceiling if necessary. 10% of \$50,000 is \$5,000, so the increase does not exceed the 10% cap.

Step 7: Determine New Penalty. The new maximum CMP = \$55,000

With respect to hazardous material violations that occur on or after [insert date 60 days after publication], the maximum CMP rises from \$50,000 to \$55,000.

The current maximum CMP for a hazardous material violation that results in death, serious illness, or severe injury to any person or substantial destruction of property is \$100,000, set on August 10, 2005, by

Section 7120 of the Hazardous Materials Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU," Pub. L. 109-59, 119 Stat. 1905)), which amended 49 U.S.C. 5123(a).

Step 1: Find the Consumer Price Index (CPI). (BLS, 1967 Base, U.S. City Average).

The CPI for June of the preceding year, i.e.,

$$\text{CPI for June 2009} = 646.121$$

The CPI for June of the year the CMP was last set or adjusted under the Inflation Act, i.e.,

$$\text{CPI for June 2005} = 582.6$$

Step 2: Calculate the Cost of Living Adjustment (COLA), or the Inflation Factor.

$$\text{COLA} = \frac{\text{CPI for June 2009}}{\text{CPI for June 2005}} = \frac{646.121}{582.6} = 1.10903$$

Step 3: Find the Raw Inflation Adjustment or Inflation Adjustment Before Rounding.

$$\text{Raw Inflation Adjustment} = \text{CMP} \times \text{COLA} = \$100,000 \times 1.10903 = \$110,903 \approx \$110,900$$

Step 4: Round the Raw Inflation Adjustment Amount.

Recall that the increase in the CMP is rounded, according to the rounding rules.

$$\text{Increase} = \text{Raw Inflation Adjustment} - \text{Original CMP} = \$110,900 - \$100,000 = \$10,900$$

Use the following rounding rule: "If the current unadjusted penalty is greater than \$10,000 and less than or equal to \$100,000, round the *increase* to the nearest multiple of \$5,000." (Federal Civil Penalties Inflation Adjustment Act of 1990, p. 4.) Multiples of \$5,000 are \$0, \$5,000, \$10,000. * * * The

nearest multiple of \$5,000 is therefore \$10,000. Rounded, the \$10,900 increase = \$10,000.

Step 5: Find the Inflation Adjusted Penalty After Rounding.

$$\text{CMP after rounding} = \text{Original CMP} + \text{Rounded Increase} = \$100,000 + \$10,000 = \$110,000$$

Step 6: Apply a 10% Ceiling if necessary. This is the first time that the statutorily reset CMP is being adjusted, so the 10% cap applies; 10% of \$100,000 is \$10,000, so the increase does not exceed the 10% cap.

Step 7: Determine New Penalty.

The new aggravated maximum CMP for certain hazardous material violations = \$110,000.

With respect to hazardous material violations that occur on or after [insert date 60 days after publication], this aggravated

maximum CMP rises from \$100,000 to \$110,000.

Minimum Civil Monetary Penalty for Training Violations

The current minimum CMP for hazardous material violations related to training is \$450, set on August 10, 2005, by Section 7120 of the Hazardous Materials Safety and Security Reauthorization Act of 2005.

Step 1: Find the Consumer Price Index (CPI). (BLS, 1967 Base, U.S. City Average)

The CPI for June of the preceding year, i.e.,

$$\text{CPI for June 2009} = 646.121$$

The CPI for June of the year the CMP was last set or adjusted under the Inflation Act, i.e.,

$$\text{CPI for June 2005} = 582.6$$

Step 2: Calculate the Cost of Living Adjustment (COLA), or the Inflation Factor.

$$\text{COLA} = \frac{\text{CPI for June 2009}}{\text{CPI for June 2005}} = \frac{646.121}{582.6} = 1.10903$$

Step 3: Find the Raw Inflation Adjustment or Inflation Adjustment Before Rounding.

$$\text{Raw Inflation Adjustment} = \text{CMP} \times \text{COLA} = \$450 \times 1.10903 = \$499$$

Step 4: Round the Raw Inflation Adjustment Amount.

Recall that the increase in the CMP is rounded, according to the rounding rules.

$$\text{Increase} = \text{Raw Inflation Adjustment} - \text{Original CMP} = \$499 - \$450 = \$49$$

Use the following rounding rule: "If the current unadjusted penalty is greater than \$100 and less than or equal to \$1,000, round the *increase* to the nearest multiple of \$100." (Federal Civil Penalties Inflation Adjustment Act of 1990, p. 4)

Multiples of \$100 are \$0, \$100, \$200.

The nearest multiple of \$100 is therefore \$0. Rounded, the \$49 increase = \$0.

Step 5: Find the Inflation Adjusted Penalty After Rounding.

$$\text{CMP after rounding} = \text{Original CMP} + \text{Rounded Increase} = \$450 + \$0 = \$450$$

Step 6: Apply a 10% Ceiling if necessary. The penalty amount did not increase, so the 10% cap does not apply.

Step 7: Determine New Penalty.

The new minimum CMP for training violations = \$450

With respect to hazardous material violations that occur on or after [insert date 60 days after publication], the minimum CMP for training violations remains \$450.

Minimum Civil Monetary Penalty for All Other Hazardous Material Violations

The current minimum CMP is \$250, set on August 10, 2005, by Section 7120 of the Hazardous Materials Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU," Pub.

Step 1: Find the Consumer Price Index (CPI). (BLS, 1967 Base, U.S. City Average).

The CPI for June of the preceding year, i.e.,

$$\text{CPI for June 2009} = 646.121$$

The CPI for June of the year the civil penalty was last set or adjusted under the Inflation Act, i.e., CPI for June 2005 = 582.6

Step 2: Calculate the Cost of Living Adjustment (COLA), or the Inflation Factor.

$$\text{COLA} = \frac{\text{CPI for June 2009}}{\text{CPI for June 2005}} = \frac{646.121}{582.6} = 1.10903$$

Step 3: Find the Raw Inflation Adjustment or Inflation Adjustment Before Rounding.
Raw Inflation Adjustment = CMP × COLA =
\$250 × 1.10903 = \$277

Step 4: Round the Raw Inflation Adjustment Amount.

Recall that the increase in the CMP is rounded, according to the rounding rules.

Increase = Raw Inflation Adjustment –
Original CMP = \$277 – \$250 = \$27

Use the following rounding rule: “If the current unadjusted penalty is greater than \$100 and less than or equal to \$1,000, round the increase to the nearest multiple of \$100.” (Federal Civil Penalties Inflation Adjustment Act of 1990, p. 4) Multiples of \$100 are \$0, \$100, \$200.* * *

The nearest multiple of \$100 is therefore \$0. Rounded, the \$27 increase = \$0.

Step 5: Find the Inflation Adjusted Penalty After Rounding.

CMP after rounding = Original CMP +

Rounded Increase = \$250 + \$0 = \$250.

Step 6: Apply a 10% Ceiling if Necessary.

The penalty amount did not increase, so the 10% cap does not apply.

Step 7: Determine New Penalty.

The new minimum CMP = \$250

With respect to hazardous materials violations, other than training violations, that occur on or after September 27, 2010, the minimum CMP remains \$250.

[FR Doc. 2010–18321 Filed 7–26–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-IA-2008-0116]

[90100-1660-1FLA B6]

RIN 1018–AW38

Endangered and Threatened Wildlife and Plants; Determination on Listing the Black-Breasted Puffleg as Endangered Throughout its Range; Final Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, determine endangered status under the Endangered Species Act of 1973 (Act), as amended, for the black-breasted puffleg (*Eriocnemis nigrivestis*), a hummingbird native to Ecuador.

DATES: This rule becomes effective August 26, 2010.

ADDRESSES: This final rule is available on the Internet at <http://www.regulations.gov>. Comments and materials received, as well as supporting documentation used in the preparation of this rule, is available for public

inspection by appointment during normal business hours at: U.S. Fish and Wildlife Service, Branch of Listing, Endangered Species Program, 4401 N. Fairfax Drive, Room 400, Arlington, VA 22203; telephone 703–358–2171.

FOR FURTHER INFORMATION CONTACT:

Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171; facsimile 703–358–1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On May 6, 1991, we received a petition (1991 petition) from Alison Stattersfield, of the International Council for Bird Preservation (ICBP), to list 53 foreign birds under the Act, including the black-breasted puffleg (also referred to in this rule as “puffleg”) that is the subject of this final rule. On December 16, 1991, we made a positive 90–day finding and announced the initiation of a status review of the species included in the 1991 petition (56 FR 65207). On March 28, 1994 (59 FR 14496), we published a 12–month finding on the 1991 petition. In that document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the black-breasted puffleg, was warranted but precluded because of other listing activity.

Per the Service’s listing priority guidelines (September 21, 1983; 48 FR 43098), we identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species in our 2007 Annual Notice of Review (ANOR) (72 FR 20184), published on April 23, 2007. In that notice, the black-breasted puffleg was designated with a LPN 2 and we determined that listing continued to be warranted but precluded. It should be noted that “Table 1 – Candidate Review,” in our 2007 ANOR, erroneously noted the black-breasted puffleg as having an LPN of 3. However, the correct LPN in 2007 was 2, as discussed in the body of the notice (72 FR 20184, p. 20197).

Previous Federal Action

On January 12, 1995 (60 FR 2899), we reiterated the warranted-but-precluded status of the remaining species from the 1991 petition, with the publication of the final rule to list the 30 African birds. We made subsequent warranted-but-precluded findings for all outstanding

foreign species from the 1991 petition, including the black-breasted puffleg, as published in our annual notices of review (ANOR) on May 21, 2004 (69 FR 29354), and April 23, 2007 (72 FR 20184).

On January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which had been previously determined to be warranted but precluded: The Andean flamingo (*Phoenicoparrus andinus*), black-breasted puffleg (*Eriocnemis nigrivestis*), Chilean woodstar (*Eulidia yarrellii*), medium tree finch (*Camarhynchus pauper*), and the St. Lucia forest thrush (*Cichlherminia lherminieri sanctaeluciae*). The court ordered the Service to issue proposed listing rules for these species by the end of 2008.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species (2008 ANOR). In that notice, we announced that listing was warranted for 30 foreign bird species, including the black-breasted puffleg, which is the subject of this final rule.

Summary of Comments and Recommendations

In the proposed rule published on December 8, 2008 (73 FR 74427), we requested that all interested parties submit written comments on the proposal by February 6, 2009. We received six comments on the proposed rule. We received one comment from the Center for Biological Diversity supporting the proposed listing, three comments were from peer reviewers, and two other comments were received from the public that contained no substantive information. We did not receive any requests for a public hearing.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from three knowledgeable individuals with scientific expertise that included familiarity with this species and its habitat, biological needs, and threats. We received responses from all three of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the proposed listing of this species. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final listing determination. Peer reviewer comments are addressed